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OFFICE OF THE INFORMATION COMMISSIONER OF CANADA
DIALOGUE ON MODERNIZING ACCESS TO INFORMATION

BRINGING CANADA'S LAGGING INFORMATION RIGHTS INTO THE 21ST CENTURY

COMMENTS OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC

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Introduction

1. Once recognized as a global leader in thoughtful information policy, Canada's entire suite of digital laws is rapidly falling behind those off our counterparts. Nowhere is this more evident than with respect to our *Access to Information Act* (the "Act"),[1] a regime that came into force almost three decades ago and has yet to benefit from any meaningful attempt to adapt its precepts to rapidly evolving technological and operational realities.[2] Canadian federal right to information laws have stood still while our Provincial and international peers have eclipsed us with innovative, effective and versatile statutory regimes.

2. This neglect has had tangible impact on the effectiveness of Canada's federal transparency law. In a letter to the Treasury Board, Canada's federal and provincial information commissioners collectively noted a "steady decline in compliance with access to information legislation".[3] In the last five years alone, for example, the number of requests that have yielded absolutely nothing at all increased by 49.1%.[4] Less than one fifth of all requests result in all information being released, signalling excessive reliance on exceptions.[5] An audit of ATI practices in Canada found that over 50% of sample federal ATI requests did not receive a response within the statutorily designated 30 day period – well under the national average of 70%.[6] A recent survey of international freedom of information regimes ranked Canada's ATIA only 55th of 92 countries globally.

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[1] *Access to Information Act*, R.S.C. 1985, c. A-1, <http://laws-lois.justice.gc.ca/eng/acts/A-1/>, [henceforth "ATIA" or the "ACT"].

[2] See e.g. Centre for Law and Democracy, "Global RTI Rating", <http://www.law-democracy.org/live/global-rti-rating/>.

[3] Information & Privacy Commissioners of Canada, "Letter on Open Government for the President of the Treasury Board", January 19, 2012, <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>. While 2012 saw a minor decline in this trend, this small improvement does little to mitigate a decade of decline: Office of the Information Commissioner of Canada, Annual Report 2011-2012, September 2012, <http://www.oic-ci.gc.ca/eng/flipbook/ar-2011-2012/>, p. 2.

[4] D. McKie, "Access to Information Turns 30 Amid Calls for Reform", July 7, 2012, CBC News, <http://www.cbc.ca/news/canada/story/2012/07/06/pol-access-to-information-30th-anniversary.html>.

[5] Information & Privacy Commissioners of Canada, "Letter on Open Government for the President of the Treasury Board", January 19, 2012, <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>.

[6] Newspapers Canada, "National Freedom of Information Audit 2012", <http://www.newspaperscanada.ca/sites/default/files/Freedom-of-Information-Audit-2012-FINAL.pdf>, Table 2.

3. We view the right to access information ("RTAI") as a component of the broader right to receive and impart information.[7] Our courts have underlined the importance of RTAIs by recognizing our ATIA's quasi-constitutional status as well as the partial protection of ATI rights under section 2(b) of the *Charter*.[8] It is therefore incumbent on the government to ensure our ATI laws remain equal to the task of meeting these important objectives. We would further characterize government-held information as a national resource, and adopt one of the animating objectives of Australia's recently modernized freedom to information statute:

> The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.[9]

Comparable language should be added to section 2 of the ATIA.

4. Speaking more broadly, the lack of a modernized RTAI regime is starkly at odds with this government's commitment to Open Government and participation in the Open Government Partnership. The Partnership in particular envisions member states taking concrete steps to surpass and exceed current access to information practices.[10] Yet the federal ATI fails to meet even minimum standards as set by common practices in the provinces. While the federal government has taken positive and encouraging steps with its open data pilot project, a commitment to modernizing the ATIA is necessary. A modernization effort of this kind will not only help Canada meet its open governance obligations, but it can also provide a chance to take into developments in information and communications technology that can greatly streamline the ATI process and reduce costs.[11] The time is ripe to effect the long called-for change, and it

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[7] See Article 19, "International Standards: Right to Information", Policy Brief, April 5, 2012, <http://www.article19.org/resources.php/resource/3024/en/international-standards-right-to-information>, text accompanying footnote 9.

[8] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Canada (Information Commissioner) v. Canada (Minister of National Defense)*, 2011 SCC 25, para. 40.

[9] *Freedom of Information Amendment (Reform) Act 2010*, Act No. 51 of 2010 as amended, <http://www.comlaw.gov.au/Details/C2012C00866>, ["Australian FOI Amendment Act"], sub-section 3(3).

[10] Open Government Partnership, "OGP Participation", <http://www.opengovpartnership.org/ogp-participation>.

[11] Association of Progressive Communications, Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic, OpenMedia.ca, TeleCommunities Canada, Alternatives and Web Networks, "Joint Submission to the

is CIPPIC's hope that this present consultative process will lead us toward the necessary updates that will bring Canada's right-to-information system forward into the twenty-first century.

5. In light of this pressing need, CIPPIC provides its views on a number of the questions posed by the Office of the Information Commissioner of Canada in this consultation process. Our answers below are based on our institutional experience as an organization that relies on ATI requests as a regular component of its advocacy efforts. In addition, our responses are based on experience gained through active participation in various stages of the policy-making process at the federal level in Canada. Failure to address a specific question or element thereof should not be taken as an endorsement of the status quo.

I. Right of Access

Question I a: *In an environment of increasing globalization, should any person be able to obtain government held records, notwithstanding their physical presence or citizenship?*

6. The current Act limits the right to make requests to Canadian citizens and permanent residents—with the possibility that such rights may also be granted by Order in Council.[12] As has frequently been argued, this requirement serves no purpose given that individuals not included in those two categories can request information through an agent or intermediary who qualifies, albeit with some potential for inconvenience.

7. To the extent that information produced can be subsequently publicized, limiting the right of access to Canadian individuals currently in Canada serves no purpose; is contrary to the spirit of Open Governance; and is prejudicial toward individuals overseas who may nonetheless be impacted by Canadian policies.[13] While consideration may be given to a requirement for a Canadian delivery address, even this

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Universal Periodic Review of Canada", October 8, 2012, <https://www.apc.org/en/system/files/UPR_Canada_Coalition_InternetRights.pdf>.

[12] ATIA, sub-section 4(2).

[13] Pursuant to s 4(2), the Act has been extended to cover inmates and individuals present in Canada. CIPPIC submits the Act itself should be amended to secure these gains. See *Privacy Act Extension Order No. 1*, SOR/83-553; *Privacy Act Extension Order, No. 2,* SOR/89-206.

obligation is difficult to justify with respect to requests that can be answered digitally. We note that the recently modernized Australian *Freedom of Information Act 1982* has recognized the validity of non-domestic interests in government held information and no longer requires even an Australian-based delivery address as a pre-requisite for a valid FOI request.[14]

Question I b: *Should all federal entities be subject to the Act as a matter of principle, or should some be exempt from the Act's requirements? What criteria or principles should determine which entity is covered by the Act?*

8. Canadians expect that governmental bodies operating in their name should be held accountable. Information is a necessary precondition to achieve that goal. CIPPIC submits that substantially all federal entities should be covered by the Act. Moreover, it has CIPPIC's experience that the range of public entities carrying out vital public roles has greatly increased in number, range, scope and diversity. The current approach, which relies on a finite list of organizations attached as a schedule to the Act, is no longer capable of achieving the underlying purposes of the Act. If Open Governance is truly the objective, then Open Access should be the baseline assumption in law. "Exemptions" should relate to the content of a document rather than the organization or individual who happened to produce it. General administrative matters are not subjects that should be subject to exclusion, whether relating to Parliament or otherwise.

9. An updated ATI should follow the lead of a number of our provincial statutes and adopt a purposive and functional definition for covered entities.[15] It may be useful to retain and maintain a non-exclusive list of covered organizations, so that it is clear to Canadians where their rights of access might apply, but such a list should not operate as a legislative limit to ATI rights.

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[14] Department of Immigration and Citizenship, Australia, "Freedom of Information (FOI) Reforms – Overview of the Changes", <http://www.immi.gov.au/about/foi/pdf/overview-of-changes.pdf>; *Freedom of Information Amendment (Reform) Act 2010*, Act No. 51 of 2010 as amended, <http://www.comlaw.gov.au/Details/C2012C00866>, ["Australian FOI Amendment Act"].

[15] See for example *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, chapter 165, <http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-165/latest/rsbc-1996-c-165.html>, [henceforth "BC FIPPA"], section 3.

10. The Act must be applied to the legislative branch, to Parliament, to Ministers (inclusive of Secretaries of State), and to their respective offices. All of these entities play a vital democratic role and the information under their respective control is therefore of central importance transparency, open governance and democratic discourse. Various provincial and international RTI regimes apply to such entities, and the experience from these jurisdictions demonstrates clearly that there is no practical or policy justification for excluding these entities. To the extent some legislative or executive communications may need to be protected, such protection is best handled through narrow, targeted exceptions. There is simply no justification for the ongoing exclusion of key elements of the Government, their offices, or the people working within them from the scope of the Act. Such ongoing exemption is antithetical to the very concept of open and transparent governance.

11. While CIPPIC makes no comment with respect to the extent to which this standard would apply to judicial bodies, it is important that it continue to apply to quasi-judicial entities. While at times adopting judicial roles, these entities are frequently tasked with matters straddling both the executive and the legislative branches, particularly where comprehensive regulatory frameworks are in place. These legislative and executive activities include, but are not limited to, meeting with stakeholders, enacting regulations under statutes, investigating violations of relevant statutes, making and carrying out enforcement decisions regarding relevant statutes, and putting in place broad policy frameworks aimed at achieving wide-ranging policy objectives. A definition that is inclusive of tribunals, with narrowly targeted exceptions for instances where the entity in question is operating in a purely judicial capacity.

12. Finally, thought should be given to addressing scenarios where non-governmental entities are relied upon to carry out governmental objectives. Such outsourcing is becoming more frequent in modern societies and the information generated by these entities can be critical to transparent and informed democratic discourse. Yet such information is wholly insulated from access rights.[16] Addressing this issue may require a more precise definition of 'control' or a more permissive definition of what qualifies as a 'public entity'. For example, the ATIA could be amended to include entities

[16] *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835 [2010] 328 D.L.R. (4th) 171 (Ont. Div. Ct.)

carrying out quintessentially governmental functions who derive the authority to do so from statute.[17]

Question I d: *Should the Act require payment of fees for: a.) making an access request; b.) processing an access request; or c.) providing copies of responsive records? Should a distinction between electronic and non-electronic records be preserved in the provisions concerning fees? Should fees be legislatively waived in certain circumstances, i.e. public interest, failure to respond on time, source of the request?*

13. Fees must not be permitted to operate as a barrier or deterrent to information access. While it is reasonable to include some fee structure within the scope of the Act, this precept should be adopted expressly within the statute as an overriding principle.

14. As a starting point, serious consideration should be given to rescinding the $5 application fee. Reliance on these fees as a deterrence is not justified, as any and all non-vexatious requests should be encouraged. At the same time, it has been suggested that the cost of processing these filing fees far exceeds the revenues they generate.[18] This suggests that the filing fees cannot be justified as a cost recovery mechanism for the included 5 hours of search time and copy fees that are included with each request at no additional charge. We note that other jurisdictions including, recently, Australia, have eliminated ATI filing fees.[19]

15. With respect to fees aimed at reflecting organizational costs associating with search time and copying fees, in CIPPIC's experience, such fees can operate not only as a means of focusing requests, but also as a mechanism for avoiding comprehensive searches or even for holding back relevant information. This is particularly the case where projected fees associated with time expenditure predictions are relied upon, but

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[17] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii335/1997canlii335.html>.

[18] BC Freedom of Information and Privacy Association (BC FIPA), "Response to Questions Posed by the Information Commissioner of Canada, for the Consultation on Needed Reforms to the Access to Information Act upon the 30th Anniversary of its Passage", November 2012, <http://fipa.bc.ca/library/Reports_and_Submissions/FIPAResponses_2012ATIAConsultation.pdf>.

[19] The Parliament of the Commonwealth of Australia, The Senate, "Freedom of Information Amendment (Reform) Bill 2010: Revised Explanatory Memorandum", <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4163_ems_e66e9257-d096-4307-b3f3-3a5a5f44c278/upload_pdf/342722.pdf;fileType=application%2Fpdf>, p. 3.

also where large volumes of relevant materials fall within the legitimate scope of a request. Steps should be taken to mitigate the negative impact such costs can have on the right to access information.

16. For example, individuals should be given, in every instance, the option of receiving the results of their requests in digital format. Needless to say, a digital file transmitted digitally costs far less than a paper document consisting of thousands of pages. Indeed, thought should be given to recognizing digital responses as the default option for all ATIA requests. Additionally, the 'quota' (number of search hours and number of 'free' pages) that any request can generate without incurring costs should be raised significantly. Finally, a 'cap' should be imposed and an obligation on responding entities to notify or consult with the Office of the Information Commissioner prior to providing quotes in excess of this cap to requesting parties.

17. Given the cost savings that will be generated by a 'digital first' policy, the net effect of these changes may well decrease the net cost of ATI requests. However, even if it does not, this should not deter the adoption of this scheme. As a starting point, government information should be viewed as a national resource and its generation, retention, processing and disclosure are paid for by taxpayers. Further, the net annual cost of our current RTAI regime appears to be quite low to begin with.[20] Moreover, there are several ways the Government can defray existing costs further, and these should be adopted in conjunction. They include: better information management practices, expansion of the Government's adopted 'Completed ATI Requests' database through the adoption of a centralized portal of detailed requests, and the statutory adoption of a declassification and comprehensive proactive disclosure regime.[21]

[20] BC Freedom of Information and Privacy Association (BC FIPA), "Response to Questions Posed by the Information Commissioner of Canada, for the Consultation on Needed Reforms to the Access to Information Act upon the 30th Anniversary of its Passage", November 2012, <http://fipa.bc.ca/library/Reports_and_Submissions/FIPAResponses_2012ATIAConsultation.pdf>.

[21] Information & Privacy Commissioners of Canada, "Letter on Open Government for the President of the Treasury Board", January 19, 2012, <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>; Government of Canada, Open Government, "Completed Access to Information Requests", <http://www.open.gc.ca/open-ouvert/ati-aai-eng.asp>; Ontario Information & Privacy Commissioner, "Access by Design: The 7 Fundamental Principles", April 2010, <http://www.ontla.on.ca/library/repository/mon/24005/301553.pdf>.

18. The latter – comprehensive proactive disclosure – should be calibrated to include a default presumption in favour of the publication of documents to which access is routinely/regularly given, subject to relief expressly granted for specific datasets by the Commissioner.[22] This obligation should extend to cover useful statistical data sets.[23] These data sets and proactive disclosure outputs should be gathered together with a comprehensive 'completed ATI request' database in one, full-text searchable data portal. The creation of such a scheme would greatly reduce processing costs while furthering transparency and open government objectives.[24]

II. Limitations on the Right of Access

Question II b: *In what circumstances should a universal right of access be limited? Should federal institutions have the discretion to limit disclosure? If so, should they be required to demonstrate that a defined injury, harm or prejudice will probably result from disclosure? Should the public interest be considered in the decision to withhold records?*

19. There are instances when access to information should be limited, however limitations cannot be allowed to eclipse the underlying objectives of the Act. Many have pointed to the long list of broadly framed and unrestricted exceptions found in the ATIA as one of the key detriments to its effectiveness.[25] In particular, exceptions relating to international affairs and defence have been invoked at increasingly alarming rates given the importance of information presumably covered by such exceptions. While there are undoubtedly legitimate reasons to withhold some information relating to

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[22] For an example, see: The Parliament of the Commonwealth of Australia, The Senate, "Freedom of Information Amendment (Reform) Bill 2010: Revised Explanatory Memorandum", <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4163_ems_e66e9257-d096-4307-b3f3-3a5a5f44c278/upload_pdf/342722.pdf;fileType=application%2Fpdf>, p. 6.

[23] For more details see: K. Mewhort, "The Path to an Open Government: CIPPIC's Responses to the Government of Canada's Open Government Consultation", January 16, 2012, <http://www.cippic.ca/sites/default/files/CIPPIC%20-%20Open%20Government%20Consultation.pdf>.

[24] For an example, see: The Parliament of the Commonwealth of Australia, The Senate, "Freedom of Information Amendment (Reform) Bill 2010: Revised Explanatory Memorandum", <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4163_ems_e66e9257-d096-4307-b3f3-3a5a5f44c278/upload_pdf/342722.pdf;fileType=application%2Fpdf>, p. 6.

[25] Information & Privacy Commissioners of Canada, "Letter on Open Government for the President of the Treasury Board", January 19, 2012, <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>.

these activities, the frequency with which such exceptions are being invoked is of grave concern.[26]

20. Generally speaking, the limitations in the ATIA require a detailed and comprehensive rethinking. A public interest and proof of harm override should be adopted as an overarching principle that applies across all exemptions. While it may be the case that some exceptions, such as solicitor client privilege (as opposed to litigation privilege), are inherently in the public interest, even in such contexts there may be some instances where privilege held by the *government* may warrant override in specific instances. In many other instances, exceptions are often employed by the government with no justification and particularly in relation to such exceptions, the applicant lacks any capacity to even assess the legitimacy of the claim.

21. In light of this, there needs to be closer oversight of the application and use of exceptions. Currently, this operates largely on a complaints basis, but applicants will often lack the information to know whether a complaint is warranted or not. The ATIA should be amended to address this issue (see section III below for some high-level suggestions).

Question II d: *Should the Access to Information Act exclude records that directly inform Cabinet decisions? If the exclusion is permitted, on what should it be based? Should the Information Commissioner be able to review Cabinet confidences?*

22. With respect to specific exceptions, the protection currently awarded to Cabinet confidences requires a re-assessment. Canadian law has always provided significant protection for confidentiality in Cabinet decision making. More recently, however, courts have recognized that cabinet confidences must be subject to consideration of the public interest, as the Supreme Court noted in *Babcock*:

> At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet

[26] Information & Privacy Commissioners of Canada, "Letter on Open Government for the President of the Treasury Board", January 19, 2012, <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>.

> confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield.[27]

While the Court has agreed that this common law balancing can be vitiated by clear legislative language,[28] the erosion of an absolute common law protection for Cabinet confidences demonstrates the importance of limiting the protection offered in other contexts as well.

23. Other jurisdictions, such as New Zealand and the Australian state of Queensland, have gone so far as to apply proactive disclosure obligations to cabinet proceedings.[29] These may even include summaries of the discussions themselves.[30] CIPPIC encourages the Government of Canada to do likewise, but at a minimum Parliament must recognize that any and all such related materials should not be withheld from Canadians by definition. The experience of other jurisdictions and the developments in our own law are evidence that even long-standing conventions can successfully adapt.

III. Oversight & Enforcement

Question III a: *What changes, if any, should be made to the current oversight model established by the ATIA? a). Should the ombuds model be retained? b). Should the federal Information Commissioner have order-making powers? c.) Should a hybrid-model be considered (when the Commissioner has order making power for administrative files but not for refusal files)?*

24. The ATIA should abandon the ombuds model and adopt order making powers, as well as the ability to fine specific departments for egregious mis-applications of exceptions or egregious refusals to respond or search with reasonable diligence.

25. In addition, the complaints-based approach to ensuring exceptions and limitations are applied by organizations legitimately is not effective. Such exceptions are often vague,

[27] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 19.

[28] *R. v. Ahmad*, 2011 SCC 6, para. 50

[29] See New Zealand Ministry of Justice, "Cabinet Policy Committee Minute of Decision", POL Min (03) 11/6 (14 May 2003), online: < http://www.justice.govt.nz/publications/global-publications/c/civil-union-bill-relationships-statutory-references-bill/cabinet-policy-committee-minute-of-decision/?searchterm=cabinet>.

[30] See New Zealand Ministry of Justice, "Cabinet Policy Committee Minute of Decision", POL Min (03) 11/6 (14 May 2003), online: < http://www.justice.govt.nz/publications/global-publications/c/civil-union-bill-relationships-statutory-references-bill/cabinet-policy-committee-minute-of-decision/?searchterm=cabinet>.

and the individual requesting the information will rarely receive any information as to the rationale for which the exception is invoked. Individuals simply are not well-placed to challenge the legitimacy of an exception, when applied. A number of solutions to this problem should be explored, including an intensive and regularly applied auditing process, an obligation placed on organizations to provide details whenever evoking an exception, and/or and obligation, in each instance in which an organization wishes to invoke it, to first convince the Information Commissioner of the legitimacy of its use.

IV. Conclusion

26. In sum, the ATIA requires a complete overhaul. Once a world-leading instrument, it has fallen well behind international standards in its makeup and the regime it puts in place. This has had tangible impact on open government in Canada. More than any specific reform, what is needed is a commitment to reform.

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