CENTRE FOR
FREE EXPRESSION

Submission of the Centre for Free Expression at Ryerson University to the Government of Canada's Review of the Access to Information System

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About the Centre for Free Expression

The Centre for Free Expression at Ryerson University is a hub for public education, research and advocacy on free expression and the public's right to know. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

We are the coordinators of the Right to Information Alliance Canada, a network of major organizations across the country committed to improved transparency and access to information.

Introduction

Canada's access to information system is outdated, under-resourced, and no longer adequately serving its intended purpose. The *Access to Information Act* (ATIA) was introduced in 1983 and has barely changed since then. It has not kept up with the advent of the Internet, nor have fundamental weaknesses been fixed. In 2019, Bill C-58 introduced various changes to the access system – some positive, others negative – but failed to address the most critical issues.

Today we have an Act with exceptions and exemptions that have been stretched beyond recognition to prevent disclosures, a critically under-resourced access system not equipped to keep up with requests, and a culture of secrecy within government that views access as a threat rather than a right of all Canadians. Despite these challenges, the access system is not beyond repair. This review is an opportunity for the government of Canada to embrace a bold vision to fix Canada's broken access system and demonstrate a commitment to transparency and accountability.

We have publicly expressed our concerns about the present review of the ATIA. In spite of our concerns, we felt it was essential to take this opportunity to participate and present our views and recommendations, in hopes that they may lead to badly needed reform.

While innumerable changes are needed to address chronic problems with Canada's access regime, we present eight priority recommendations below. These are the most pressing reforms that must be made to repair the access to information system and ensure its ongoing relevance.

1. Duty to Document

Recommendation 1: Create a legal duty within the ATIA to document government business and decisions, backed up by penalties for non-compliance and an oversight and enforcement mechanism.

A duty to document is a legal requirement for public officials to create records detailing decisions they have made, and the processes followed to make them. It would mean that even if government business is conducted entirely by phone or videoconference, the officials involved would have to create written records of the work.

A legislated duty to document that is backed up with penalties for non-compliance and an oversight and enforcement mechanism is critical to any access to information system. It ensures that records will be created and preserved that can be accessed under the ATIA. Without a duty to document, there is no guarantee that adequate records will be created about important government business – and without this guarantee, access to information becomes meaningless.

The COVID pandemic and the transition to remote work has hastened the adoption of videoconferencing and other electronic means of communication. In this context, where work is increasingly carried out in meetings, it is especially important to enact a duty to preserve records of government business.

There are various federal acts and policies currently in place requiring records to be preserved or decisions documented (e.g., the *Library and Archives of Canada Act* and the Treasury Board *Policy on Information Management*). However, these are not adequate replacements for a legal duty to document. They do not contain penalties or oversight mechanisms – and there is no indication that they are enforced.

There are many international examples that the federal government could draw on to design a duty to document for the ATIA. For example, New Zealand's *Public Records Act*, requires that "every public office and local authority must create and maintain full and accurate records of its affairs."[1] The US *Federal Records Act* requires federal agencies to make and preserve records containing adequate and proper documentation of decisions, procedures, and essential transactions.[2] Further examples can be found in the Australian states of New South Wales, Victoria, and Queensland.

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[1] *Public Records Act*, New Zealand, 2005 at s. 17 (assented to 20 April, 2005), online: <https://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345529.html#DLM345727>.

[2] 44 United States Code §3101, online: <https://uscode.house.gov/view.xhtml?path=/prelim@title44/chapter31&edition=prelim>.

This recommendation has been made countless times before. Provincial and federal information commissioners have been calling for a legislated duty to document since the 1990s. Civil society organizations have made hundreds of submissions advocating for a duty to document.

It is time to act now. A statutory duty to document is foundational to any proper access to information system, and its inclusion in the ATIA is long overdue.

2. The Scope of the Act

Recommendation 2: Expand the scope of the ATIA to cover any entity to whom the government has outsourced the delivery of programs or services or that carry out public functions entrusted to them by the government.

In recent years, there has been a fundamental shift in the way that many public services are delivered. The federal government has subcontracted and outsourced the delivery of many programs and services to external organizations. Many services are now delivered by private businesses, quasi-public agencies, non-profit organizations or public-private partnerships.

When public services are delivered by external organizations, rather than government, records relating to the services are no longer subject to ATIA disclosure requirements. This means that records individuals could previously access under the Act become inaccessible when a program is outsourced – because they are no longer under the control of a government department.

One of many examples of this issue is the outsourcing of visa application centres around the world to a private company. These centres deliver critical immigration services, collect sensitive information and biometric data from visa applicants and cost Canadian taxpayers hundreds of millions of dollars.[3] However, since the service is delivered by a private entity, records relating to this major public program are not subject to the ATIA. Individuals cannot scrutinize information relating to the delivery of the program or hold government accountable.

This is unacceptable in a democratic society. The scope of the ATIA should include any entity that delivers a public program or services, or that has been entrusted by

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[3] Kelly Goldthorpe, “Outsourcing Immigration Services: Economical or Cause for Concern?” The Lawyer’s Daily (23 Feb 2021) online: <https://www.thelawyersdaily.ca/articles/24752>.

government to carry out a public function. This should include public, private and non-profit as well as any partnerships between various types of entities.

3. The Exclusion of Cabinet Records

Recommendation 3: Eliminate section 69 excluding cabinet records from the scope of the Act and replace it with a narrow cabinet exemption (including a definition of "cabinet confidences"), subject to oversight by the Information Commissioner and federal courts.

Section 69 of the ATIA excludes cabinet records from the act's coverage, meaning that they are not subject to disclosure requirements or oversight. Over the years, s. 69 has been stretched and expanded to exclude an increasing number of records from disclosure. The fact that there is an exclusion (rather than an exemption) for cabinet records means the government can label any record as cabinet privileged, and no external body can examine it to ensure it has been appropriately categorized.

The rationale for excluding Cabinet records is that the federal cabinet must be able to have free and open discussions on controversial topics, without fear that records revealing the contents of discussions will be disclosed to the public. It is legitimate to afford cabinet records some degree of protection from disclosure to achieve this goal. At the same time, every single province and territory in Canada is able to adequately protect cabinet confidences with an exemption, rather than an exclusion. A cabinet exemption means that records are subject to the oversight of courts and the Information Commissioner.

A mandatory exemption from disclosure for cabinet records provides ample protection of cabinet confidences. The ATIA should therefore be amended to convert the s. 69 exclusion of cabinet records to a mandatory exemption.

For clarity, the new cabinet exemption clause should specify that the Office of the Information Commissioner of Canada and the Federal Court of Canada would have the authority to review cabinet records to provide oversight of the use of the exemption. In addition, the ATIA should include a definition of "cabinet confidences" to provide greater clarity on when the exemption can and cannot be used by government.

Finally, the time period for which cabinet records are prevented from being disclosed needs to be reduced. Currently, cabinet records are excluded for 20 years. This should be reduced to five years to improve accountability and transparency.

4. The Policy Advice Exemption

Recommendation 4: Add examples of non-exempt records to the policy advice exemption to prevent its overuse and ensure it is only used for its intended purpose.

Certain types of government records are legitimately exempted from disclosure under the ATIA. If releasing records would create a real risk of harm to an individual, or could create a national security risk, then it is legitimate to prevent their disclosure. However, exemptions need to be narrowly defined to only exempt records that really do create such risks.

Section 21 of the Act allows the head of a government institution to refuse to disclose records that contain advice or recommendations, accounts of consultations, negotiating positions and plans relating to the management of personnel.

We have concerns about the use of section 21 to prevent the disclosure of a very large number of records. Treasury Board statistics show that this is one of the most frequently used exemptions in the Act, having been invoked more than 3,500 times last year.[4]

Government institutions should only be able to use the policy advice exemption to prevent the disclosure of actual advice. Any other information contained in a document, or any document that does not contain advice should be subject to disclosure.

We echo the recommendation of the BC Freedom of Information and Privacy Association that s. 21 should include a list of non-exempt records. Records containing background or technical information, surveys and field research, forecasts and audits do no constitute policy advice. Section 21 should clearly define the information to which it applies and specify the types of records that do not constitute policy advice.

5. Public Interest Override

Recommendation 5: Include a broad public interest override in the ATIA, requiring the disclosure of records if the public interest in their disclosure outweighs the reason for exempting their release.

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[4] Canada, Treasury Board Secretariat, *Access to Information and Privacy Statistical Report for the 2019 to 2020 Fiscal Year*, (Ottawa: 12 Dec 2020), online: < https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2019-2020.html>.

One of the most critical elements of any access to information law is a public interest override clause. It requires a government body to release records if the public interest in their disclosure outweighs the reason for exempting their release. It overrides the exemptions that would otherwise prevent records from being disclosed to the public. The strongest public interest clauses require records to be released whether or not they have been requested.

There is currently a very weak public interest override in the ATIA that only operates to override one exemption. It is contained in section 20 of the Act and allows a head to release third party information if the public interest outweighs the harm that would be done to the third party. There is no override for the many other exemptions contained in the Act.

The Government of Canada could look to Newfoundland and Labrador's *Access to Information Act* for an example of a strong public interest override. It overrides any discretionary exemption in the Act and requires records to be released where the public interest in disclosure outweighs the reason for the exemption. The exemptions overridden by this clause include the policy and legal advice exemptions, and the exemptions for disclosures harmful to labour relations or intergovernmental relations.

The lack of a broad public interest override within the ATIA is one of the act's greatest omissions, and it is time to address this shortcoming.

6. Timelines and Extensions

Recommendation 6: Cap the duration of allowable extensions to timelines and clarify when the head of an institution is permitted to extend a deadline.

It is essential for records to be released promptly after they are requested. When media and other organizations request information, there is often a pressing need to receive it rapidly. For the purposes of the ATIA to be achieved – to enhance accountability and transparency of federal institutions – records need to be released quickly enough to actually be able to hold institutions accountable.

Far too many records take too long to be disclosed. Chronic delays are caused by both a lack of resourcing for access to information teams and the Information Commissioner, (which we discuss later in this submission) as well as delaying tactics used by government institutions, which are permitted under the ATIA.

The ATIA needs to be amended to remove the tools used by government institutions to delay and slow walk the release of records. Section 9 of the Act allows the head of a government institution to extend timelines for responding to a request by an unspecified "reasonable amount of time." A head can unilaterally decide to take an extension if it would interfere with the institution's operations to respond on time, or if consultations are required with another government body.

Extensions should be capped at a specific amount of time, rather than allowing a head to determine what they consider "reasonable." We believe that a head should only be able to extend a deadline by 15 days (mirroring Newfoundland and Labrador's *Access to Information Act*). Any extension beyond this amount of time should require the approval of the Information Commissioner.

In addition, the ATIA should provide further clarity on when extensions are allowable. Treasury Board statistics show that a large percentage of extensions are taken to consult with other departments.[5] The ATIA should specify reasons why a department may need to consult, to prevent this being used as a convenient excuse to delay disclosure, when consultations are not really required.

7. First Nations

Recommendation 7: Immediately work in full partnership with First Nations and their representative organizations to develop and enact mutually agreed-upon changes to policy and legislation regarding access to information, in full compliance with Article 19 of the UN Declaration of the Rights of Indigenous Peoples.

Complete and timely access to federally controlled information is essential to First Nations' pursuit and resolution of their historical grievances against the Crown, including historical breaches of the Crown's legal obligations under statutes or treaties. Full access to information is also necessary for Indigenous peoples to protect and advance their Title, Rights, and Treaty Rights, and in matters related to governance and cultural interests.

First Nations have unique rights regarding access to government information. Section 35(1) of the Constitution Act, 1982, Canada's fiduciary obligations, and the honour of

[5] Canada, Treasury Board Secretariat, *Access to Information and Privacy Statistical Report for the 2019 to 2020 Fiscal Year*, (Ottawa: 12 Dec 2020), online: <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2019-2020.html>.

the Crown require Canada to disclose records to First Nations advancing claims against the Crown. These rights are also articulated in Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), which emphasizes access to justice through fair and timely access to procedures for dispute resolution with States. First Nations' access to justice requires timely disclosure of government information necessary to support and advance claims.

Despite a clear right of access affirmed by Canadian courts and articulated in the UN Declaration, Indigenous peoples' access to information is impeded by Canada's overarching conflict of interest whereby federal government departments retain the majority of records necessary to substantiate First Nations claims. The 2016 report of the Office of the Auditor General emphasized "limited information sharing between the Department and First Nations" as a critical barrier to the resolution of historical claims.[6] Barriers to accessing information have significant implications for fulfilling the federal government's lawful obligations, which Canada has publicly acknowledged is integral to achieving reconciliation between the Crown and Indigenous peoples.

We note that the federal government failed to fully and properly consult with First Nations and their representative organizations prior to drafting Bill C-58.[7] On June 21, 2021, Bill C-15, An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples received Royal Assent and is now law. Canada must take all necessary measures to ensure Canadian laws and administrative processes are consistent with the UN Declaration and must take all measures to ensure the UN Declaration's objectives are met. Article 19 of the UN Declaration requires that:

> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

8. Under-Resourcing of Access to Information Offices and the Office of the Information Commissioner

Recommendation 8: Provide adequate staffing resources to access offices in each federal institution and the Office of the Information Commissioner to

[6] Office of the Auditor General, 2016. "Overall message" (section 16.7). *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. Available at https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html.

[7] National Claims Research Directors and Union of BC Indian Chiefs, "The Impacts of Bill C-58 on First Nations' Access to Information: A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs," May 20, 2019.

ensure they can properly carry out their functions in Canada's access to information system.

This recommendation, like the next one, relates not to the ATIA itself, but to the administration of the federal access to information system. In recent years, the number of access to information requests received by federal departments has risen steeply. In spite of this, there has been no increase in resources allocated to access to information offices. According to the Information Commissioner, many access teams are stretched thin and badly understaffed, leading to systemic delays in processing requests.[8]

Access offices need to be adequately staffed to ensure that they can carry out their functions and process access requests within legislated timelines. The federal government should allocate additional staff to access offices – particularly to those receiving the greatest number of access requests.

In addition, access offices are not equipped with technologies that could improve efficiency by automatically identifying documents and assessing them for disclosure. Instead, access teams have to follow a time-consuming process of manually searching for responsive records, then reviewing each page individually. It will always be important for access to information staff to manage the access process, but labour-saving technologies could be used to improve their ability to process an ever-increasing number of access requests. Such technologies are already used in other jurisdictions and could greatly improve the efficiency of Canada's access regime.

Finally, it is also essential that the Office of the Information Commissioner be adequately staffed to fulfil its important oversight role in the access to information system. The office received additional funding after Bill C-58 expanded the commissioner's role to include order-making power. Further resources are still required to ensure they can address all complaints received in a timely manner, in addition to initiating investigations into chronic access issues and providing guidance and direction to federal public bodies.

[8] Information Commissioner of Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, (Gatineau: January 2021), online: <https://www.oic-ci.gc.ca/en/resources/reports-publications/observations-and-recommendations-information-commissioner-review> at 6-7.

9. Changing the Reporting Structure of Access Offices

Recommendation 9: Create a new reporting structure for access offices, where they report to a central branch (or arms-length agency) rather than the heads of the departments or agencies in which they are housed.

Currently, access to information offices in each department report directly to the head of the department in which they are embedded. This could leave access offices in a position where they are under pressure from a head to delay the release of records or deny access to certain information that the department does not wish to see released. It could leave access officials in a difficult position where they feel unable to advocate strongly for meeting standards set under the ATIA – when they are having to pressure their direct superiors to do so.

As an alternative, we propose that the federal government establish a separate access authority, to which all access officials would report. An analogous structure is currently seen in the reporting structure of lawyers within the federal government. Legal services branches are seconded from the Department of Justice to provide in-house legal advice to federal departments – yet they ultimately report to the Deputy Attorney General.

The access authority could either be a new branch within the Treasury Board Secretariat, or ideally, an arms-length agency. Access offices would still be embedded within each department and agency but would report to the central authority. This would remove any potential conflict of interest between access officials and heads of federal departments. It would allow access officials to advocate forcefully for improved access, without worrying about any impact it could have on their position within the department.

This organizational separation between departments and access offices would create a safeguard against conflict for both heads and access officials and improve confidence in the administration of the access system.

Conclusion

As you note in your consultation materials, there are three fundamental principles contained in the ATIA that underlie the access to information system:

- Government information should be available to the public,
- Exceptions to the right of access should be limited and specific, and
- Decisions on the disclosure of government information should be reviewed independently.

These principles are a commendable starting point for the access to information system. Unfortunately, over the past decades, we have only seen movement away from all three and the continuous erosion of transparency and accountability.

This review is an important opportunity to repair a broken system and restore Canada as a leader on government transparency. The recommendations presented above would move the access to information system in the right direction towards openness and respect for the rights of Canadians.

We urge you to embrace a bold vision and make fundamental changes to the ATIA and its administration to ensure the public the transparency, openness and accountability to which we all have a right and which is essential for a vibrant democracy.

Respectfully submitted,

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