CENTRE FOR LAW AND DEMOCRACY

Canada

Recommendations for Reforming Canada's Access to Information Act

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Lawyers' Rights Watch Canada

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Introduction[1]

For years, stakeholders across Canada have called for root and branch reform of the federal Access to Information Act (the Act). These appeals have come from virtually every NGO whose work touches on the right to information (RTI),[2] from Information Commissioners across the country[3] and from journalists and other key stakeholders who have been repeatedly frustrated by the Act's shortcomings.[4] The voices for reform pointed to a growing mountain of evidence that the system was broken, notably our dismal ranking of 58th place on the global RTI Rating, a comparative assessment of all national right to information laws globally.[5]

For years, these complaints fell on deaf ears, as the growing consensus among external stakeholders failed to generate meaningful political will within government to fix the problem. However, during the last election campaign in the fall of 2015, the Liberal Party announced a promise to reform the Act. The first concrete step in this process came on 5 May 2016, when a new Interim Directive on the Administration of the *Access to Information Act* (Directive) came into effect which implements the first substantive improvements to Canada's access to information system in over 30 years. Some of the changes in the Directive that have attracted more attention are the fact that all fees relating to requests for information beyond the initial $5 fee for lodging a request will be waived (paragraph 7.5.1), and that public bodies are

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[2] See, for example, submissions to the 16th Session of the UN Human Rights Council's Universal Periodic Review 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/, and by the 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] See, for example, Office of the Information Commissioner of Canada, Letter on Open Government to the President of the Treasury Board (Ottawa: January 2012). Available at: http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx.

[4] See, for example, "Canada needs to improve access to information", Montreal Gazette, 6 July 2012, available at: www.pressreader.com/canada/montreal-gazette/20120706/281758446390795, and "Access to information regime in dire need of an update: Editorial", Toronto Star, 23 June 2014, available at: www.thestar.com/opinion/editorials/2014/06/23/access_to_information_regime_in_dire_need_of_an_update_editorial.html.

[5] See www.RTI-Rating.org. It is worth noting that, since the Interim Directive on the Administration of the Access to Information Act came into force on 5 May 2016, Canada's ranking jumped up to 44th place, which is a significant improvement, although clearly much more work is needed.

instructed to release information in machine-readable and reusable formats wherever possible (paragraph 7.4.6).[6]

According to Canada's most recent proposals for its Open Government Partnership Action Plan, the Draft New Plan on Open Government 2016-2018 (OGP Plan), amendments to the Act will be made in two phases. A set of short term measures will introduce some quick improvements to the Act and a full review will follow, to take place by "no later than 2018".[7]

These Recommendations were drafted in response to a Call for Comment on Government proposals to revitalise access to information put out by the Treasury Board of Canada Secretariat.[8] To align with the purpose of the consultation, which focuses on the first phase – i.e. short term measures in advance of a full review – our Recommendations focus on those reforms which we believe are of great urgency to improve the functionality of the Act. At the same time, we preface our specific Recommendations with some comments about manner in which the reforms are proposed to take place.

The Reform Process

As noted above, the government is proposing to conduct the reform of the Act in two phases. We believe this does not make sense for a number of reasons. First, and most importantly, a true 'quick fix' would simply not be enough at this point. The age of the Act, the failure of successive governments to introduce any major reforms since it was first adopted, the truly transformational changes in the information space, mostly driven by technological developments, that have taken place since that time, and the recognition of a human right to information, both within Canada[9] and internationally,[10] mean that even the urgent reform needs are very significant. This is reflected in the March 2015 report by the Office of the Information Commissioner of Canada, "Striking the Right Balance for Transparency–Recommendations to modernize the Access to Information Act", which included no less than 85 separate Recommendations for improving access to information.[11] Perhaps even more significant in this respect is the 16 June 2016 Report of the Parliamentary Standing Committee on Access to Information, Privacy and Ethics (ETHI Committee), following its review of the Act, which included 32 recommendations for reform, of

[6] Available at: www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310.
[7] Available at: open.canada.ca/en/consultations/canadas-new-plan-open-government-2016-2018.
[8] See open.canada.ca/en/consultation/government-proposals-to-revitalize-access-to-information.
[9] *Ontario (public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, 17 June 2010 (Supreme Court of Canada).
[10] See Centre for Law and Democracy, Entrenching RTI: An Analysis of Constitutional Protections of the Right to Information, March 2012. Available at: www.law-democracy.org/wp-content/uploads/2012/04/Const-Report-with-Annex.pdf.
[11] Available at: www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx.

which 14 were explicitly tagged as being for the "first phase" of the review, and only two of which were specifically held over for the second phase.[12]

Second, a two-phase process is grossly inefficient for government, for Parliament and for external stakeholders. These sorts of reform processes involve a significant commitment of time and effort for all involved. The idea of presenting two sets of legislative reforms to Parliament within a period of two or three years highlights this inefficiency. Two sets of reforms will also place significant change management pressure on the civil service, and create a learning curve challenge for citizens and other requesters.

We are aware of the pressures on the current government to deliver a significant programme of reforms in a number of different areas. We also note that consultation and public engagement, vital components of any process of legislative reform, are even more important when the subject matter is the right to information, a foundational element of democratic and accountable government. However, in this case, the process is hardly starting from the beginning, as there have in recent years been extensive consultations over how the Act should be reformed. In preparing her March 2015 Report, Canada's Information Commissioner carried out a major consultation between 2012-2015, which garnered contributions from 44 groups and individuals and two petitions totalling more than 2,300 signatures. Further consultations have been undertaken in the context of the development of Canada's Action Plans as part of its participation in the Open Government Partnership.[13] And between February and June 2016, the ETHI Committee heard testimony from 41 witnesses, including a representative from the Centre for Law and Democracy.

We therefore strongly recommend that the government reconsider its proposal to proceed in two phases and that it instead conduct a full review now and introduce all of the changes needed to bring the Act into line with modern right to information standards and the fact that the Supreme Court has found constitutional protection for the right. At the same time, we endorse Recommendation 31 of the ETHI Committee and the commitment in the OGP Plan that a requirement be introduced into the Act that it be reviewed every five years.

Recommendations for Immediate Reforms

Canada's Open Government Action Plan commits to eight short-term changes:

[12] The Report is available at: www.parl.gc.ca/content/hoc/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf.

[13] See, for example, CLD's contribution to the consultation to develop Canada's second Action Plan on Open Government, available at: www.law-democracy.org/live/wp-content/uploads/2014/09/Canada.OGP_.Note_.pdf.

- Making government data and information open by default, in formats that are modern and easy to use;
- Eliminating all fees, except for the initial $5 filing fee;
- Providing requestors with a written explanation when information cannot be released;
- Giving Government institutions and the Information Commissioner authority to decline to process requests that are frivolous or vexatious;
- Giving the Information Commissioner the power to order the release of government information;
- 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;
- Undertaking a mandatory legislative review of the Access to Information Act every five years; and
- Strengthening performance reporting on the Access to Information program.[14]

These ideas are a welcome start and we support all of these proposals. At the same time, we believe that this is not nearly enough, even for a short-term review. We therefore urge the government to go even further and include the Recommendations below in its short-term reform package

1. The Information Commissioner should have order-making power.

CLD has long advocated in favour of an order-making oversight model and we welcome the fact that both the ETHI Committee (Recommendation 26) and the OGP Plan support this and suggest that it be included in the first phase reforms. Order-making power is vital to improve compliance with the Act, and would bring the federal system into line with the oversight systems in place in Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and Quebec, along with better practice jurisdictions around the world. Based on experience in other countries, we believe that order-making powers will have a number of benefits, including:

- providing greater impetus to, and thereby significantly bolstering, mediation, which is far more rapid and less confrontational;
- generally enhancing the status of the Information Commissioner and compliance by public authorities with his or her decisions; and
- contrary to the prevailing view, speeding up complaints processing, mostly through more timely and appropriate responses from public authorities.

Although the ETHI Committee supports an order-making model, it also suggests a ministerial veto for orders relating to national security issues. We believe this is entirely unnecessary and it is not in line with international better practice. Instead, the government should challenge in court any disclosure orders of the Information Commissioner that it believes would cause serious harm. This is an important

[14] *Supra* note 6.

distinction since it would place the onus on the government in such cases, requiring it to consider carefully the implications before acting to keep information secret. It would also mean that the Information Commissioner, rather than the requester, would bear the cost of taking the case forward, so that sufficient funding would need to be provided to the Commissioner's office in order to allow it to fulfil this role.

2. **Both access and requesting fees should be eliminated.**

The May 2016 Directive eliminated all fees for processing information requests, although it left in place the $5 filing fee. This was an important step forward, but we suggest that the $5 filing fee also be eliminated (which the ETHI Committee has also included in its Recommendation 14). These payments likely cost more to collect than they bring in in terms of revenue. Moreover, the notion that filing fees are needed to "deter" requests is both undemocratic and, in all likelihood, incorrect. In 2015, Newfoundland and Labrador eliminated the filing fee and there is no indication that, since then, the province has been inundated with an unmanageable flood of requests. There is also no evidence of a need or support for imposing filing fees in the numerous countries around the world where they are not currently charged.

The ETHI Committee calls for consideration to be given to reinstating fees for voluminous requests and requests that require lengthy research, with the exception of requests for personal information. This would be a mistake, particularly in light of the recommendation regarding frivolous and vexatious requests (see below). Responding to requests is a core government responsibility, the cost of which should be factored into operating budgets.

If fees are to be reinstated, these should at least be limited to the actual costs of reproducing and delivering information (i.e. the market rate of photocopying or postage). Many developing countries – including Rwanda, Jamaica and India – only impose these types of fees. Charging requesters for time spent searching for files effectively penalises the requester for shortcomings in public records management systems. Exorbitant fees have consistently been raised by stakeholders as one of the biggest problems with Canada's right to information system.

3. **Public bodies should be allowed to dismiss frivolous or vexatious requests with the consent of the Information Commissioner.**

Among the first phase commitments included in OGP Plan, supported by ETHI Committee Recommendation 12, is that public authorities should be granted authority to decline to process requests that are frivolous or vexatious. We support this proposal, based on the legitimate need for public authorities to be able to avoid expending potentially significant resources on these sorts of requests, subject to the

caveat that the zone of exclusion needs to be defined very precisely and narrowly, among other things so that it cannot be abused to refuse large requests, which is an entirely different matter.

The ETHI Committee recommends that decisions to dismiss a request as frivolous or vexatious should be made by the public authority but be subject to an appeal to the Information Commissioner. Given the broad existing powers of review of the Commissioner, the appeal part of this essentially goes without saying. We recommend, instead, that the federal government follow the example set by Newfoundland and Labrador, where public authorities must obtain the permission of the Information Commissioner before they may dismiss a request on these grounds. This approach would build in rapid consideration by the Information Commissioner at the front end of the process, rather than placing the onus on the requester to file an appeal, which could take months. Although this might short-circuit a further appeal to the Commissioner, the relative lack of complexity of these types of decision, the availability of appeals to the courts, and the benefits of the system in terms of preventing abuse of this mechanism would outweigh any disadvantages of this.

4. **All exclusions in the Act should be replaced with exceptions, and all exceptions should be subject to a harm test and a public interest override.**

Under international law, the right to information is not absolute but 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 this harm outweighs the public interest in accessing the information (the public interest test or override, which is essentially a balancing test). This effectively leads to a three-part test for exceptions: they should protect only 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 test.

There are significant ways in which the Act fails to adhere to all three parts of this test. There is a need to address all three areas but, at a minimum, harm tests and a broad public interest override should be added in a first phase. The first could be achieved through minor tweaks to the language of each exception which lacks a harm test (namely, sections 13(1), 16(1), 16(3), 16.1, 16.2, 16.3, 16.31, 16.4, 16.5, 18.1(1), 20, 20.1, 20.2, 20.4, 21 and 22.1). For example, section 16.2, which prohibits the release of any information obtained for or on behalf of the Commissioner of Lobbying, should be redrafted as an exception for information whose disclosure would harm the ability of the Commissioner of Lobbying to perform her function. With this change, a request could be refused only if disclosure of the information

sought would cause harm, rather than simply because it related to the Commissioner of Lobbying. In the same way, the exclusions in the Act in sections 68, 68.1, 68.2, 69 and 69.1 could be replaced with harm-tested exceptions.

The only explicit public interest test in the Act applies to the section 20 exception for third-party trade secrets. The ETHI Committee recommends that, in the first phase, the Act should be amended to include a general public interest override, but only for non-mandatory exceptions (Recommendation 17). This falls far short of what is needed. Indeed, it would do little more than to codify the existing law, since the Supreme Court decision in *Criminal Lawyers' Association v. Ontario (Public Safety and Security)* already effectively requires consideration of the public interest when deciding whether or not to apply discretionary (i.e. non-mandatory) exceptions.[15]

While there was a particular rationale behind the Supreme Court decision, in general there is no reason to limit the public interest test to non-mandatory exceptions. Better practice, as reflected in the laws of many countries, is to apply the public interest test to all exceptions. We understand that some government information is very sensitive but this would be factored in as part of the public interest balancing. In practice, and based on the nature of the test, this type of information would only be released if there were an overriding public interest in favour of release, such as where the information would directly expose corruption or illegal activity, taking into account the possibility of redacting exceptionally sensitive material. Blanket public interest overrides are in force in many countries which face extremely grave security threats, such as Liberia, Indonesia and Colombia.

To mitigate concerns about arbitrary application of the public interest test, the Act could include a non-exclusive list of considerations to be taken into account, along the lines of those included in Recommendation 17 of the ETHI Committee. We suggest that additional factors be considered for inclusion in this list, such as facilitating public participation and exposing corruption.

5. **The scope of the Act should be extended to apply to all federal constitutional or statutory bodies and any other body that performs a public function or receives public funding, to the extent of that funding or function, including the offices of the Prime Minister and Cabinet, Parliament and the institutions which support it, and the courts.**

Both the OGP Plan and the ETHI Committee recommend expanding the scope of bodies to which the Access to Information Act applies during a first phase of reforms. Both call for the Act to be expanded to apply to the Prime Minister's and

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

Ministers' offices, institutions which support Parliament and the courts (Recommendations 3, 4 and 9 of the latter). These changes, which CLD has been recommending for a long time, are overdue and should be implemented immediately. In relation to the court, the ETHI Committee recommends that there should be exceptions for court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity. Although these types of information would generally be exempt, it is preferable for them to be considered as part of a harm-tested exception to protect the integrity of the judicial process rather than as class exclusions.

Recommendation 1 of the ETHI Committee also recommends that in the first phase the ambit of the Act should be expanded 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. Once again, these recommendations are in line with longstanding CLD proposals, in line with international standards and better national practice. We would only add to this list federal bodies which are created by the Constitution.

International standards also call for right to information laws to apply to bodies which receive public funding, to the extent of that funding. Recommendation 2 of the ETHI Committee calls for this to be studied as part of the second phase of reforms. In our view, and speaking as a body which falls within the scope of this exception, the challenge here is substantially the same as applying the Act to private bodies which perform a public function. We therefore see no need to delay this recommendation to a second phase of reforms.

6. The right to request information should be extended to all persons.

Recommendation 11 of the ETHI Committee calls for extending access to all persons to be considered in the second phase. We see no need for delay on this reform. Restricting foreigners from filing requests runs counter to international human rights guarantees, which apply to everyone, and is contrary to established international practice. Only a few countries impose this sort of limitation, not including the United States and the United Kingdom. The substantial body of experience in this area provides no credible evidence to suggest that allowing foreigners to file requests places a significant additional burden on public authorities. On the contrary, the restriction itself imposes an additional burden on officials who have to determine whether a requester is Canadian.

Furthermore, requests by foreigners are generally in the national public interest, whether they are from researchers, who may contribute to our national understanding, or companies, which may invest in Canada. Any fears that foreigners may use the system to gain access to sensitive information are not well founded. The

Act already has exceptions to protect such information. In any case, in an interconnected world, it is easy enough for a foreigner to find a Canadian to file their requests for them.

7. **The Act should be amended to formally require public bodies to respond to requests as soon as possible, and to limit extensions to the extent strictly necessary. Extensions beyond 30 days should only be permitted with the permission of the Information Commissioner.**

Among the most significant and recurring problems reported by users of the Act are long delays in responding to access requests. The legislative intent is that public authorities should generally respond to access requests within 30 days. However, section 9 allows public authorities to extend this by "a reasonable period of time" by giving notice to the requester and, if their extension runs longer than 30 additional days, by giving notice to the Information Commissioner as well.

Formally, extensions may only be invoked in exceptional cases where "the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution" or where "consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit". In practice, however, the 2012 *National Freedom of Information Audit* found that response times exceeded 30 days in fully 50% of all cases, and 16% of requests were either completely ignored or were not responded to at all within the timeframe of the study.[16] Other studies have shown that public authorities regularly exceed their own, discretionary and often already unduly long timeframes for responding to requests.[17]

The maxim 'justice delayed is justice denied' applies to access to information. The ETHI Committee suggests that, in the first phase, extensions beyond 30 days should require the permission of the Information Commissioner (Recommendation 16). We endorse that recommendation. We also suggest that public authorities be required to respond to requests as soon as possible in order to establish that rapid processing of requests should be viewed as a core institutional goal. We also recommend that consideration be given to putting in place measures to create more pressure to comply with the time limits. For example, a requirement, when time limits are breached, to provide compensation to requesters, to go through a special procedure

[16] Canadian Newspaper Association, *National Freedom of Information Audit 2012* (2012). Available at: www.newspaperscanada.ca/sites/default/files/Freedom-of-Information-Audit-2012-FINAL.pdf.
[17] A study by the Office of the Information Commissioner, for example, found that more than 25% of all requests were not responded to even within the extended deadlines public authorities set for themselves. See Office of the Information Commissioner, *Out of Time: 2008–2009 Report Cards and Systemic Issues Affecting Access to Information in Canada* (2010), p. 3.

– perhaps requiring the personal sign-off of the Minister – to apply exceptions, or to prohibit the charging of any fees.