CENTRE FOR FREE EXPRESSION

Occasional Paper Series

Canada's Access to Information Law Falls Short of International Best Practices

Max Binks-Collier

July 28 , 2019

Ryerson University

Centre for Free Expression
Faculty of Communication & Design

About the Centre for Free Expression

The Centre for Free Expression at Ryerson University focuses on issues related to freedom of expression and the public's right to know. This includes campus free expression, academic freedom, hate speech, censorship, disinformation, access-to-information, whistleblower protection, anti-SLAPP legislation, corporate and government surveillance, and freedom of the press. The Centre sponsors public educational events, does research, provides advice and engages in advocacy on these issues. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

Centre for Free Expression

Mail : 350 Victoria St.
Toronto, ON M5B 2K3

Office: Rogers Communications Centre
80 Gould Street
Toronto, Ontario

cfe@ryerson.ca

Canada's Access to Information Law Falls Short of International Best Practices

Max Binks-Collier

Canada's access to information (ATI) legislation enables Canadian citizens and permanent residents to request information from federal government institutions. It was cutting-edge when adopted in 1983, but now lags far behind the ATI legislation of many foreign countries. As of 2016, it ranks 57th of the 123 foreign ATI laws in the Global Right to Information Rating.

In June 2017, the Liberal government introduced Bill C-58, which it portrayed as a modernization of Canada's ATI legislation. But Canada's former information commissioner, Suzanne Legault, joined many other critics of the bill by expressing dismay with its provisions on the eve of her retirement in early 2018: "Bill C-58 is a bill for the bureaucracy, it's definitely not a bill for transparency. The government has made some amendments to the proposed legislation, but it is still regressive in many respects."

Eventually, the Liberal government accepted Senate-proposed amendments to ameliorate some of the troubling provisions, but there is nevertheless much room for improvement in the bill, which received royal assent in June 2019.

I analyzed the best foreign ATI laws to identify provisions of them that could serve as models for improving Canada's legislation. I prioritized identifying provisions that would most efficiently and effectively maximize transparency and accountability within the government. I also focussed on provisions that would mitigate the worst parts of Canada's legislation, and on provisions that would broaden the mandate and increase the power of the Information Commissioner so that she could design, implement, and enforce improvements to Canada's ATI system herself.

Empowering the Information Commissioner

The primary role of Canada's Information Commissioner is to investigate complaints that requesters of information make when they believe an institution has not respected their rights under Canada's *Access to Information Act*. If the Commissioner determines that a complaint is well-founded, she can currently only try to persuade the institution to release the information, or issue a recommendation that the institution release it. If that fails, the complainant has the right to apply for a Federal Court review of the institution's refusal to release the information.

Under the new legislation, the Information Commissioner can finally order institutions to release information. But the authority of Canada's Information Commissioner is still circumscribed compared to that of many of her counterparts abroad. Bringing Canada's ATI law into line with the world's best requires a bolder, more expansive conception of the role of the Information Commissioner. Even under the new legislation, the Information Commissioner is still largely reactive, her actions remedial. Instead, the Commissioner should design policies that optimize the information-sharing practices of all government institutions subject to the ATI

legislation, and should provide training and support to the bureaucrats who must follow those policies. If an institution nevertheless consistently fails to meet its ATI obligations, the Commissioner should then recommend or order specific changes to the practices and policies of the institution. Finally, she should sanction institutions or individuals who contravene the ATI law.

1. *Optimizing institutional information-sharing*:

Mexico's *General Act of Transparency and Access to Public Information* authorizes the Mexican equivalent of the Office of the Information Commissioner of Canada (OIC) to manage, train, and support bureaucrats to ensure they act according to best practices in the field of information-sharing when meeting their ATI obligations:

> Article 31(5) enables Mexico's version of the OIC to "Assist in the development, promotion and dissemination among the regulated entities of the criteria for the systematization and conservation of files that allow public information to be efficiently located . . ."
>
> Article 31(7): "Establish policies regarding the digitization of public information in possession of the regulated entities and the use of information technologies . . . to ensure full access thereto."
>
> Article 31(10): "Establish programs of professionalization, updating and training of Public Servants and members of the regulated entities on transparency, access to public information and protection of personal data."
>
> Article 42(7): "Train Public Servants and provide technical support to the regulated entities on transparency and access to information; Sign agreements with regulated entities that promote the publication of information within the framework of proactive transparency policies . . ."

2. *Recommending or ordering changes to institutional practices and policies*:

It is preferable to enable the Commissioner to both recommend and order changes to the practices and policies of institutions that underperform despite provisions like the above, than it is to only empower her to order changes. If the Commissioner has more options, she can better tailor her solutions to the particularities of specific problems. For example, she might sometimes determine that recommending changes to a cooperative institution is better than ordering those changes. Recommendations could provide guidance to the institution while also giving it the flexibility to devise solutions to its problems that are based on the recommendations, but which are more suited to the unique circumstances of the institution. Such solutions could be more practicable and convenient than the recommended changes would be if they were orders, while being just as effective.

The following provisions enable the oversight bodies of their respective ATI systems to either recommend or order changes:

> Article 35(3) of Serbia's *Law on Free Access to Information of Public Importance* allows Serbia's information commissioner to "Propose to public authorities measures to be taken to improve their work regulated by this Law."

Article 42(21) of Mexico's law states that its version of the Information Commissioner "may make recommendations to the regulated entities to design, implement and evaluate open government actions that guide the internal policies in this area."

Article 34(3) of Afghanistan's *Access to Information Law* states that Afghanistan's version of the Information Commissioner "can obligate the institutions during the redressal of complaint to make necessary decisions in order to improve the affairs of the Public Information Officers, proper management of documents, publication of information and publishing of annual reports."

3. *Sanctioning institutions or individuals who contravene the ATI law*:

Many foreign ATI laws sanction government institutions or bureaucrats who don't follow the law. The following provisions of Serbia and Slovenia's ATI laws, ranked in the top five in the Global Right to Information Rating, could be the basis for amendments to Canada's law:

Article 46 of Serbia's law states that:

"A fine between 5,000 and 50,000 dinars shall be imposed upon the authorized person in a public authority if the public authority: 1. Acts in contravention of the principle of equality (Article 6); 2. Discriminates against a journalist or a media outlet (Article 7); 3. Fails to specify the information medium, where and when the requested information was published (Para 2 of Article 10); 4. Fails to communicate accurate and complete information, i.e. fails to allow insight in a document containing accurate and complete information. (Article 11); 5. Fails to allow the applicant insight in a document or to make a copy of the document in the language in which the request was submitted (Para 4 of Article 18); 6. Refuses to receive a request, fails to inform the applicant of possessing the information, or fails to allow insight in a document containing the requested information, i.e. does not deliver a copy of the document in an appropriate way, fails to issue a decision on rejecting the request and refuses to provide the applicants with the necessary assistance for exercising their rights (Sub-Para 1 of Para 2 of Article 38)."

Slovenia's *Access to Public Information Act* contains two articles that call for sanctions:

Article 15 (Liability for violations): "(1) A fine in range of SIT 100.000 to SIT 250.000 will be imposed upon an official responsible for a violation, with which according to the provision of Article 10(1) of this Act, while delivering the applicant's appeal, in spite so requested, the official fails to transfer to the Information Commissioner the demanded document, case, dossier, register, record or documentary material, although they are in the bodies' possession. (2) A fine in range of SIT 100.000 to SIT 250.000 will be imposed upon an official responsible for a violation, when according to the provision of Article 10(3) of this Act, in spite of the Information Commissioners decision, the official fails to transfer the required document, case, dossier, register, record or documentary material to the applicant. (3) A fine in range of SIT 100.000 to SIT 250.000 will be imposed upon a responsible official of the data controller, who in spite of the Information Commissioner's decision on a case of applicant's appeal from point 3 of Article 2(1) of this Act, fails to assure the applicant the right defined in point 3 of Article 2(1)."

Article 39 (Liability for misdemeanor): "(1) A fine of at least SIT 250.000 shall be imposed upon a person for the misdemeanor of destruction of a document, a case, a dossier, a

> register, a record or a documentary material containing public information, with the intention of making such information inaccessible to the public. (2) A fine of at least SIT 350.000 shall be imposed upon a responsible person of the body for the misdemeanor of destruction of a document, a case, a dossier, a register, a record or a documentary material containing public information, with the intention of making such information inaccessible to the public. (3) A fine of at least SIT 150.000 and at most SIT 300.000 shall be imposed upon an official of the body for the misdemeanor, if this person does not, without justification, transmit the requested public information within the prescribed time limit or does not publish the catalogue of public information or in a larger extent other prescribed information or does not submit the annual report from first paragraph of Article 37 of this Act in the prescribed deadline."

Requiring the use of a harm test

Many of the world's best ATI laws require government institutions to use a harm test when determining whether they should refuse to release information. A harm test often consists of a set of criteria that must be met to determine that there is a reasonable expectation that releasing information will cause harm to some protected interest, like national security or the public interest. When institutions claim that a harm test indicates there is such a risk, oversight bodies like the Information Commissioner often evaluate the findings of the test and either approve or override them. Many harm tests contain provisions stipulating that even when releasing information will likely cause harm, the information must be divulged if the information's benefit to the public interest outweighs its harm.

Canada's ATI law allows a government institution to refuse to release some types of information if the head of the institution believes that doing so poses "a reasonable expectation of injury" to a protected interest, like "international affairs and defence." But the law does not set out a harm test that must be used to determine whether there is such "a reasonable expectation," even if the OIC's guide to interpreting the ATI law indicates that institutions must consider certain factors, principles, and other criteria when deliberating whether to not release information. The Information Commissioner cannot override an institution's decision to not release information and the public interest override in Canada's ATI law "only applies narrowly to a few exceptions," according to the Global Right to Information profile on Canada's law. The Canadian government would likely be far more transparent and accountable if our ATI law required institutions to use a specific harm test, whose findings could be overridden by the Information Commissioner, and a more widely applicable public interest override. Amending the law to include such an override is in keeping with a 2016 report by the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI):

> Recommendation 17: "That . . . the Act be amended to include a general public interest override, applicable to all non-mandatory exemptions, with a requirement to consider the following, non-exhaustive list of factors: • Open Government objectives; • environmental, health or public safety implications; • whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person."

The simplicity and ease of use of the Mexican harm test, found at Article 104 of its law, make it a good model for a future Canadian harm test:

"In applying the harm test, the regulated entity must justify that: I. The disclosure of the information represents a real, demonstrable and identifiable risk of significant harm to the public interest or national security; II. The harm risk that the disclosure would mean exceeds the public interest of being disseminated, and III. The limitation is consistent with the principle of proportionality and is the least restrictive means available to avoid harm."

Article 4 of Serbia's law and Article 5(4) of Sri Lanka's *Right to Information Act* contain public interest overrides that Canadian public interest overrides could be modelled upon:

Article 4: "It shall be deemed that there is always a justified public interest to know information held by the public authority, in terms of Article 2 of this Law, regarding a threat to, i.e. protection of public health and the environment, while with regard to other information the public authority holds, it shall be deemed that there is a justified interest of the public to know . . . unless proven otherwise by the public authority."

5(4): ". . . a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure."

Expanding coverage of the ATI law

Canada's ATI law only applies to a narrow range of institutions, excluding such important ones as the Prime Minister's Office, the offices of ministers, the Queen's Privy Council, various Crown corporations, and even two whole branches of government: the legislature and the judiciary. Widening the scope of Canada's ATI law would mitigate one of its worst defects, and it is in keeping with the first nine recommendations of the 2016 ETHI report. The ATI laws of Mexico, Serbia, and Afghanistan are some of the most far-reaching in the world, and therefore provide models of how to make Canada's law more expansive:

Serbia's Article 3: "In terms of this Law, a public authority body (hereinafter: public authority) shall denote notably: 1) A state body, territorial autonomy body, a local self-governance body, as well as an organization vested with public authority (hereinafter: state body); 2) A legal person founded by or funded wholly or predominantly by a state body."

Mexico's Article 23: "The regulated entities who are obliged to make transparent and ensure effective access to their information and protect personal data held thereby are: any authority, entity, body or agency of the Legislative, Executive and Judicial branches, autonomous bodies, political parties, trusts and public funds, as well as any individual, legal entity or union who receives and uses public resources or performs acts of authority of the Federation, the States and the municipalities."

Afghanistan's Article 3(6): "Institutions include Offices of the President, National Assembly, the Judiciary, ministries, independent directorates, independent state commissions, local administrations, provincial councils, district councils, village councils, municipalities, municipal councils, state-owned enterprises, government corporations and joint ventures and all other bodies and institutions established by law. This definition also includes any organization or institution which is owned, controlled or substantially funded by one of the institutions defined above as well as any other body which undertakes a public function."

Readers who are concerned that such a widening of the law's scope could jeopardize aspects of the government that are essential to a free society but which rely upon certain documents being confidential, like judicial independence, should read the first nine recommendations of the ETHI report. These recommendations list types of information that should be exempted from the law even as they recommend that it be expanded overall, thereby providing a starting point for debate about what information it is necessary to exempt from disclosure. For example, recommendation 9 recommends that institutions within the judiciary be subject to the legislation, "except in regards to court files, the records and personal notes of judges, as well as communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity."

Timeliness

A culture of delay pervades many institutions of the Canadian government when it comes to responding to requests for information. Institutions currently have thirty days to respond to a request with the desired information or with a message stating that it is unavailable or does not exist. But there is no limit on the length of the extensions that institutions can grant themselves. Months—and even years—can go by without requesters receiving information. Canada's ATI law will only match the world's best when it requires institutions to respond to requests as soon as possible, lowers the amount of time institutions have to respond, and requires institutions to provide reasons for their extensions in writing to requesters.

Serbia's Article 16(1), Mexico's Article 132, and Afghanistan's Article 8(1) all state that institutions must respond as soon as possible to a request for information. Incorporating such a provision into Canada's legislation could help counteract the culture of delay. The same articles of Mexico and Afghanistan's laws also require institutions to provide information to requesters within ten to twenty days. The deadlines for extensions are similarly between ten and twenty days. Reducing the amount of time that Canadian institutions have to respond to requests and the length of their extensions would also speed up the disclosure of information. Article 15(2) of Albania's ATI law would further ensure that institutions respond promptly: when one institution transfers a request for information to a second institution, Article 15(2) requires the second institution to respond to the request within a short timeframe. This prevents a chain of referrals leading to a long delay.

> Article 15(2): "when the public authority receives the information request and forwards it to another authority, it replies no later than 15 working days from the request having being received by the first authority."

Finally, requiring institutions to tell requesters of information why they are granting themselves an extension would increase institutional accountability. Two provisions of foreign legislation that could serve as models for a similar Canadian amendment are Article 8(1) of Afghanistan's law and Article 25(6) of Sri Lanka's law:

> 8(1): "... In case the institutions have a justifiable reason(s), this duration can be extended to another 10 working days. In case of any extension of the period, the institution shall contact the applicant and provide him/her a written justification including reasons for extension."

25(6): “Where a period for providing information is to be extended for any of the circumstances referred to in subsection (5), the information officer shall, as soon as reasonably possible, but in any case within fourteen days, notify the citizen concerned of such fact giving the following reasons: (a) the period of the extension; and (b) reasons for the extension.”