CENTRE FOR LAW AND DEMOCRACY

Canada

Submission on Access to Information Reform in Quebec

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

Executive Summary

This Submission was prepared for a general consultation and public hearing being held by the Province of Quebec's Committee on Institutions. Among other issues, the consultation is meant to address the implementation of Quebec's Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information. The Submission highlights a number of severe deficiencies in the legal framework for transparency in the province.

The most significant problem is the unduly broad regime of exceptions to disclosure, which prevent public access to huge swaths of information. A specific problem is that many exceptions lack a requirement that the disclosure of information would cause harm to a protected interest, an omission which violates international human rights standards. Quebec's legal framework often raises multiple lines of defence against the disclosure of particular categories of information, appearing to treat openness is a threat to be neutralised rather than as a human right to be promoted. Several public authorities, including ministers' offices, municipal bodies and members of the National Assembly, are under no firm obligation to disclose information, instead having the discretion to release information only when they feel this would be expedient.

Other problems with the legal framework for access to information include limitations in the scope of both information and public authorities covered, excessive charges levied on requesters for accessing information, and a failure to fully recognise the right to information. The province's oversight body, the Commission d'accès à l'information, also lacks a formal mandate to conduct public awareness raising or other promotional activities.

The legislative deficiencies outlined here have allowed a climate of secrecy to flourish, which has contributed to Quebec's ongoing battles with corruption and mismanagement. When secrecy is rife, official malfeasance is the natural consequence. We urge the government of Quebec to take advantage of the opportunity presented by this consultation to undertake a substantial, root-and-branch reform of its access to information law. This is an opportunity both to give proper substantiation to the human rights of the people of Quebec and to take a very concrete step in the ongoing battle against corruption.

Introduction

The Province of Quebec's Committee on Institutions is holding a general consultation and public hearings on the Five-Year Report of the Commission d'accès à l'information du Québec (Quebec Access to Information Commission) report, *Technologies et vie privée à l'heure des choix de société*.[1] The report, published in 2011, provides a five-year assessment of, among other things, implementation of Quebec's Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information (the Act).[2]

The Centre for Law and Democracy (CLD) – an international human rights organisation based in Halifax, Nova Scotia which provides expert legal services and advice on foundational rights for democracy (www.law-democracy.org) – has prepared this Submission to the consultation with a view to promoting reform of the Act. The Submission outlines the major problems with Quebec's Act from the perspective of international standards, and proposes substantive legislative and regulatory changes that will help bring this legislation more closely into line with those standards.

According to the Supreme Court of Canada, the right to access information held by public bodies, or the right to information (RTI), is a constitutional right in Canada, flowing from the right to freedom of expression.[3] This decision affirmed a development that has been broadly recognised internationally. The right to information is explicitly protected in dozens of the more progressive constitutions around the world.[4] It is also entrenched in international human rights law, including through decisions of the Inter-American Court of Human Rights[5] and the European Court of Human Rights,[6] as well as the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[7]

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[1] Information on the consultation and the report are available at: http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/CI/consultations/consultation-311-20130221.html.

[2] The Act is available at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/A_2_1/A2_1_A.html. A quinquennial review is required by section 179 of the Act.

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

[4] See http://www.right2info.org/constitutional-protections-of-the-right-to.

[5] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151.

[6] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

[7] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18. Article 19 is the one in the ICCPR which guarantees freedom of expression.

Despite having passed one of the early RTI laws in 1982, the Access to Information Act, Canada is now lagging in terms of both its legal framework for and its implementation of this right. According to the RTI Rating, an internationally renowned methodology for assessing the quality of legal frameworks for the right to information,[8] Canada currently languishes in 55th place among the 93 countries that have adopted RTI laws, scoring only 79 points out of a possible total of 150.

As a study conducted by CLD in 2012 found, every jurisdiction in Canada has significant problems with its legal framework for RTI.[9] However, even within this weak peer group, Quebec's system is notably deficient. It came in 10th place from among the 14 Canadian jurisdictions,[10] scoring just 81 points on the RTI Rating, only two points ahead of last place finishers, Alberta, Canada (federal) and New Brunswick. Although The RTI Rating only measures the letter of the law rather than the strength of its implementation, evidence suggests that implementation of the Act in Quebec is equally problematic. The *National Freedom of Information Audit*, an annual review of public authorities' performance in responding to access requests, awarded Quebec's provincial authorities a C grade on the speed of their disclosures and an F on the completeness of their disclosures, while Quebec's municipal authorities were awarded an F for speed and a C for completeness.[11]

1. Recognition of the Right

The first major problem with the Act is its extremely weak recognition of the right to information. The Act fails to establish a specific presumption in favour of access to all information held by public authorities. It also fails to set out the benefits of the right to information, and it does not contain any statement of principles calling for a broad interpretation of its provisions, with a view to best giving effect to the right of access.

It might be argued that the above is unnecessary given the fact that the Supreme Court has held that there is a constitutional right to information, and the way in which courts interpret the Act. However, experience suggests that administrative attitudes towards RTI are often entrenched and hostile. The continuing issues around implementation, as chronicled in the *National Freedom of Information Audit,* suggest the need for a change in attitude among public authorities in Quebec.

[8] See www.RTI-rating.org. The RTI Rating was developed by CLD and another international human rights organisation, Access Info Europe.
[9] The full results are available at http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating.
[10] The ten provinces, federal Canada and the three territories.
[11] Canadian Newspaper Association, *National Freedom of Information Audit 2012* (2012). Available at: http://www.newspaperscanada.ca/public-affairs/FOI2012.

Amending the Act so as to clarify its main thrust and purpose, namely to protect a fundamental human right, would send a clear signal to officials that attitudinal change is expected.

Recommendations:

- A clear presumption in favour of access to all information held by public authorities should be added to the Act.
- The Act should include a statement of the benefits of the right to information, along with a rule requiring its provisions to be interpreted broadly so as best to foster those benefits.

2. Scope

As an international human right, the right to information extends to all information held by any authority which engages the responsibility of the State. This includes all information held by the executive, legislative and judicial branches of government, crown corporations, constitutional, statutory and oversight bodies, and any other body which is owned, controlled or substantially funded by a public authority, or which performs a statutory or public function.

The Act extends openness obligations to the government, the Conseil exécutif, the Conseil du Trésor, government departments and agencies, health services and social services institutions, the Lieutenant-Governor, the National Assembly, agencies whose members are appointed by the National Assembly and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision.

It does not, however, apply to the judiciary. Furthermore, section 34 gives ministers' offices, municipal bodies and schools the power to refuse to respond to access requests unless they feel releasing the information would be expedient. The same rule of expediency applies to documents held by the office of a member of the National Assembly or the President of the Assembly, and documents produced for that member by the services of the Assembly. This idea of expediency has no place in a right to information framework. As a human right, the right of individuals to access information held by public authorities should never be subject to official discretion.

Another problem is that the Act is limited in application to documents kept by a public authority in the exercise of its duties, while section 9 specifically excludes

personal notes written on a document, sketches, outlines, drafts, preliminary notes and "other documents of similar nature". According to international standards, the right to information should apply to all information held or produced by a public authority. While personal notes can sometimes legitimately be withheld from disclosure on grounds of privacy or internal decision making, they should not be categorically excluded from the scope of the Act. The Act already contains exceptions to protect internal deliberations and decision making in sections 29.1, 30, 33(6) and 35. The fact that the Act contains blanket exclusions that overlap with targeted exceptions is troubling in what it reveals about the general attitude of Quebec's authorities towards the right to information. By constructing multiple lines of defence against disclosure, the law treats openness as a threat to be neutralised rather than as a human right to be promoted.

Section 15 states that the Act only applies to information that is ready to be released, and does not require computation or comparison of information. This could block access to information which a public authority holds, but which is spread across different documents or which needs to be extracted from a database. For example, if a requester wanted to know how much money an authority spent on a particular type of expenditure, and that expenditure was not specifically aggregated, the authority would be justified in refusing the request, rather than being required to extract the information from the different documents in which it was contained. International standards mandate that public authorities should be required both to provide documents and to collect information from different documents to respond to a request, as long as this would not unreasonably divert the resources of the public authority.

Recommendations:

- The Act should be extended to apply to the judiciary and section 34, granting discretion to refuse to respond to requests on grounds of expediency, should be removed.
- The right of access should apply to all information held by public authorities, not just information kept "in the exercise of its duties".
- The exclusions in section 9 should be removed.
- Section 15, limiting the right of access to information which does not require "computation or comparison", should be removed.

3. Procedural Problems

Response times for information requests are a problem in every jurisdiction in Canada, but this is a field where Quebec performs particularly poorly. The Act provides a reasonable timeframe for responding to access requests, twenty working days with a possible extension of ten additional days. The Act does not, however, require public authorities to respond to requests as soon as possible. According to the *National Freedom of Information Audit*, a relatively small proportion of requests – specifically 19% of those made to the provincial government and 30% of those made to the municipal governments – were responded to within ten days. This suggests that information requests are not being prioritised, something an 'as soon as possible' requirement might help to address.

More serious, again according to the *National Freedom of Information Audit*, 38% of requests to the provincial government and 40% of requests to the municipal government were not addressed within the legally established timeframe. This suggests a significant problem in terms of official attitudes towards disclosure. In some jurisdictions, specific measures are put in place to address these sorts of problems. In Uruguay and Guatemala, for example, failure to respond within the legal time limits deprives the public authority of the right to charge for requests, while in Mexico, such a failure means the public authority may only refuse to grant access to the information with the permission of the oversight body (the equivalent of the Commission).

The other major procedural problem is with access fees. Although Quebec is one of the few jurisdictions in Canada that does not charge a fee simply for making a request, many of the charges listed in the regulations go far beyond what could be considered to be a reasonable rate. For example, public authorities are allowed to charge $14.50 for a computer disk, $0.36 per page of photocopying or printing and up to $56.50 for a video cassette, plus $63.25 per hour of recording. Providing information should be seen as a public service, and only actual direct costs incurred by a public authority should be imposed on requesters.

Recommendations:

- The Act should be amended to require public authorities to respond to requests as soon as possible.
- Consideration should be given to putting in place measures which effectively punish public authorities which fail to respond to requests within the time limits, along the lines noted above.
- Allowable fees should be limited to the actual and direct costs (i.e. not including employee time) incurred by public authorities.

4. Exceptions

The right to information is not absolute; however, under international law it may be overridden only in limited and justifiable circumstances. Specifically, information should be withheld only if its disclosure would be materially harmful to a legitimate interest, and if the likely harm caused by the disclosure outweighs the public interest in the release of the information. This effectively leads to a three-part test for assessing the legitimacy of exceptions: they should cover only narrow and legitimate interests, they should only extend to information the disclosure of which would pose a serious risk of harm to those interests, and they should be subject to a public interest override. The Act fails to pass muster in relation to all three parts of this test.

Several exceptions in the Act are either overbroad or protect illegitimate interests. One the worst of these is section 30, which allows the Conseil exécutif to refuse to release for 25 years any order whose publication is deferred under the Executive Power Act (chapter E-18), or any decision resulting from its deliberations or those of its cabinet committees. Section 30 grants a similar power to the Conseil du trésor. These blanket powers to cordon information off from the public are extremely problematic, and are not consistent with the right to information or the basic democratic principle of accountability.

Section 18 excludes information received from another government, government agency or international organisation, while section 19 exempts information detrimental to relations with another government or international organisation. There is no reason why either of these warrants special protection. It is sufficient to protect Quebec's financial interests, for example by preventing the release of information that could damage the province's negotiating position with other provinces or with the federal government. However, this information is already covered by section 22, which excludes information whose disclosure "would likely

hamper negotiations in view of a contract, or result in losses for the body or in considerable profit for another person". Section 20, which specifically excludes information that could hamper negotiations, and section 27, which excludes strategies for collective bargaining, are also unnecessary in light of section 22.

The exceptions dealing with legal opinions are also problematic. Public authorities do not require the same degree of solicitor-client protection as private individuals. Solicitor-client confidentiality exists to allow lawyers to plan their strategies for upcoming litigation (litigation privilege) and to promote candour between lawyers and their clients. While the first of these is clearly necessary for government lawyers, the second is likely not. When public officials deliberate with government lawyers they are not confessing their involvement in criminal enterprises or their infidelities. Rather, they are being professionally advised on matters of public policy. It is difficult to see why these conversations should not be subject to the same standards of disclosure as any other official deliberations. Section 31, which allows for refusals of legal opinions concerning the application of the law to a particular case, or the constitutionality or validity of legislative or regulatory provisions, is therefore unnecessary. Section 32, which allows for refusals if information may impact the outcome of judicial proceedings, should be limited to situations where the information would ordinarily fall under litigation privilege.

Several of the exceptions in the Act also lack proper harm tests, which begs the question as to why it could possibly be considered necessary to withhold information the disclosure of which would not cause any harm. Provisions which lack a harm test include sections 22 (industrial secrets), 23 (confidential third-party information) and 28(3) (investigative methods).

Some exceptions are also both overbroad and lack a harm test. The Act's approach to government deliberations is particularly problematic. According to international standards, it is legitimate for a public authority to exclude information that is part of an ongoing deliberative process if the disclosure would harm governmental decision-making or threaten the free and frank provision of advice. However, any information whose disclosure would not be harmful to the decision-making process should be disclosed, and information should normally be disclosed once the deliberative process has been concluded (i.e. a decision has been reached). The Act's exceptions are far broader than this. Section 29.1 exempts all information from *in camera* deliberations; section 33(6) contains a mandatory exception for deliberations of the Conseil exécutif or a cabinet committee; section 35 allows public authorities to refuse to disclose information about deliberations of a meeting of their boards of directors for 15 years; and section 31 allows for a preliminary or final draft of a bill or regulations to be withheld.

Sections 21, 28, 28.1, 29, 29.1, 30, 30.1, 41, 86 and 87 also allow public authorities to refuse to confirm or deny the existence of certain categories of excluded information. While it can be legitimate to refuse to confirm or deny the existence of information, this should only happen where the act of confirmation would itself harm a protected interest. These exceptions are not limited in this way.

The Act is also deficient in relation to the third key ingredient in a good regime of exceptions, namely the public interest override. Section 41.1 states that the regime of exceptions does not apply to information which reveals or confirms the existence of an immediate hazard to life, health, safety or the environment. This formulation fails to capture many other categories of public interest, such as exposing corruption or other illegal activity. Furthermore, section 41.1 does not extend to several exceptions, namely those found in sections 28, 28.1, 29, 30, 33, 34 and 41. As a result, information about deliberations of the Conseil exécutif, for example, may not be released even if this would reveal a grave threat to lives and safety.

International standards also mandate that sunset clauses should apply to all exceptions, whereby information should be disclosed once a particular time period (usually 15 or 20 years) has elapsed. Although some exceptions in the Act contain sunset clauses, most do not.

Recommendations:

- Sections 18, 19, 20, 27, 30 and 31 are unnecessary and should be deleted.
- Sections 21, 28, 28.1, 29, 29.1, 30.1, 41, 86 and 87 should only allow public authorities to refuse to confirm whether information exists where that confirmation would itself harm a protected interest.
- Sections 22, 23 and 28(3) should be amended to include a requirement for harm.
- Section 29(1), 33(6) and 35, protecting the deliberative process, should be consolidated into a single exception which protects a legitimate interest and which is harm tested.
- Section 32 should be limited to legal proceedings in which the government is a party and where the information was prepared as part of a litigation strategy.
- Section 41.1 should be replaced by a broad public interest override, which requires the release of any information, regardless of any exception, if its disclosure is in the overall public interest.
- The law should be amended so that all information is presumptively subject to disclosure if it is more than 15 years old.

5. Oversight and Appeals

The best way to improve implementation of the right to information is through strong and effective oversight. Although the Commission d'accès à l'information (the Commission) is relatively strong compared to other provincial oversight bodies, its power and mandate still fall short of better practice standards. For example, although the Commission has the power to make binding orders, it does not have the power to impose structural changes on perennially non-compliant public bodies. The Act also fails to place the burden in appeals on public authorities to demonstrate that they have operated in compliance with the Act.

The Commission also has no mandate to conduct public awareness raising or other promotional efforts, contributing to a public apathy towards the right to information which in turn fosters stagnation within the system. The Commission also does not play any formal role in training officials in information management or about their responsibilities related to the right to information. It could be useful to give the Commission some sort of oversight over training, to ensure that public authorities allocate adequate resources and attention to this.

The Commission is required to prepare an annual report on the state of the right to information, but other public authorities are not required to report on their own implementation activities, including statistics on how many requests were received and how they were dealt with. Without this downstream reporting, it is not possible for the Commission to maintain an accurate and comprehensive overview of what is happening in terms of implementation of the Act.

Recommendations:

- The Commission should have the power to impose appropriate structural solutions on public authorities that repeatedly breach the Act.
- Public authorities should bear the burden of demonstrating that they acted in accordance with the law in any appeal.
- The Commission should have a mandate to promote public awareness of the right to information and to conduct other promotional activities.
- Consideration should be given to mandating the Commission to exercise oversight over training of officials on implementation of the Act.
- Public authorities should be required to report annually on their implementation activities, including the number of requests received and how they were dealt with.

Conclusion

Over the past decades, countries around the world have embraced the right to information, adopting strong laws and putting in place increasingly robust systems of implementation. Canadian jurisdictions, in stark contrast, have demonstrated apathy and stagnation, or worse, in relation to this important democratic human right. Quebec is no exception, with a legal framework that ranks near the bottom when compared to Canada's other provinces and territories. Quebec's score of only 81 points out of a possible 150 (54%) on the RTI Rating would place it only in 54th place globally, just behind Mongolia, Colombia and the Netherlands.

The impact of Quebec's lack of transparency is readily visible in the multiple layers of scandal uncovered by the Charbonneau Commission. This is exactly the type of corruption that thrives in the absence of a culture of openness and respect for the right to information.

This consultation is an important opportunity for the government of Quebec to launch a meaningful, root-and-branch reform of a broken system, with the aim of providing the people of Quebec with an effective right to information regime. This, in turn, will help foster accountability, effective government and democratic participation, and counter corruption. We urge Quebec's government to seize this opportunity to take action to put a stop to the culture of secrecy and the harm it engenders.