



Canada: Note on Bill C-58 Amending the Access to Information Act¹

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

Introduction

For many years, the Centre for Law and Democracy (CLD), along with other stakeholders across Canada, has been calling for major reforms to the federal Access to Information Act (ATIA).² In 2013, CLD wrote, in *Canada: Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*,³ about the shortcomings of Canada's legal framework for access to information (ATI). The most notable problems we identified at that time were Canada's approach toward exceptions to

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² See, for example, the 2012 *Submission to the 16th Session of the Universal Periodic Review on the State of Freedom of Expression in Canada* by CLD, Lawyers' Rights Watch Canada, Canadian Journalists for Free Expression, the British Columbia Freedom of Information and Privacy Association and PEN Canada. Available at: <http://www.law-democracy.org/live/canada-un-universal-periodic-review-submission/>. See also the submission to the same review by Association for Progressive Communications, OpenMedia, the Canadian Internet Policy and Public Interest Clinic and Web Networks. Available at: www.apc.org/en/system/files/UPR_Canada_Coalition_InternetRights.pdf.

³ January 2013. Available at: http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_Jan13.pdf.

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disclosure, which was significantly overbroad and deviated from a human rights based approach, the problematically narrow scope of application of the Act, the lack of proper control over the power to extend the time limit for responding to requests for information, and the Information Commissioner's lack of order making power.

These problems are also reflected in the way the ATIA is applied in practice. The 2017 *National Freedom of Information Audit*, an annual review of public authorities' performance in responding to requests for information, assigned the federal government an F grade on the completeness of its disclosures and found that just a quarter of requests sent to federal government departments, agencies and crown corporations were answered within the initial 30-day time limit.⁴

In the fall of 2015, during the federal election campaign, the Liberal Party made a number of bold promises to reform the ATIA, including by giving binding order making powers to the Information Commissioner, eliminating all fees for responding to requests, providing written responses within 30 days where access was being refused, and extending coverage of the Act to the offices of the Prime Minister and Ministers and the administrative institutions that support Parliament and the courts.⁵ CLD was excited about the possibility of real reform of the ATIA after literally decades of government refusals to do this.

However, an initial problem was that the government proposed to roll out the reforms in two phases, the first phase consisting of a set of short term measures which introduced some quick improvements to the Act, to be followed by a full review taking place "no later than 2018".⁶ CLD criticised this as inefficient noting that it would place unnecessary change management pressures on the civil service, and create an unnecessary burden on civil society and citizens who wished to engage in the reform process by sending two sets of legislative reforms to Parliament within a period of two to three years.⁷

We were also concerned that delays would mean that the full review might not take place within the lifetime of this government. These concerns appeared to have merit when, in March 2017, the government announced that there would be delays in the first phase process. In response, CLD mobilised over 60 Canadian organisations and individuals to sign

⁴ Canadian Newspaper Association, *National Freedom of Information Audit 2017* (2017), pp. 76-77. 55 requests were made at different federal public authorities. Available at: <https://nmc-mic.ca/public-affairs/freedom-of-information/2017-freedom-information-audit/>.

⁵ See the Liberal Party's campaign promises in this area: *Real Change: A Fair and Open Government*, p. 4. Available at: <https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.

⁶ This was reflected, for example, in Commitment 1 of Canada's Third Biennial Plan to the Open Government Partnership (2016-18). Available at: <https://open.canada.ca/en/content/third-biennial-plan-open-government-partnership#toc5-1-1>.

⁷ See *Canada: Recommendations for Reforming Canada's Access to Information Act*, a submission prepared jointly with Lawyers' Rights Watch Canada and the British Columbia Freedom of Information and Privacy Association in June 2016 in response to a call for comments on Government proposals to revitalise access to information put out by the Treasury Board of Canada Secretariat. Available at: http://www.law-democracy.org/live/wp-content/uploads/2016/07/Canada.RTI_Jun16.pdf.

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a letter to the Prime Minister expressing their concerns and urging the government to continue to move forward with the promised reforms.⁸ As of today, with the first round of reforms still being discussed in Parliament, it seems very unlikely that the full review will be concluded by 2018 as promised. This highlights the importance of achieving as much as possible in the first phase of reforms.

A first set of draft amendments, Bill C-58, An Act to amend the Access to Information Act and the Privacy Act, was tabled in Parliament on 19 June 2017.⁹ The draft was roundly critiqued for not going far enough not only by CLD and other RTI advocates,¹⁰ but also by the Information Commissioner of Canada, who wrote in her report:

In short, Bill C-58 fails to deliver.

The government promised the bill would ensure the Act applies to the Prime Minister's and Ministers' Offices appropriately. **It does not.**

The government promised the bill would apply appropriately to administrative institutions that support Parliament and the courts. **It does not.**

The government promised the bill would empower the Information Commissioner to order the release of government information. **It does not.**¹¹

In its comments on the initial draft of Bill C-58, CLD made the following points:

- We welcomed the fact that the Bill would formalise the fee waivers for responding to requests and the fact that the Bill granted order making powers to the Information Commissioner, an important measure that CLD and others had repeatedly called for.
- However, we noted that the Bill failed:
 - To expand the scope of the ATIA, as had been promised, to the offices of the Prime Minister and Ministers and the administrative institutions that support parliament and the courts, instead only imposing limited obligations on these bodies to disclose information proactively (and not in response to requests).
 - To do anything to address the very serious delays in responding to requests.
 - To do anything to address the vastly overbroad regime of exceptions (if anything, expanding its scope slightly).
 - To put in place a duty to document important decision making processes.

⁸ Available at: <https://www.law-democracy.org/live/wp-content/uploads/2017/04/17.04.04.ATIA-delay.let1.pdf>.

⁹ This version is available at: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/first-reading>.

¹⁰ See, for example, CLD, *Canada: Note on Bill C-58 Amending the Access to Information Act*, June 2017. Available at: <https://www.law-democracy.org/live/wp-content/uploads/2017/06/Canada.RTI-Note.Jun17.pdf>.

¹¹ Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*, September 2017. Available at: http://www.ci-oic.gc.ca/eng/rapport-special-c-58_special-report-c-58.aspx#1.

- We also noted that the Bill would remove the obligation on public authorities to publish information about the classes of records they hold, which is designed to facilitate the making of requests for access to information.¹²

On 28 September 2017, CLD and other civil society organisations sent a letter to the Honourable Scott Brison, President of the Treasury Board, signed by over 60 Canadian organisations and individuals.¹³ This letter called for Bill C-58 “to be scrapped, and for government officials to be tasked with crafting a bill that takes seriously the crisis undermining our right to know”. It called for any reforms of the ATIA to deliver on the promise to expand the scope of the Act, to put in place a formal duty to document and to preserve records, to limit the discretion of public authorities to extend the time limits for responding to requests, and to introduce comprehensive reforms to the regime of exceptions and exclusions to the right of access.

Unfortunately, the version of Bill C-58 that was passed at the third reading of the House of Commons on 6 December 2017 is very similar to the original version passed in June 2017.¹⁴ The main improvement relates to the new proposed section 6.1, which would have allowed the heads of public authorities to refuse to process requests in certain cases, including because they consider that processing the request would “unreasonably interfere” with their operations or that the request is “vexatious, is made in bad faith or is otherwise an abuse of the right to make a request”. The December version of Bill C-58 makes this subject to the written approval of the Information Commissioner, thus substantially limiting the risk of abuse.

This Note elaborates on the problems with Bill C-58, focusing on the extent to which the Bill fails to address the calls for reform that CLD outlined in two previous documents. These are *Canada: Recommendations for Reforming Canada’s Access to Information Act*,¹⁵ which set out our expectations at the beginning of the reform process, and *Canada: Note on Bill C-58 Amending the Access to Information Act*,¹⁶ which critiqued the June 2017 version of the Bill.

Scope

One of the most serious problems with the ATIA is its narrow applicability in terms of the public authorities it covers. Under international law, openness obligations apply to all information held by all authorities which engage the responsibility of the State. In other

¹² See *Canada: Note on Bill C-58 Amending the Access to Information Act*, note 10.

¹³ Available at: <https://www.law-democracy.org/live/letter-to-the-president-of-the-treasury-board-demanding-access-to-information-reform/>.

¹⁴ This version is available at: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/third-reading>.

¹⁵ Note 7.

¹⁶ Note 10.

words, all information held by the executive, legislative and judicial branches of government, constitutional, statutory and oversight bodies, crown corporations, and any entity that is owned, controlled or substantially funded by a public authority or which performs a statutory or public function should be covered by both the proactive and request processing regimes in the Act.

Canada's ATIA does not apply to key types of public authorities. On 16 June 2016, the Parliamentary Standing Committee on Access to Information, Privacy and Ethics produced a report titled *Review of the Access to Information Act* (ETHI Committee Report).¹⁷ Recommendation 1 of that Report calls for the ambit of the Act to be expanded in the first phase to include any body which is controlled in whole or in part by the government, which performs a public function, which is created by statute, or which is covered by the Financial Administration Act. The Report also recommended that court files, the records and personal notes of judges and the communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity be excluded from the ambit of the Act. CLD recognises that much of this information will be exempt. However, as discussed below, it is far preferable presumptively to cover all of the information held by all public authorities, and then to protect legitimate interests such as the integrity of the judicial process and administration of justice through harm-tested exceptions (rather than as class exclusions).

Instead of keeping its promise to bring the offices of the Prime Minister and Ministers and the administrative institutions that support Parliament and the courts within the scope of the ATIA, Bill C-58 merely codifies a system of proactive disclosure for these bodies that already largely exists in practice. Proactive publication obligations are an important part of any RTI regime, as this helps ensure access to at least a minimum common platform of information from public authorities for all. However, the essence of a right to information system, and of any claim to be “open by default”,¹⁸ is the right of individuals to request whatever information they want from government and not to be restricted to accessing specific categories of information, as determined by the government. The move to formalise the practice of proactive disclosure is welcome, but it signally fails to extend the Act to these bodies.

Not only do the ‘new’ proactive disclosure obligations fail substantively to expand the scope of the Act, but they are also excluded from the oversight functions of the Information Commissioner. Bill C-58 specifically states that the Commissioner may not exercise oversight over any matter relating to proactive disclosure, including the information that

¹⁷ The Report is available at:
<http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf>.

¹⁸ See the Liberal Party's Access to Information Promises: <https://www.liberal.ca/realchange/access-to-information/>.

must be published, and the exercise of a power or the performance of a duty or function under the proactive disclosure regime.

In its current form, the ATIA only applies to citizens and residents. This runs counter to both international standards and constitutional guarantees, which apply to everyone, as well as to better international practice. Furthermore, this limitation makes Canada look unnecessarily xenophobic as compared to countries like the United States and United Kingdom, where the right applies to everyone. Foreigners often make requests in the public interest; academics and researchers may seek information to publish reports that help inform public policy, and foreign companies and business people may seek information to be able better to participate in and contribute to our economy. This limitation is not only unnecessary but it is also unduly burdensome for officials, who will have to take steps, and waste time and potentially resources, to establish who is and is not a citizen or resident.

Bill C-58 also fails to institute a duty to document important decision-making processes. Such a duty would address the problems of officials conducting business in ways that create no paper trail, such as orally, and the use of private devices to communicate official business. Although, technically, the Act covers the latter acts, it can be very difficult to capture this content via information requests while a duty to document would ensure that key decision-making information was maintained in official records as a matter of course.

Requesting Procedures

One of the most serious problems with the ATIA, about which users have consistently complained, is that it allows, and public authorities often impose, long delays in responding to requests. The ATIA, in broad conformity with international law and practice, creates a presumption that authorities will respond to requests within 30 days. However, it also allows authorities to extend the 30-day period by “a reasonable period of time” by giving notice to the requester and, if the extension runs to longer than 30 additional days, by giving notice to the Information Commissioner. These extensions are only supposed to apply in exceptional cases where requests are considered too voluminous or compliance with a request is considered to require consultations and therefore cannot reasonably be completed within the original time limit. In practice, however, public authorities very frequently take advantage of this highly discretionary power to create long delays in responding to requests. This seriously undermines the right to information. Indeed, it can render time sensitive requests entirely moot, for example where journalists are working on tight deadlines.

There are a number of options for reducing the scope of this discretion to delay. For example, public authorities could be required to obtain prior permission from the

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Information Commissioner for delays beyond a set period of time, say of 60 days.¹⁹ Alternatively, an absolute maximum limit, say of 60 days, could be imposed for responding to requests. Slovenia, for example, allows for extensions of no more than 30 additional days and Sri Lanka requires responses within 14 days, with an option to extend for no more than 21 additional days. Penalties for failures to respect the time limits could also be put in place. In Mexico, for example, breaches of the time limits result in an obligation for the public authority to disclose the information, unless the Information Commission allows the information to be withheld. In Uruguay, when the time limits have been breached, the information must be provided for free and, in India, information commissions can impose sanctions on officials who have, in bad faith, unduly delayed in responding to requests.

The ATIA also falls short of international standards in terms of the cost of accessing information. International standards hold that no fees should be imposed simply for making a request for information. Bill C-58 allows for fees of up to \$25 to be charged for lodging a request, and the current fee is set at \$5. Abolishing this fee was included in the ETHI Committee Report, Recommendation No. 14. The collection of these payments has been shown to cost far more than the revenue they generate. As we have pointed out in previous analyses, the underlying rationale for the fee, which is that it deters requests, is both incorrect and undemocratic. Countries which do not impose fees for making requests have not found that this causes problems. And India, which does charge a fee, has more requests per capita, even given its huge population, than any other country. Closer to home, when New Newfoundland and Labrador eliminated the filing fee in 2015, there was no evidence of a stark, let alone unmanageable, increase in the number of requests.

In terms of fees for responding to requests, the elimination of all fees for processing requests in the Interim Directive on the Administration of the Access to Information Act May 2016 Directive was very welcome.²⁰ Unfortunately, Bill C-58 does not fully institutionalise this. It would replace the current list of types of additional fees with a general statement that fees may be prescribed by regulation, making it possible for fees to be reintroduced. The government should entrench its promise to eliminate, and current policy of eliminating, fees. As the Information Commissioner noted, collecting fees is inefficient, causes delays, increases the cost of administering the Act and is “inconsistent with open government principles”.²¹ At a minimum, the law should respect international standards in this area, which mandate that any fees related to information requests should be limited to the cost of reproduction and delivery of the information (i.e. photocopying and/or postage).

Bill C-58 has also made it more complicated to make a request for information, contrary to international standards which call for clear and relatively simple procedures for both making requests. Currently, section 6 of the Act only requires requesters to provide a

¹⁹ Recommendation No. 16 of the ETHI Committee Report, note 17, called for this.

²⁰ Adopted 5 May 2016. Available at: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310>.

²¹ *Failing to Strike the Right Balance for Transparency*, note 11.

sufficient description of the information sought so that an experienced employee can, with a reasonable effort, identify the record. Bill C-58 would complicate this by amending section 6 to require requesters to provide: (a) the specific subject matter of the request; (b) the type of record being requested; and (c) the period for which the record is being requested or the date of the record. Section 6.1(1)(a) would then allow public authorities to refuse to respond to requests if any one of these was missing.

These criteria are too specific and create unnecessary barriers to access. Individuals do not always know the exact type of record they are looking for. Indeed, Bill C-58 makes this more difficult by removing the current requirement, in section 5(1)(b) of the ATIA, for public authorities to publish, “a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act”. Requesters also do not always know the date or period of time for the record that pertains to the information they seek. In fact, the date or period of time may itself be the information they seek. This amendment should be abandoned.

As noted above, the June version of Bill C-58 allowed public authorities, of their own accord, to ignore information requests that they deem to be frivolous or vexatious, or which they considered meeting would unreasonably interfere with their operations. This has now been amended to require the written consent of the Information Commissioner, a change CLD supports.

Exceptions

An RTI law should be based on a specific presumption in favour of access to any and all information held by public authorities, subject only to a narrow regime of exceptions. Under international law, the right of access may be subject to certain limited restrictions, but only where exceptions are: 1) set out in law and protect only legitimate interests; 2) apply only where disclosure would pose a risk of harm to the protected interest; and 3) do not apply where, notwithstanding a risk of harm, the public interest in disclosure outweighs that harm. The list of legitimate interests is well established under international law and is limited to: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs, the fair administration of justice and legal advice privilege; privacy; legitimate commercial and other economic interests; management of the economy; conservation of the environment; and legitimate policy making and other operations of public authorities.

Some of the exceptions in the ATIA do not protect illegitimate interests. For example, section 14 exempts from disclosure records relating to federal-provincial relations and section 20.4 excludes information about the terms of a contract between a performing artist and the National Arts Centre. No reason is given for why these categories of information should be protected. In any case, section 18 aims to protect Canada’s economic

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interests – a legitimate interest – and section 18(b) 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.” This already covers any legitimate interest protected by sections 14 and 20.4.

Other exceptions protect legitimate interests but lack the necessary harm test and therefore go beyond what is necessary. These include provisions protecting information received in confidence from other States or governments (section 13(1)), law enforcement information (section 16(1)(a)), information related to law enforcement investigative techniques (section 16(1)(b)), information treated as confidential by crown corporations (18.1(1)), financial or commercial information which is treated as confidential by a third party (section 20(1)(b)), government advice (section 21) and draft reports or internal working papers related to government audits (section 22.1).²²

One step that would go a long way in terms of ameliorating problems with the regime of exceptions would be to enact a blanket public interest override. Currently, the Act contains only a limited public interest test that applies to third-party trade secrets and financial, scientific or technical information, allowing for disclosure if it “would be in the public interest as it relates to public health, public safety or protection of the environment” or where “the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party”. The scope of this was extended by the Supreme Court 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.²³ As a result, all discretionary exceptions are now subject to some form of public interest test, but this still leaves out mandatory exceptions. The best position would be to make the public interest is made explicit, as is the case in many countries such as Colombia, Indonesia, Macedonia, South Africa, Tunisia, Ukraine and the United Kingdom.

Should the government have concerns about arbitrary application of the public interest test, it could include within the Act a non-exclusive list of considerations to be taken into account in assessing the public interest. This was included in Recommendation No. 17 in the ETHI Committee Report. If that is done, we recommend that additional factors, such as facilitating public participation and exposing corruption, be included in the list.

Bill C-58 does not address the current situation whereby “confidences of the Queen’s Privy Council for Canada”, also known as “Cabinet confidences”, are, pursuant to section 69, simply excluded from the scope of the Act. Section 69 defines these confidences very broadly. This fails to impose any harm test or public interest override to exempt this sort of

²² Other sections falling within this description include: 16.1, 16.2, 16.3, 16.31, 16.4, 16.5, 20, 20.1, 20.2, 20.4, 21 and 22.1.

²³ *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, para. 48.

information. It also means that exemptions under this category are not subject to review by the Information Commissioner.

Schedule II of the Act contains a list of 59 secrecy provisions in other laws that continue to apply. Not all of these are necessary, harm tested and include public interest overrides. For example, section 107 of the Customs Act prohibits 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 does not describe an interest which needs protection but, instead, excludes a whole category of information. It is, as a result, overly broad, lacking a harm test and public interest override. No doubt other provisions in this list are similarly problematical.

Appeals

As noted above, Bill C-58 would finally give the Information Commissioner order making powers, something CLD has welcomed. We note, however, that there is no clear procedure for certifying the orders of the Information Commissioner as orders of the Federal Court, or for the Commissioner to enforce orders through the courts. This leaves open the possibility that public authorities may simply ignore ‘orders’ of the Commissioner, something that has been a problem in other countries.

Review by the courts of orders of the Information Commissioner would be *de novo*, meaning that new facts and issues, including new claims regarding exceptions, could be introduced at that point. This is problematical. One option would be to limit review of Information Commissioner orders to the standard of judicial review, thereby precluding the introduction of new issues and imposing a lower standard of review. Alternately, a modified *de novo* review standard could be employed, which precluded public authorities from making new claims about exceptions following the appeal before the Information Commissioner.

Conclusion and Recommendations

Bill C-58 does represent some progress inasmuch as it gives the Information Commissioner order making powers and imposes at least formal proactive publication obligations on a number of bodies. However, Canadians have been waiting for decades for reform of the ATIA and these proposals are simply not enough. The Centre for Law and Democracy has consistently called for a major overhaul of the Act. Canada can no longer afford to approach this reform process through negligible tinkering with the ATIA. If it does, it will continue to languish behind other countries, hardly moving from its current position of 49th place

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globally from among countries with access to information laws.²⁴ It is time for the government to act decisively, to deliver properly on the promises it made in 2015 and, indeed, to address other major access to information law reform needs.

Recommendations:

- The scope of the Act should be expanded in terms of both proactive disclosure and the right to make requests to cover not only the offices of the Prime Minister and Ministers and the administrative institutions that support Parliament and the courts, but also all other State actors as well as private bodies that undertake public functions or operate with public funding that are not already covered.
- The Act should also be expanded to allow everyone, including non-Canadian residents or citizens, to make requests for information.
- Public authorities should be under a duty to document key decision-making processes.
- A robust system should be put in place to limit the discretion of public authorities to extend the time limits for responding to requests.
- All fees for both lodging and responding to requests should be done away with.
- The proposed new requirements in section 6 relating to how requests must describe the information being requested should be removed.
- Radical reforms should be introduced to bring the regime of exceptions into line with international standards. This should include limiting exceptions to protect those interests which are recognised as legitimate under international law, providing for a harm test for all exceptions, putting in place a clear public interest override for all exceptions, reviewing the provisions referred to in Schedule II of the Act and removing those that do not conform to these standards and transforming all exclusions into harm-tested exceptions.
- Effective measures should be put in place to ensure that the orders of the Information Commissioner are enforceable.
- Consideration should be given to limiting review of the Commissioner's orders to the standard of judicial review and, failing that, to modify the *de novo* review process so that public authorities cannot rely on new exceptions on appeal.

²⁴ According to the RTI Rating, the leading global methodology for assessing the strength of a country's legal framework for the right to information. The Country Data for the Rating is available at: <http://www.rti-rating.org/country-data/>.