CENTRE FOR LAW AND DEMOCRACY

Canada

June
2026

Submission to the 2025 Review of Canada's Federal *Access to Information Act* (ATIA)

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Introduction[1]

For many years, the Centre for Law and Democracy (CLD) and other civil society groups, in common with individual experts, parliamentary committees and the Information Commissioner of Canada, have been calling for major reforms to the Federal *Access to Information Act* (ATIA),[2] which gives individuals a right to access information held by public authorities, or the right to information (RTI).[3] CLD welcomes the opportunity to make a submission in response to the 2025 review of the ATIA, despite having to raise, yet again, many of the same concerns which we and others have echoed for many years, since these concerns have still not been addressed.

The right to information is a human right under international law. The rights to "seek" and "receive" information are part of the guarantee of freedom of expression under Article 19 of both the *Universal Declaration of Human Rights*[4] and the *International Covenant on Civil and Political Rights*,[5] which Canada ratified in 1976. It is now widely recognised that this includes the right of everyone to access information held by public authorities, subject only to narrow exceptions to protect overriding public and private interests.[6]

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[2] R.S.C., 1985, c. A-1, https://laws-lois.justice.gc.ca/eng/acts/a-1/.

[3] See, for example, CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* April 2023, https://www.law-democracy.org/resources/canada-submission-to-the-upr-on-the-right-to-information/; *Report of the Standing Committee on Access to Information, Privacy and Ethics*, June 2023, 44th Parliament, 1st Session, https://www.ourcommons.ca/Content/Committee/441/ETHI/Reports/RP12544531/ethirp09/ethirp09-e.pdf; and Office of the Information Commissioner of Canada, *Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act*, March 2015, https://www.oic-ci.gc.ca/en/resources/reports-publications/striking-right-balance-transparency.

[4] UN General Assembly Resolution 217A(III), 10 December 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[5] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[6] See, for example, CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, p. 2; and CLD and Open Media, *Submission to the UN Human Rights*

The policy paper by Treasury Board of Canada Secretariat (TBS), Policy Approaches, recognises that an effective federal access to information regime should empower Canadians and Indigenous peoples to obtain timely access to records held by government institutions, enabling them to participate meaningfully in Canadian democracy.[7] It also states that the review seeks feedback on its policy proposals, which are aimed at improving the performance and operations of the access to information regime, strengthening transparency and accountability, and enabling public debate on the conduct of institutions.[8] These are important objectives. However, achieving them requires reforms which go well beyond the cautious and partial proposals set out in the Policy Approaches paper.

Canada was once among the global leaders in access to information. Unfortunately, that is no longer the case. Canada now ranks poorly relative to other countries largely because global standards and legislation have advanced while Canada has failed to keep pace, and because the ATIA contains lax timelines; an overbroad regime of exceptions, including due to the lack of a proper public interest override; and limited scope, including due to the blanket exclusion of many public authorities.[9]

CLD has developed a globally recognised tool for assessing the strength of legal frameworks for access to information, the RTI Rating.[10] As the table below, providing an outline of the Rating scores for Canada, shows, Canada currently achieves a score of just 95 out of a possible total of 150 points, putting it in a dismal 47th position globally from among the 142 countries currently assessed on the RTI Rating.

Committee's 145th Session, February 2025, p. 13, https://www.law-democracy.org/wp-content/uploads/2026/02/CLD-HRC-Submission.final_.pdf.

[7] Treasury Board of Canada Secretariat, *2025 Review of the Access to Information Act: Policy approaches*, March 2026, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/modernizing-access-information/reviewing-access-information-act/2025-review-access-information-act/2025-review-access-information-act-policy-approaches.html.

[8] *Ibid.*, Introduction and Purpose.

[9] RTI Rating, *Canada Country Page*, Introduction, https://www.rti-rating.org/country-data/Canada/.

[10] Available at: www.RTI-Rating.org.

Section	Max Points	ATIA	Percentage
1. Right of Access	6	5	83%
2. Scope	30	14	47%
3. Requesting Procedures	30	20	67%
4. Exceptions and Refusals	30	13	43%
5. Appeals	30	26	87%
6. Sanctions and Protections	8	6	75%
7. Promotional Measures	16	11	69%
Total score	**150**	**95**	**63%**

This Submission is divided into three Parts. Part I addresses the serious concern that the review is not being conducted by an independent body. Part II responds to the proposals in the TBS Policy Approaches report. Part III addresses key reform needs which are largely or entirely omitted from the review, despite having been raised repeatedly by CLD and others, including during the last federal review process in 2021.[11] The new federal government in Canada has an opportunity to break the cycle of over-promising and under-delivering on access to information reform. It should seize that opportunity.

1. The Need for a Comprehensive, Independent Review

The most glaring issue with the 2025 review is the review process itself. A review of the ATIA led by TBS suffers from an inescapable conflict of interest. Below, we elaborate on what a proper review should look like, and how the experience of Newfoundland and Labrador shows that independent review processes can produce meaningful reforms.

1.1. Structural Concerns with a Review Led by TBS

Section 93 of the ATIA requires the President of the Treasury Board to conduct a review of the Act every five years and to table a report before each House of Parliament. TBS' Policy Approaches paper notes that the President of TBS is responsible for the general

[11] See CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, August 2021, p. 1, https://www.law-democracy.org/wp-content/uploads/2025/11/Canada.RTI_.21-08.Submission.final_.pdf.

administration of the Act across more than 250 institutions.[12] However, neither section 93 nor this fact mean that it is required or appropriate for TBS to conduct the review itself. Nothing in section 93 prevents the President of the Treasury Board from constituting an independent body to undertake the actual review. And TBS is simply not an appropriate body to assess, impartially, comprehensively and independently, the future needs of Canada's access to information regime.

In June 2025, CLD and other leading RTI observers in Canada published an open letter to Prime Minister Mark Carney calling for a genuine and timely review of the ATIA.[13] That letter noted that the previous review, which led to a report to Parliament in late 2022, suffered from serious structural flaws. As a "government institution", TBS is itself subject to the sometimes not insignificant obligations created by the ATIA, which represents a clear conflict of interest in terms of its ability to conduct an independent review of the Act. This conflict is only deepened by the fact that TBS is responsible for the general administration of the ATIA.

This concern is not simply formal in nature. The design of a review process shapes its outcome. TBS' responsibilities under the Act make bias unavoidable, whether conscious or unconscious, and it does not take a great deal of imagination to conceive of such biases flowing from considerations of administrative convenience or a desire to lessen the burdens which implementation of the Act presents for the federal government. This is especially the case, and of particular concern, given that the fundamental purpose of the Act is to empower the public to scrutinise the government.

This concern is also not theoretical in nature, but can be seen quite clearly in the outcome of the previous review. The Executive Summary of the Report to Parliament following that review stated:

> Whether from ATI users or federal institutions, the greatest complaint about the ATI regime is poor compliance with the law. As such, consideration of ATI improvements starts with opportunities to improve implementation of parts 1 and 2 of the ATIA, as set out in this report.[14]

[12] Note 7, Introduction.
[13] *Canada: Time for a Serious Review of the Access to Information Act*, June 2025, p. 1, https://www.law-democracy.org/wp-content/uploads/2026/02/25.06.ATIA-letter.EN_.final_.pdf.
[14] *Access to Information Review: Report to Parliament*, Executive Summary, December 2022, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/modernizing-access-information/the-review-process/access-information-review-report-parliament.html.

This is simply not true. Submission after submission to the review detailed significant structural failings with the Act itself. That included the submission prepared by the Office of the Information Commissioner of Canada, some two-thirds of which was devoted to reform of the Act itself and which included the following statement:

> Over the years, many recommendations to improve the Act have been made. Most of these recommendations remain relevant today.[15]

This flagrant distortion by TBS of what they heard during the review demonstrates clearly the problems with having TBS conduct this sort of review. Another review led by TBS risks repeating this pattern of distortion and a failure to promote the meaningful legislative overhaul which is needed. CLD believes that this is reflected in the limited and sometimes regressive nature of the proposals in the TBS Policy Approaches paper. At a time of austerity, Canadians do not expect to see their government waste resources on a non-genuine review. More importantly, at a time of resurgent global threats to democracy, Canadians expect their government to act properly and seriously when reviewing legislation which represents a foundational pillar of democracy.

1.2. What an Adequate Review Should Look Like

1.2.1. Independence, Breadth, and Resources

The June 2025 open letter called for the review of the ATIA to be conducted under the leadership of an independent panel, with a broad mandate to consider all reform needs and sufficient resources to conduct robust consultations with Canadian stakeholders. Anything less than an independent, comprehensive and consultative review would waste public resources and further erode public trust in the ATIA system.[16]

The Terms of Reference appended to that letter provide a strong model for review of the Act. They call for a review which is comprehensive, independent and inclusive, grounded in the

[15] Office of the Information Commissioner of Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada' s Review of the Access to Information Regime*, p. 9, January 2021, https://www.oic-ci.gc.ca/sites/default/files/2021-01/Review_of_the_Government_of_Canada's_Access_to_Information_Regime__Observations_and_Recommendations_from_the_Information_Commissioner-ENG.pdf.
[16] *Canada: Time for a Serious Review of the Access to Information Act*, note 13.

public's right to know, and aimed at creating a robust, transparent, reliable, user-friendly and enforceable system for accessing information held by public authorities.[17]

1.2.2. Public Engagement and Transparency

An adequate review should involve robust written, digital and in-person consultations to ensure that all stakeholders, regions and communities in Canada have a genuine opportunity to participate. This process should involve the publication of a draft "What We Heard" document and a draft set of findings and recommendations, with opportunities for comment before they are finalised.[18]

The review should also mirror the transparency values it is meant to promote. TBS' Policy Approaches outlines that individual submissions will not be made public, although they may be subject to requests under the ATIA. This is fundamentally at odds with the spirit of a review of the Act. To ensure transparency, written submissions, meeting transcripts, working documents and other relevant materials should be published promptly through a central, bilingual review portal, subject only to the protection of personal information.

1.3. The Federal Government Can Learn from the Example of Newfoundland and Labrador

The need for an independent process is not abstract. The experience of Newfoundland and Labrador demonstrates that a comprehensive and independent review process produces reforms which are meaningful and constructive. Following a thorough and independent review, Newfoundland and Labrador adopted a substantially strengthened RTI framework in 2015.[19] CLD believes that this is the only time such an independent review has been conducted in Canada and that it is no coincidence that the legislation which emerged from it ranks as by far the strongest in Canada, according to CLD's Canadian RTI Rating.[20]

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[17] *Ibid*, p. 4.
[18] *Ibid*.
[19] S.N.L., 2015, c. A-1.2, https://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm.
[20] See https://www.law-democracy.org/canadian-rti-rating/. See also CLD, *Submission to the Independent Review of Newfoundland and Labrador's Access to Information and Protection of Privacy Act*, November 2020, https://www.law-democracy.org/wp-content/uploads/2025/11/Canada.Nfld_.RTI_.Nov20.pdf.

The federal government should treat Newfoundland and Labrador's success as evidence that process matters. Independent review is not merely symbolic; when properly designed, it can identify weaknesses, build public trust and provide a credible basis for legislative reform.

Recommendations

- The federal government should commit to a future independent review of the ATIA, led by a panel which is independent of government.
- The review should have a broad mandate covering both legislative reform and implementation measures.
- The review should incorporate robust, accessible and transparent consultations, and include the publication of submissions and findings.
- The government should commit to introducing legislative amendments which advance the right to information following the review, in line with the independent panel's recommendations.

2. Responses to Policy Approaches Proposed by TBS

CLD acknowledges that the TBS Policy Approaches paper contains some positive proposals, many of which would be a step in the right direction. However, many are vague, incomplete or risk creating new opportunities for delay and secrecy. Below are responses to the main policy approaches proposed by TBS: publication schemes and proactive publication, delays and extensions, exceptions and exclusions, declassification, information management, Indigenous access, and oversight.

2.1. Publication Schemes and Proactive Disclosure

2.1.1. Publication Schemes

The proposal to require institutions to publish and regularly update publication schemes[21] is a meaningful step toward systemic transparency. Publication schemes can provide a flexible mechanism for expanding proactive disclosure in a manner which is adapted to the situation of different institutions, as well as help members of the public understand what information

[21] Note 7, Policy approach: Adopt publication schemes.

they can expect from a given institution, potentially reducing the volume of access to information requests and improving overall transparency. CLD welcomes this approach.

However, the value of publication schemes is almost entirely dependent on two factors. The first is how robust the schemes are in the first place. In this regard, we welcome the idea of giving TBS the power to stipulate categories of information which the schemes should include. TBS should also be required to consult with Canadians when adopting regulations or policy statements in this area. In the United Kingdom, which the Policy Approaches paper specifically refers to in this area, the Information Commissioner must approve publication schemes (or public authorities must adopt one of the Commissioner's model schemes). While this requires significant resources, consideration should be given to allocating some oversight role to the Information Commissioner in terms of the adoption of publication schemes in Canada.

Second, the value of publication schemes depends on whether institutions actually comply with them. The TBS proposals do not set out any means of enforcement of these schemes. It does note that publication schemes would build on existing policy requirements, but existing policy has not consistently driven proactive disclosure in practice. And one of the key problems here is the lack of any independent oversight of these obligations. For publication schemes to be meaningful, they should be mandatory and regularly updated, and, critically, subject to enforceable oversight. The Information Commissioner should have explicit authority to receive complaints and investigate failures to comply with publication scheme requirements, as well as failures to meet the proactive requirements set out in Part 2 of the ATIA, and non-compliance should carry real consequences. Without accountability mechanisms of this kind, publication schemes risk becoming exercises in box-ticking rather than genuine transparency tools.

2.1.1. Flexible Proactive Publication

The proposal to allow the government to "change" proactive publication categories without legislative amendment[22] could be a useful modernising measure, enabling more effective responses to public demand for transparency. CLD is cautiously supportive of this proposal, subject to the condition that the flexibility being proposed only ever runs in one direction, namely by adding additional categories of information which are subject to proactive

[22] *Ibid*., Policy approach: Build in more flexibility for proactive publication categories.

disclosure. As a result, any ministerial or regulatory power to modify proactive publication categories should be constrained to expanding disclosure.

It also bears emphasis that enhanced proactive publication should not be treated as a substitute for reactive disclosure obligations. Proactive publication is inherently limited as a transparency mechanism. As CLD has noted in previous submissions, the essence of a right to information system is the right of individuals to request whatever information they want from the government, subject only to narrow exceptions. That is fundamentally different from proactive disclosure, which only grants access to specific and therefore inherently limited categories of information which are ultimately determined by the government.[23] Proactive publication and reactive disclosure serve distinct functions, and both are necessary for a complete RTI regime.

Recommendations

- Publication schemes should be mandatory and regularly updated, and TBS should be required to consult with Canadians when setting conditions for these schemes.
- The Information Commissioner should be given some role in the system of adoption by government institutions of publication schemes, and she should be given the same enforcement powers over the whole area of proactive publication, including via publication schemes, as she enjoys in relation to requests for information.
- Flexible proactive publication powers should only be able to be used to expand disclosure obligations.
- Proactive publication should never replace reactive disclosure obligations.

2.2. Delays, Extensions and Timeliness

Delays remain a very serious problem with Canada's federal RTI regime. The TBS Policy Approaches paper acknowledges that many users indicate that delays mean the Act is not working as intended, with time extensions being identified as a particular concern regarding delays.[24] Despite this, and to our surprise, three of the four policy proposals in Policy

[23] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, pp. 4–5.
[24] Note 7, Delays and extensions.

Approaches paper relate to measures to further extend the time for processing requests. This is the precise opposite of what is needed here.

2.2.1. Objective Criteria for Extensions

The Policy Approaches paper outlines the need to establish "objective criteria" for time extensions, including the nature and scope of the request, the size and complexity of the request, the need for consultations and institutional capacity, such as staffing and workload.[25] Despite the title of this proposal, no objective criteria are in fact being proposed; rather, subjective factors are put forward to be taken into account. While this would be an improvement over the current highly discretionary approach, it does not address the core problem, which is that the ATIA fails to impose clear standards in this area, instead allowing a highly subjective and discretionary "reasonable period of time" for extensions.[26]

CLD has long recommended that extensions should either be subject to a hard overall maximum (such as of 60 days) or at least that extensions beyond a certain period, say of 60-days, should require prior approval from the Information Commissioner. Absolute maximum limits exist in many countries. One example is Slovenia, where extensions of only a maximum 30 additional days are allowed,[27] and another is Sri Lanka, where an extension of just 21 additional working days is allowed.[28] In India, the Information Commissioner even has the power to impose penalties for failures to respect time limits.[29] But Commissioner approval for longer delays may be more suited to the Canadian context, given that at least five Canadian jurisdictions already implement such a system, normally requiring commissioner approval for extensions beyond an additional 30 days.

We continue to believe that more forceful control over the exercise of discretion to extend the timelines, which subsequent review by the Information Commissioner cannot effectively provide, is needed in Canada.

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[25] Note 7, Policy approach: Establish objective criteria for time extensions.
[26] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, pp. 6–8.
[27] *Access to Public Information Act*, Official Gazette of RS, No. 24/2003, Article 24(1), https://www.rti-rating.org/wp-content/uploads/Slovenia.pdf.
[28] *Right to Information Act*, No. 12 of 2016, section 25(5), https://www.rti-rating.org/wp-content/uploads/Sri-Lanka.pdf.
[29] *The Right to Information Act*, No. 22 of 2005, section 20, https://www.rti-rating.org/wp-content/uploads/India.pdf.

We also note here that the ATIA should require government institutions to respond to requests as soon as possible and not merely within the maximum time limits (for example, initially of 30 days). That is fully consistent with the aims of the Act and would help limit abusive practices of waiting until the 30th day to respond to requests even when the information is readily available, which are unfortunately quite common.

2.2.2. Multiple/Coordinated Requests

TBS proposes to allow institutions to extend response timelines when receiving multiple RTI requests from the same person or from people working together.[30] This is problematical. Journalists, researchers, civil society groups and community advocates often submit multiple related requests, sometimes as part of coordinated public interest work. A rule which treats multiple or coordinated requests as a rationale for delay could penalise precisely those who rely on the ATIA to hold the federal government accountable. The current rules on timelines for responding to requests already grant government institutions far too much discretion, as noted above. Those rules should not be expanded by allocating sweeping new powers to delay legitimate requests merely because they are numerous, coordinated or inconvenient.

We note that the Act already includes a mechanism for institutions to seek permission from the Information Commissioner to decline to act on requests which are "vexatious", "made in bad faith" or "otherwise an abuse of the right to make a request for access to records."[31] Where appropriate, in highly exceptional cases, this mechanism could be used in the context of coordinated and illegitimate requests.

2.2.3. Emergency Extensions

TBS proposes to allow time extensions during emergencies such as pandemics, floods or disasters.[32] CLD recognises that genuine emergencies may affect an institution's capacity to fulfil a request. However, the importance of open access to information is even more relevant during times of emergency, as governments often exercise expanded powers, spend significant public resources and make crucial decisions with serious consequences for public health, safety and rights. As such, these circumstances necessitate timely transparency in

[30] Note 7, Policy approach: Enable fair and equitable access.
[31] Note 3, 6.1(1).
[32] Note 7, Policy approach: Allow time extensions during emergencies

order to maintain accountability and public trust, and to encourage informed public debate on how our elected officials respond to crises.[33]

More importantly, beyond the already highly discretionary time limits for responding to requests, we simply do not believe a measure of this sort is needed. While the onset of the COVID-19 pandemic caught societies around the world unprepared, that is no longer the case. COVID-19 clearly demonstrated that we are now ready to operate electronically and remotely, which is sufficient for the overwhelming majority of RTI requests. Most institutions do not experience increased workloads during these sorts of emergencies – indeed for many the opposite is true – and for the few which do, the current regime already accommodates the possibility of claiming delays.

During the COVID-19 pandemic, several government institutions abused the situation and simply suspended processing of information requests, without any legal authorisation.[34] As CLD noted in our submission to TBS' 2021 review, the right to access information should be maintained as part of the emergency response, not suspended or weakened.[35]

2.2.4. Clarification Periods

TBS proposes to allow institutions to take additional time to process requests when there is need to clarify "unclear or overly broad" requests.[36] Clarification can be useful, particularly where it helps narrow requests so that requesters obtain only the information they actually need. And it is fair to pause the clock on responding to requests while requesters think about how to limit or clarify their requests. However, we note that, in practice, at least some federal institutions already institute a practice of pausing time limits while waiting for clarification responses from requesters.[37] This is another example of the problematical nature of the highly

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[33] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 2; and Information Commissioner of Canada, *The importance of access to information during the COVID-19 pandemic*, 19 June 2020, https://www.oic-ci.gc.ca/en/resources/speeches/importance-access-information-during-covid-19-pandemic.

[34] See, for example, *Canadian Heritage (Re)*, 2020 OIC 10, 5820-00645, 16 December 2020, https://www.oic-ci.gc.ca/en/canadian-heritage-re-2020-oic-10; and *Privy Council Office (Re)*, 2020 OIC 7, 3218-00618, 11 September 2020, https://www.oic-ci.gc.ca/en/decisions/final-reports/final-report-3218-00618-privy-council-office.

[35] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 2.

[36] Note 7, Policy approach: Provide time for clarifying requests.

[37] See Office of the Information Commissioner, Striking the Right Balance for Transparency: Recommendations to modernize the *Access to Information Act*, p. 27, https://www.oic-

discretionary current regime governing time limits for responding to requests, since this practice is nowhere authorised by the ATIA.

Any pause to accommodate time taken by requesters to clarify requests should be strictly limited to the delay occasioned by the requester. In other words, such pauses should apply only during the period while a government institution is waiting for a requester to clarify a request. The TBS proposal to allow institutions to claim a 15-day delay in this context is neither appropriate, since requesters often clarify their requests far more quickly than that, nor logical, since it would not make sense in those few cases where a requester took longer to clarify the request.

Recommendations

- The ATIA should require institutions to respond to requests as soon as possible and not merely within the legal deadline.
- Introducing factors to consider for delays is helpful but, in addition, there should either be a hard cap on extensions, for example of 60 days, or any extensions beyond 60 days should require the prior approval of the Information Commissioner.
- The proposal to allow institutions to extend timelines merely because a requester, or requesters working together, have filed multiple requests should not be accepted.
- The proposal to introduce emergency extensions should not be accepted.
- Any pause for clarification should be strictly limited to the time taken by the requester to respond to a suggestion to clarify or narrow a request.

2.3. Exceptions, Exceptions and the Public Interest

2.3.1. Public Interest Override

TBS proposes to establish a public interest override for records which would otherwise be covered by the regime of exceptions in the Act.[38] This override would only apply to discretionary exceptions and would require institutions to assess whether release of the information "would mitigate the risk of significant harm to the environment or to the health

ci.gc.ca/sites/default/files/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf.

[38] Note 7, Establish a public interest override.

or safety of the public, or would clearly serve the public interest". This appears to be based on the public interest overrides currently found in sections 19 (Personal Information, via section 8(2)(m)(a) of the Privacy Act)[39] and 20(6) (relating to Third Party Information) of the Act, both of which only apply where the public interest "clearly outweighs" the harm and the latter of which is limited to protecting public health, public safety or the environment.

This is a step in the right direction but it does not go nearly far enough. Many better practice RTI laws around the world improve on this approach in three key ways. First, they do not limit the public interest override to these three interests but, rather, apply it to all public interests, the recognition of which evolves and grows over time. Second, they apply the public interest override whenever the public interest merely outweighs the risk of harm, rather than clearly outweighs it.[40] This is consistent with the status of the right to information as a human right. Third, they apply the public interest override to all exceptions, not just discretionary ones. If mandatory exceptions remain outside the proposed override, information may still be withheld even where disclosure would clearly be in the public interest.

A public interest override is a key safeguard which ensures secrecy rules do not prevent disclosure where the public interest in access outweighs any harm. CLD has repeatedly recommended that a clear public interest override which has all three of these characteristics be introduced into the Canadian ATIA.[41]

2.3.2. Sunset Clauses

TBS proposes, in a very general way, to establish limits on the duration of certain exceptions. The review correctly recognises that information generally becomes less sensitive over time.[42] But the proposal is extremely general and unclear in nature. It does not put forward any specific time limit or even discuss what exceptions such a limit should apply to, although it does refer to the Policy Guidance on the Disclosure of Historical Records under the *Access to*

[39] R.S.C., 1985, c. P-21, https://laws-lois.justice.gc.ca/eng/acts/P-21/.
[40] Both of these standards apply, for example in the United Kingdom. See the United Kingdom, *Freedom of Information Act 2000*, s. 2(2)(b), https://www.legislation.gov.uk/ukpga/2000/36/contents.
[41] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, pp. 10–12; and CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, pp. 12–13.
[42] Note 7, Policy approach: Establish more time limits on the protection of information.

Information Act,[43] which includes non-mandatory thresholds ranging from 15 to 100 years for a number of (but not all) exceptions.

CLD has long recommended that all exceptions protecting public interests should be subject to sunset clauses of 20 or fewer years, subject only to need-based extensions in exceptional circumstances where information remains demonstrably sensitive beyond that time.[44]

2.3.3. Advice and Recommendations

TBS proposes that factual information generated as part of internal government operations should not be exempt from disclosure under section 21 of the ATIA, unless it is so related to advice that revealing it would expose the nature of that advice.[45] This would be a meaningful improvement. Factual or background information should not be withheld merely because it appears in a document which also contains advice or recommendations.

Section 21 is widely used and, according to TBS, is "often criticised by requesters and by the Information Commissioner."[46] TBS' proposed clarification is partly in line with the Information Commissioner's recommendation that section 21 be amended to indicate which categories of information are not covered by the exception, although those recommendations also call for the protection period for advice and recommendations to be reduced from 20 years to 10 years.[47]

We have a more significant criticism of section 21, namely that it protects all advice, recommendations, consultations and deliberations without indicating what interest is being

[43] Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-informatio-policies-guidance/policy-guidance-disclosure-historical-records-access-information-act.html#toc-8.
[44] See CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, pp. 11–12; and CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada*, note 3, p. 13.
[45] Note 7, Policy approach: Make government operations more transparent.
[46] Note 7, Policy approach: Make government operations more transparent.
[47] Office of the Information Commissioner of Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, January 2021, p. 20, https://www.oic-ci.gc.ca/sites/default/files/2021-01/Review_of_the_Government_of_Canada%E2%80%99s_Access_to_Information_Regime__Observations_and_Recommendations_from_the_Information_Commissioner-ENG.pdf.

protected and without any harm test.[48] We believe it should apply only where the release of information would harm government deliberations (or the success of a policy due to its premature release). The mere fact that information contains advice does not mean that it is sensitive. Only certain types of advice are sensitive. Put differently, it is only in certain cases that the risk of advice being released would constrain free and frank debate within government, a value we recognise needs to be safeguarded. We thus call for this exception to be limited to cases where release of information would in fact pose a risk of harm to free and frank debate or potentially other interests which warrant protection.

A broader problem remains. TBS' 2021 "What We Heard" report noted that participants viewed exceptions and exclusions as overly restrictive and excessively applied, and an unwarranted cause of delay.[49] CLD has repeatedly argued that some exceptions in the ATIA do not protect legitimate interests and that others are class-based exceptions (i.e. lack a harm test), both of which are inconsistent with international standards.[50] This issue is addressed in more detail in Part III of this Submission.

Recommendations

- The ATIA should incorporate a public interest override which covers all exceptions, which is engaged whenever disclosure serves any public interest and which applies whenever the public interest in disclosure outweighs the risk of harm to a protected interest.
- All exceptions protecting public interests should be subject to mandatory sunset clauses so that they no longer apply after a maximum of 20 years, with an exceptional procedure to extend that limit where the information remains genuinely sensitive.
- Section 21 should be amended not only to exclude factual or background information, but also to apply in the first place only where release of the information poses a risk of harm to a legitimate interest.

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[48] CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada*, note 3, p. 11.

[49] Treasury Board of Canada Secretariat, *ATI Review – Interim What We Heard Report*, 2021, Key Themes: Reviewing the Legislative Framework, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/modernizing-access-information/the-review-process/ati-review-interim-what-we-heard-report.html.

[50] CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, p. 10–13.

2.4. Declassification and Historical Records

The TBS review recognises that Canada lacks a systematic approach for regularly reviewing, declassifying and disclosing historical records. The review also notes that this creates unnecessary delays for requesters seeking access to historical records and puts Canada out of alignment with other countries in the Five Eyes intelligence alliance, all of which have established systematic declassification and disclosure regimes.[51]

CLD welcomes and encourages the establishment of a systematic and regular regime for declassification and disclosure of historical records. These records should not remain inaccessible long after their sensitivity has diminished simply because no individual requester has made a request for them under the ATIA.

Declassification should be legislated and enforceable. A simple policy-based approach would not be legally mandatory and would practically be insufficient. The Act should be amended to establish clear timelines for review, declassification, transfer to Library and Archives Canada and disclosure of historical records, as appropriate.

Recommendation

- Canada should adopt a statutory declassification framework which provides for historical records to be reviewed, declassified, transferred and disclosed according to clear, legislated timelines.

2.5. Information Management, Duty to Document and Definition of a "Record"

2.5.1. Duty to Document

CLD welcomes the TBS proposal to create a "duty to document"[52] but the proposal, as presented, is unduly vague. It should be refined so as to guide officials and public authorities properly. CLD has long called for a legislated duty to document decisions and related information,[53] which would address the well-documented problem of officials conducting

[51] Note 7, Declassification and disclosure of historical records.
[52] Note 7, Policy approach: Establish a "duty to document" in official repositories.
[53] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11; CLD, Centre for Free Expression, Canadian Institute for

business in ways which create no reliable paper trail, whether because this is done orally, through informal channels or on private devices. A duty to document would ensure that key decision-making information is maintained in official records as a matter of course.[54]

For this duty to be meaningful, it should be legally enforceable. The TBS proposal acknowledges the possibility of linking the duty to document to the existing offences framework under section 67.1 of the Act, which CLD supports.[55] Without such a link, the duty risks becoming aspirational rather than binding.

However, the legislation should also define the scope of this duty clearly. It should apply broadly to all key decisions, actions and the rationales behind them. This should include not only to decisions with obvious downstream accountability implications, but also to the processes and inputs which precede them.

A key issue here is that there are also no clearly defined rules on the use of private devices for official business. While the ATIA technically covers official information which is held on private devices, it can be very difficult to capture it so as to respond to requests.[56] Clear and largely limiting rules should apply to the use of private devices or unofficial channels for official business, and the fact that records held on such devices or channels remain subject to the Act should be set out explicitly in legislation.

2.5.2. "Official Record" Proposal

CLD has serious reservations about the proposal to update the definition of "record" to refer only to "official records", namely those which "have ongoing business value and … are stored in official repositories", effectively removing transitory records from the scope of the Act.[57] CLD understands the administrative rationale for this – namely, that the digitisation of government work has produced enormous volumes of records which burden the RTI system – but this approach carries significant risks mean that it is not justified.

Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, p. 17; and CLD, *Submission to the UN Human Rights Committee's 145th Session*, note 6, p. 26.

[54] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 5.

[55] Note 7, Policy approach: Establish a "duty to document" in official repositories.

[56] CLD, *Submission to the UN Human Rights Committee's 145th Session*, note 6, p. 26.

[57] Note 7, Policy approach: Enable better records management for access and accountability.

First, narrowing the definition of "record" in this way would reduce the scope of access to information which is genuinely relevant to accountability. Even if the official definition of "official record" is drawn broadly, which would be very challenging to do, it would inevitably be interpreted in an often narrow and sometimes biased manner to exclude information which was intended to be covered. At a very minimum, this proposal should not be instituted unless a very robust duty to document is first put in place, so as to help counter any overreach in terms of screening out records. But we recommend, instead, an alternative approach whereby more effort is directed to ensuring that requests actually focus on the information requesters are genuinely seeking, alongside more robust use of artificial intelligence to help identify responsive information.

Second, and equally troublingly, the limitation of the Act to records which are stored in official repositories is counterproductive and would create perverse incentives. If only such records were subject to the Act, officials would be tempted to conduct sensitive business in a manner which avoided such storage, precisely to shield information from disclosure. That risk is far from theoretical, given the existing problems with officials using informal channels and private devices for official business precisely with this goal. Even if a robust duty to document is introduced in a legally enforceable manner and accompanied by strong anti-evasion rules, it will not be enough to counter this threat. The part of the proposal to limit the scope of the Act to records which are stored in official repositories should be dropped.

2.5.3. Retention and Disposal Schedules

The proposal to require institutions to publish their retention and disposition schedules is clearly positive.[58] Knowing how long records are kept, when they are disposed of, and when they are transferred to Library and Archives Canada helps requesters understand what information exists, where to find it and whether it may already have been destroyed. This kind of transparency about information management processes is an important support system for an effective RTI system.

Retention and disposition schedules should be mandatory and publicly accessible as a matter of course, and institutions should be accountable for adhering to them. Premature or unauthorised disposal of records should carry real consequences under the framework for offences.

[58] Note 7, Policy approach: Publish retention and disposition schedules.

Recommendations

- The ATIA should include a legally enforceable duty to document, the scope of which is clearly defined, and which covers all key decisions and actions, as well as the background information leading to them.
- Clear and largely limiting rules for the use of private devices or unofficial channels for official business should be included in the ATIA.
- The proposal to limit the scope of the Act to "official records" and to records which are stored in official repositories should not be instituted. Instead, more effort should be put into limiting requests to information which is genuinely sought by requesters and to using artificial intelligence to locate responsive information. At a very minimum, no proposal in this area should be put in place before a robust duty to document has been implemented.
- The proposal to require government institutions to publish retention and disposition schedules should be introduced.

2.6. Indigenous Access, Self-Determination, and Knowledge

The TBS review contains several proposals aimed at improving Indigenous access to information, with the aim of aligning Canada's RTI regime with the United Nations Declaration on the Rights of Indigenous Peoples[59] and the (Canadian) United Nations Declaration on the Rights of Indigenous Peoples Act.[60] It notes that First Nations, Inuit and Métis requesters rely on the RTI system for a variety of crucial purposes, including redress for historical grievances, status and genealogical records, land claims, commercial interests, health, natural resources and self-determination.

CLD very much welcomes measures which would improve Indigenous peoples' timely access to records held by the federal government. This need is underscored by the principle that access to such records can be essential to the exercise of individual and collective rights. Everyone has a right to access information held by governments, but Indigenous governments and representatives may need processes which better reflect collective rights

[59] UN General Assembly Resolution 61/295, 13 September 2007, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[60] S.C. 2021, c. 14, 21 June 2021, https://www.canlii.org/en/ca/laws/stat/sc-2021-c-14/latest/sc-2021-c-14.html. For the proposals, see note 7, Indigenous access to, and protection of, information.

and their special circumstances. At the same time, any such mechanisms should not reduce the rights individual Indigenous requesters or other requesters already have under the access regime.

2.6.1. Indigenous Access and Self-Determination

A first proposal here is to recognise, in the purpose clause of the Act, the right of Indigenous peoples to self-determination and to define "Indigenous peoples" in the same way as the term "aboriginal peoples of Canada" is defined in subsection 35(2) of the Constitution Act, 1982.[61] CLD supports both of these proposals.

2.6.2. Update the Definition of "Aboriginal Government"

The second proposal here is to replace the definition of "aboriginal government" in the Act with a broader definition to cover any "council, government or other entity that is authorized to act on behalf of an Indigenous group".[62] This is relevant only to section 13(1)(e) of the Act, which creates a mandatory exception for any record which "contains information that was obtained in confidence from" such a body. The rest of section 13(1) applies the same rule to foreign States, inter-governmental organisations, provinces and municipalities.

CLD has a general concern with section 13(1). As noted above, it is a fundamental principle of human rights guarantees of access to information that all exceptions should refer to an interest and then protect that interest against harm, instead of protecting categories of information, as section 13(1) does. We thus believe that all of the different sub-sections here should be subject to some form of harm. For foreign States, inter-governmental organisations, we recommend that the exception be conditioned on harm to the relationship between Canada and those entities. But we believe this is too weak for provinces and municipalities, and here we believe this exception should be limited to information which they are permitted to keep secret under their own access to information laws. Otherwise, these actors could, simply by placing a confidential stamp on a record, throw a veil of secrecy over it, at least in terms of obtaining it from federal institutions, even while they could not refuse disclosure under their own laws.

Aboriginal government represents the only system of government in Canada which is not subject to any access to information regime, so our proposal for provinces and territories will

[61] Note 7, Policy approach: Reflect self-determination in the Access to Information Act.
[62] Note 7, Policy approach: Update the definition of "aboriginal government".

not work in that context. Also, as such, it is only via other governments, and primarily the federal government, that any information from this system of government may be obtained by law. Section 13(1)(e) in its current form already enables aboriginal governments to render any information secret without any constraint, other than the need to tag it as confidential. Expanding this power without introducing appropriate limits seems ill advised to CLD.

We recommend that the matter of how to translate the aboriginal government exception into a human-rights compliant one should be considered before the exception is expanded. One option here would be to link it to protecting the ability of aboriginal governments to manage their affairs efficiently (so that it would only be where disclosure of the information undermined that interest that the information could be kept secret). Other options should be discussed with Indigenous peoples and a proper, i.e. harm-tested, exception should be introduced.

2.6.3. Indigenous Knowledge Exception

The third proposal here is for a new exception for Indigenous knowledge provided in confidence, subject to limited exceptions.[63] The TBS Policy Approaches paper recognises that "Indigenous knowledge" would need to be defined in the Act so as to align with other federal acts.

Here, again, however, the proposal fails to align with international human rights standards inasmuch as it seeks to create a class-based rather than harm-tested exception. CLD thus again calls on the government to identify the legitimate interest it is seeking to protect through secrecy here, define that in the Act and subject it to a harm test. We note that, as defined, there is potential for this exception to be misused, for example in the context of negotiations around natural resources. Indigenous peoples have rights to maintain, control, protect and develop their "cultural heritage, traditional knowledge and traditional cultural expressions", as recognised in the Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples.[64] That could form the central basis for a harm-based rather than class-based exception, which would apply only when disclosure of information would pose a risk of harm to those rights.

[63] Note 7, Policy approach: Protect 'Indigenous knowledge' from disclosure.
[64] Note 59, Articles 31.1–31.2

2.6.4. Exception for Third-Party Information

The fourth TBS proposal is for yet another new exception which would cover "third-party information that is under the control of Indigenous-affiliated institutions".[65] The proposal suggests, very generally, that this would "enable Indigenous peoples to have more control over their own economic development and self-determination". It goes without saying that private (personal) third-party information is already protected by section 19 of the ATIA, while sensitive commercial third-party information is protected by section 20. And we note that other systems of government in Canada do not appear to need an exception along these lines.

As with all exceptions, what is needed here is the identification of a clear interest which needs protection and then the limitation of the exception to cases where disclosure of the information would pose a risk of harm to the protected interest. CLD is not in a position to evaluate the real merits of this proposal and why it is needed beyond the protections already afforded by sections 19 and 20 of the Act. In this regard, vague references to "economic development" and "self-determination" are not enough, as they could be abused to cover a vast range of information. We therefore call on the government to work through what really needs to be protected here and to put forward clear and narrow proposals to protect those interests.

2.6.5. Collective Rights and Alternative Pathways to Access

The fifth proposal here is to recognise collective rights so that relevant information could be made accessible to representative governing bodies.[66] CLD welcomes this as a proposal which actually seeks to expand access. If the idea is merely to extend the right to make a request to bodies which do not currently have legal status (and are thus unable to make requests currently), then it is uncontroversial.

At the same time, the few areas where this would appear to be of practical relevance are in relation to either personal information or third-party commercial information (since it would likely not affect the way other exceptions are interpreted and applied, although it might impact the calculation of the public interest in disclosure). Some thought and care will need

[65] Note 7, Policy approach: Exclude from disclosure third-party information provided to Indigenous-affiliated institutions.
[66] Note 7, Policy approach: Recognize collective rights in the *Access to Information Act*.

to be taken to ensure that this recognition does not undermine legitimate sensitivity concerns regarding personal or commercial information.

This is followed by a proposal which seeks to create an "alternative mechanism" which allows for requests "using a prescribed form that includes a mutually agreed disclosure schedule", and with redress via the Federal Court in case of disputes.[67] This sounds very interesting to CLD, and it may facilitate more mutually agreeable timeframes for the release of information in this context, but we are unable to assess it fully as not enough detail has been provided to enable us to understand properly what is being proposed.

2.6.6. Fee Waiver for Indigenous Requesters

The last TBS proposal in this area is to waive the $5 application fee for Indigenous peoples and their representatives.[68] CLD supports this proposal but believes it does not go far enough. CLD's longstanding position is that the $5 fee should be waived for all requesters. No one should have to pay a fee to exercise a human right.[69]

Recommendations

- The proposal to amend the purpose clause of the Act to recognise the right of Indigenous peoples to self-determination and to redefine "Indigenous peoples" in the Act should be accepted.
- The proposal to update the definition of "aboriginal government" should be put on the back burner until this exception is, for all of the systems of government it covers, brought into line with human rights standards by referring to a legitimate interest and protecting it against harm.
- The two proposals for new exceptions – for Indigenous knowledge and for third-party information held by Indigenous institutions – should be reworked so that they also only protect legitimate interests against specific harms caused by disclosure.
- The recognition of collective rights and alternative pathways should be considered further so as to supplement, not reduce, ordinary ATIA rights for Indigenous peoples, and so that they do not undermine legitimate third-party secrecy interests, specifically in personal and commercial information.
- The $5 application fee should be abolished for all requesters.

[67] Note 7, Policy approach: Establish an alternative pathway for access.
[68] Note 7, Policy approach: Permanently waive the $5 application fee for Indigenous requesters.
[69] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, pp. 7–8; and CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada*, note 3, pp. 8–9.

2.7. Oversight, Orders, Mediation and Compliance

2.7.1. Enforceability of Orders

CLD strongly supports the proposal to make the orders of the Information Commissioner enforceable as court orders once registered with the Federal Court.[70] CLD has long called for exactly this reform. While public authorities generally comply with binding orders, better practice is to provide a direct enforcement mechanism for the rare but important cases where they do not, as already exists in British Columbia, Alberta, Quebec and Prince Edward Island, among other jurisdictions.[71] The current model, which requires separate Federal Court proceedings to give effect to orders, creates unnecessary delay and administrative burden for all parties. Direct enforceability would give the Commissioner's orders the weight they are intended to carry.

2.7.2. Action Plans for Systemic Compliance Issues

The proposal to allow the Commissioner to order institutions to publish action plans in response to an investigation which reveals systemic compliance failures is a useful addition to the enforcement toolkit, provided it is implemented carefully.[72] Action plans which are made public, involve time-bound milestones and include concrete commitments can help address the kind of entrenched, institution-wide non-compliance which individual orders alone may not resolve.

However, we see value in going a bit further in terms of powers being allocated to the Commissioner. By definition, having conducted an investigation, her office will have a good understanding of what is needed to bring the institution into compliance with the Act. In many countries, oversight bodies have the power to order institutions to take certain actions,

[70] Note 7, Policy approach: Give more weight to the Information Commissioner's orders.
[71] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 12.
[72] Note 7, Policy approach: Require action plans to address compliance issues.

such as to improve their records management practices, train their information officers (or appoint them) and so on. We recommend that this power also be allocated to the Commissioner following an investigation. Where the Commissioner makes such an order, the institution in question would be required either to implement the order or to put in place an effective, alternative measure to address the issue, which they should include in their action plan.

2.7.3. Mediation Before Orders

CLD acknowledges that mediation can be a valuable tool for resolving complaints efficiently and the TBS review's reference to the 70% resolution rate achieved during former Commissioner Legault's pilot project demonstrates that.[73] However, it is our understanding, including based on our own lodging of complaints before the Commissioner, that mediation is in practice already used very widely, as appropriate, and based on the consent of the parties.

In addition, there are cases where institutionalising mediation would simply further delay redress for requesters who have already waited too long for information. Mediation seems pointless in very clear-cut cases, such as where the institution has failed to respect the time limits set out in the Act. The Commissioner's ability to move directly to an order where circumstances warrant should be preserved.

2.7.4. Standard Criteria for Orders

We are unable to understand the real motivation for the proposal to establish standard criteria for orders by the Commissioner, and the rationales presented in the Policy Approaches paper do not make sense to us.[74] In particular, that paper states: "There are no standard criteria the Information Commissioner must consider and document when making a decision. This makes it difficult for institutions to justify their decisions and to understand how their actions are being evaluated." This does not make sense. The Commissioner is required to assess the actions of institutions against the requirements of the Act. And institutions need to justify their actions against those same requirements. If the Commissioner should deviate from this, it would always be open to institutions to appeal her decisions before the courts.

[73] *Ibid*, Policy approach: Prioritize mediation to resolve complaints.
[74] *Ibid*., Policy approach: Establish standard criteria related to orders.

CLD is concerned that this proposal would unduly fetter the decision-making power of the Commissioner and it could also unnecessarily complicate and elongate the processing of complaints, as the Commissioner might be required to walk through all of the listed factors, even if they were not relevant to the matter in question. Indeed, this seems a bit like requiring judges to consider a standard list of factors in a wide range of legal cases, which would clearly not be acceptable.

CLD also has concerns about several of the proposed criteria, some of which relate to matters which are not supported by the Act. Requiring the Commissioner to advert to these factors would require her to diverge from the requirements of the Act, which is clearly illogical. In particular, factors such as an institution's history of compliance with the Act, capacity and whether it "did its best" to respond to a request are simply not relevant to the key determination of a complaint which, to state the obvious again, must be based on the provisions of the Act. Institutional resource constraints and workload pressures are real but they cannot be allowed to excuse non-compliance with legally guaranteed rights. If capacity is treated as a mitigating factor in the issuance of orders, the practical effect could be to insulate the worst-performing institutions from accountability, precisely when accountability matters most.

Recommendations

- The proposal to render the orders of the Information Commissioner directly enforceable should be implemented.
- The proposal to empower the Information Commissioner to order institutions to adopt action plans following an investigation is positive, and such action plans should be made public, involve time-bound milestones and include concrete commitments. We also recommend empowering the Commissioner to order institutions to take certain actions to address systemic problems, subject to the institution being able to implement effective, alternative measures (including via the action plan).
- The benefits and risks of institutionalising mediation in the ATIA should be studied carefully before any proposal in this area is acted upon. Any formal system of mediation which is adopted should be subject to acceptance by the requester and the Commissioner should have the power to move directly to orders in appropriate cases.
- The proposal to establish standard criteria for orders of the Commissioner should not be adopted.

3. Foundational Reforms Omitted from the TBS Proposals

The most serious weakness of the TBS review is the many foundational reforms which are simply omitted, including numerous issues CLD has highlighted in previous submissions.[75] This Part addresses the foundational reforms which TBS leaves largely untouched: the scope of the Act, exceptions, sanctions, whistle-blower protections and promotional measures. It should be read in conjunction with CLD's previous submissions, many of which go into these issues in more detail.

3.1. Scope of the Act

3.1.1. Scope of Institutions Covered

Under international standards, openness obligations should apply to "all information held by all authorities which engage the responsibility of the State".[76] In other words, the executive, legislative and judicial branches of government, oversight, statutory and constitutional bodies, crown corporations and any entity, private or public, which is funded, controlled or owned by a public authority or which performs a public function should be covered by the Act.[77]

In contrast to this, a wide range of public authorities are excluded from the ATIA. This includes bodies which are owned or controlled by other public bodies, which receive substantial public funding or which perform public functions – such as NAV Canada, Canadian Blood Services and private bodies which receive funding from the federal government – as long as they are not listed in Schedule I. The Prime Minister's Office, Ministers' Offices and administrative bodies supporting Parliament and courts are also excluded from reactive disclosure obligations.[78]

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[75] See notes 6 and 7.
[76] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 4.
[77] *Ibid*.
[78] CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, pp. 5–6.

3.1.2. Right of Access

Currently, the ATIA only applies to citizens, permanent residents, persons who are present in Canada and legal entities.[79] It does not apply to foreign nationals who are not present in Canada, which is a form of discrimination and not in line with international better practice, as more than 70 countries extend the right to information to everyone.[80] Furthermore, most external users are foreigners trying to obtain information for immigration purposes. Denying them their right to information forces them to go through Canadian middlemen to whom they have to pay fees, as highlighted in our 2021 Federal Submission.[81]

Recommendations

- The ATIA should apply to all public authorities engaging the responsibility of the State. This includes:
  - The Prime Minister's office, ministers' offices and administrative bodies supporting Parliament and courts (including in terms of reactive disclosure).
  - Private bodies which are owned, controlled by or receive substantial public funding from other government institutions, or which perform public functions.
- Every individual and legal entity, including foreign nationals not residing in Canada, should have a right of access under the Act.

3.2. Overbroad Regime of Exceptions

Under international human rights standards, exceptions should be drafted clearly and narrowly in the first place so as to protect legitimate interests, not categories of information, and then access to information should be able to be refused only where its disclosure would pose a risk of harm to the protected interest. Many of the exceptions in the ATIA fail to meet this standard, either because it is not clear what interest they protect or because, even if one might surmise what interest is being protected, they do not incorporate a harm test. All exceptions should also be subject to a public interest override, discussed above, and

[79] See Access to Information Extension Order, No. 1, SOR/89-207, section 2, https://laws-lois.justice.gc.ca/eng/regulations/SOR-89-207/page-1.html.
[80] See the RTI Rating, as sorted by Indicator 4 on universal access, https://www.rti-rating.org/country-data/by-indicator/4/.
[81] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 5.

exceptions protecting public interests should be subject to sunset clauses, also discussed above.

3.2.1. Exclusions

Sections 68 to 69.1 of the ATIA fall under the heading "Exclusions", meaning that Part 1 of the Act, regarding requests, simply does not apply to them, so that there is no right to make a request for the information they describe or to lodge a complaint about any refusal to provide this information with the Information Commissioner. A key provision here is section 69, which excludes entirely from the scope of Part 1 "confidences of the Queen's Privy Council for Canada", known as Cabinet confidences. And these are defined very broadly to cover a wide range of information, including not only material designed to protect the collective decision-making process within Cabinet (a legitimate interest to protect) but much more. For example, background papers and memoranda are covered, regardless of their relationship to cabinet confidence, as well as decisions of cabinet. No harm test is included in section 69. Another exclusion applies to the Canadian Broadcasting Corporation, other than its general administration information (section 68.1) and Atomic Energy of Canada Limited, other than its general administration information or information about the operation of regulated nuclear facilities (section 68.2).

3.2.2. Overbroad Exceptions

A number of other exceptions protect or appear to protect legitimate interests but lack the necessary harm test, therefore allowing for information to be withheld even when disclosure would cause no harm. These include information received in confidence from other States or governments (section 13(1)), information related to law enforcement investigative techniques (section 16(1)(b)), information treated as confidential by crown corporations (section 18.1(1)), financial or commercial information which is treated as confidential by a third party (section 20(1)(b)) and draft reports or internal working papers related to government audits (section 22.1). This also includes a series of exceptions relating to information which was obtained during different sorts of investigations, such as law enforcement investigations (section 16(1)(a)), investigations conducted by various public authorities (section 16.1(1)), investigations conducted by the Commissioner of Lobbying (section 16.2(1)) and investigations under the Canada Elections Act (section 16.3). Such investigations may include information which is legitimately exempt based on other exceptions, and in some cases releasing information might harm the investigation, but this has not been included as a condition for withholding the information in these exceptions.

Section 21(1), relating to advice, is also vastly overbroad in nature, covering all "advice or recommendations developed by or for a government institution" (see section 21(1)(a)), again without any reference to the idea of harm. Another overbroad exception is section 23, covering solicitor-client privilege. The ordinary role of solicitor-client privilege is to protect the exchange of legally-sensitive information between individuals and their solicitors, even on sensitive topics such as criminal behaviour. However, in many cases no such sensitivity exists in communications between public officials and government lawyers, for example where the latter are providing policy advice, much as any other official might do. In the government context, CLD suggests that the scope of this exception be limited to "litigation privilege", also specifically mentioned in that section.

3.2.3. Secrecy Provisions in Other Laws

Schedule II of the ATIA contains a list of 65 secrecy provisions in other laws. Most of these provisions fail to conform to international standards because they fail to include one or more of the following features: being limited to protecting narrow and legitimate interests, being harm tested, including public interest overrides and being subject to sunset clauses of 20 years or fewer. Just as one example, section 17 of the Canadian Ownership and Control Determination Act, listed in Schedule II, prohibits the disclosure of any information or document obtained by the Minister of Natural Resources unless there is written authorisation from the person or agency from whom the information originates. This is a class exception, i.e. it protects a whole category of information rather than a narrowly defined legitimate interest against harm, and it lacks a public interest override and sunset clause. Many other provisions in this list are similarly problematical.

Recommendations

- Exceptions should protect only those interests which are recognised as legitimate under international law.
- All exceptions should be harm tested, so that the ATIA does not include any blanket exclusions.
- A clear public interest override should apply to all exceptions.
- All exceptions which protect public interests should be subject to sunset clauses so that they no longer apply after a maximum of 20 years.
- All the provisions in Schedule II of the Act should be reviewed and retained in that Schedule only if they protect legitimate interests, are harm tested, are subject to a public override and, where they protect public interests, are subject to a sunset clause of not more than 20 years. Where necessary, these provisions can be amended to bring them into line with those standards.

3.3. Sanctions

The TBS Policy Approaches document does discuss oversight of the ATIA, but it does not address sanctions for obstruction of requests. It is clear that obstruction of access is a serious and growing problem in Canada. To give just one example, in fiscal year 2024-2025, only 65% of access to information requests were responded to within legislated timelines, down from 70% in 2023-2024 and 72% in 2022-2023.[82]

The ATIA lacks an effective system of accountability for routine violations of access rights. It provides for criminal sanctions for obstructing the Information Commissioner (section 67) and for destroying, altering, concealing or falsifying records with the intent of denying access (section 67.1). However, these provisions have never resulted in a criminal prosecution, let alone a criminal conviction, due to their narrow scope, inherent procedural limitations and the high bar of securing a criminal conviction. They also fail to cover more routine obstructions such as delaying the granting of access or abusively claiming exceptions to deny access.

These omissions matter because access rights are only meaningful if the most common violations have consequences. Where institutions or individuals repeatedly or abusively fail to meet deadlines or otherwise undermine the right of access, the law should provide for effective accountability. Options here include disciplinary measures or administrative sanctions, with the latter having proven to be effective in many countries.

[82] Treasury Board Secretariat, "Access to Information and Privacy Statistical Report for 2024–2025 Fiscal Year", https://www.canada.ca/en/treasury-board-secretariat/services/access-informationprivacy/statistics-atip/information-privacy-statistical-report-2024-2025.html.

Recommendation

- The ATIA should include an effective sanctions regime for wilfully undermining RTI, defined broadly. This should retain criminal sanctions for egregious breaches of the right, along with administrative or at least disciplinary sanctions for wilful but less extreme breaches.

3.4. Whistle-blower Protections

To give effect to the public's right to know, RTI legislation should be accompanied by solid protections for whistle-blowers to protect disclosures which are otherwise illegal or in breach of employment rules but are justified in the public interest. Such rules are generally needed as a safeguard for transparent and accountable institutions, especially where the regime for authorised disclosures is deficient, as it is in Canada.[83]

Canada does have the 2005 Public Servants Disclosure Protection Act (PSDPA),[84] but this is demonstrably ineffective as a means of protecting whistle-blowers. According to a 2021 global study by the Government Accountability Project and the International Bar Association, Canada, Lebanon and Norway ranked as tied for last place among all of the 49 whistleblowing laws assessed.[85] This has been corroborated by other reports and a 2017 report by a Parliamentary Committee.[86]

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[83] CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, p, 15.

[84] S.C. 2005, c. 46, https://laws-lois.justice.gc.ca/eng/acts/p-31.9/page-1.html#h-402911.

[85] Government Accountability Project and International Bar Association, "Are whistleblowing laws working? A global study of whistleblower protection litigation", 2021, pp. 10 and 75, https://s3.documentcloud.org/documents/21189854/are-whistleblowing-laws-workingreport_02march21.pdf.

[86] See Centre for Free Expression, *What's Wrong with Canada's Federal Whistleblowing System: An analysis of the Public Servants Disclosure Protection Act (PSDPA) and its implementation*, 14 June 2017, https://cfe.torontomu.ca/publications/whats-wrong-canadas-federal-whistleblower-legislation; and Report of the Standing Committee on Government Operations and Estimates, *Strengthening the Public Interest within the Public Servants Disclosure Protection Act*, 42nd Parliament, First Session, June 2017, https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf.

While this is technically a separate matter than reform of the ATIA, its subject matter is closely related.

Recommendation

- Canada's whistleblowing regime should be improved significantly, including by implementing the recommendations of the 2017 Report of the Standing Committee on Government Operations and Estimates.

3.5. Promotional Measures

TBS's review addresses a number of issues regarding administrative implementation of the ATIA but it largely fails to address the need to improve promotional measures regarding the ATIA. Despite some improvement since the last federal review, promotional measures remain a weak area in Canada's RTI framework.[87] CLD has noted that this can be ameliorated by providing independent oversight bodies with a mandate to promote RTI.[88] Canada's federal Information Commissioner lacks such a mandate.

A key issue here is the need to promote public awareness of the ATIA. For individuals to exercise RTI successfully, they must know that the right exists and understand how to use it.[89] A right which is poorly understood is likely to be underused, particularly by individuals who are less familiar with the inner-workings of government, among members of disadvantaged groups and in communities with fewer public resources. Raising public awareness is not ancillary to RTI; it is key to ensuring that the right can be fully realised.

In many other jurisdictions around the world, raising public awareness is recognised as a core part of the implementation of RTI legislation. For example, India's Right to Information Act requires different levels of government to develop and organise educational programmes to advance public understanding of how to exercise RTI rights, particularly

[87] CLD and British Columbia Civil Liberties Association, *Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)*, note 11, p. 3.
[88] *Ibid.*; and CLD, Centre for Free Expression, Canadian Institute for Information and Privacy Studies and Democracy Watch, *Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada,* note 3, p. 16.
[89] CLD, *Submission to the UN Human Rights Committee's 145th Session*, note 6.

among disadvantaged communities.[90] In New Zealand, the Office of the Ombudsman prepares comprehensive guides and official training resources which educate requesters on how to exercise their rights under the Official Information Act.[91]

Canada should put in place similar measures. These should include a statutory mandate and the related resources for the Information Commissioner to promote RTI, including through public education, user-friendly guides, outreach to communities which face barriers to access and guidance for requesters. Without such measures, administrative-level reform will remain incomplete.

Recommendations

- The ATIA should be amended to provide the Information Commissioner with a clear mandate to promote RTI.
- The Information Commissioner should be provided with sufficient resources to conduct public education programmes, publish user-friendly guidance and engage in outreach to communities which face barriers to access.

Conclusion

Canada's federal access to information regime no longer reflects the standards expected of a leading democracy. The ATIA was once a symbol of Canada's global leadership on the right to information, but decades of piecemeal reform have left it badly out of step with international standards and better practice. The current review of the ATIA gives the new federal leadership an important opportunity to succeed where previous governments have failed and to deliver the root-and-branch reform of the federal right to information system which Canadians have demanded for decades. Otherwise, Canada will remain well behind the many other countries around the world which have stronger, often much stronger,

[90] *The Right to Information Act*, No. 22 of 2005, Articles 26(1)(a), (c), (2), https://www.rti-rating.org/wp-content/uploads/India.pdf.

[91] See New Zealand Ombudsman, *Official Information Act Guides and Resources*, https://www.ombudsman.parliament.nz/resources/official-information-act-guides-and-resources; and New Zealand Ombudsman, *Advice and Training*, https://www.ombudsman.parliament.nz/agency-assistance/advice-and-training.

national right to information laws.[92] The government should act decisively to ensure that this review is followed by meaningful legislative amendments, so as finally to bring the ATIA into line with Canada's democratic commitments.

[92] See the RTI Rating, note 9.