

CJFE Submission to the OIC Call for Dialogue

# A HOLLOW RIGHT:

## Access to information in crisis

**A submission by Canadian Journalists for Free Expression  
to the Office of the Information Commissioner  
concerning reform of Canada's Access to Information Act**

January 2013

## Introduction

Canadian Journalists for Free Expression (CJFE), as its name indicates, promotes and defends the rights enshrined in Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. These articles recognize freedom of expression as a freedom inherent in the human condition (UDHR) or one recognized by states parties (ICCPR). They acknowledge the opportunity to engage in creative expression and participate in social organization as an essential attribute of the human condition.

Much of CJFE's work involves promoting what is enshrined in these articles: the right of human beings to express themselves freely in any cultural form, regardless of content or style. CJFE calls attention to attacks on this fundamental freedom and defends those who suffer such attacks.

For freedom of expression to flourish however, its promoters must do more than reactively denounce and defend. We must work to ensure that those exercising free expression have the raw material necessary to form their opinions and create their types of expression in the first place. This raw material includes available knowledge of the world they live in. That available knowledge includes the information collected and created by governments.

The UDHR and ICCPR recognize this, stating in their freedom of expression articles that freedom of expression encompasses the right "to *seek, receive* and impart information" (emphasis added). Furthermore, international jurisprudence has recognized Access to Information as a fundamental human right in *Claude Reyes v. Chile*<sup>1</sup> in the Inter-American Court of Human Rights and the 2001 [Declaration of Principles on Freedom of Expression](#)<sup>2</sup> by the Inter-American Commission on Human Rights which asserts that "access to information held by the state is a fundamental right of every individual."

In Canada, the Charter of Rights and Freedoms guarantees freedom of expression (section 2(b))<sup>3</sup> and the Supreme Court of Canada has recognized, albeit in somewhat careful language, that access to information "is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."<sup>4</sup>

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<sup>1</sup> [Claude Reyes v. Chile](#), Article 77 states: "...the right to freedom of thought and expression includes the protection of the right of access to State-held information..."

<sup>2</sup> <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&IID=1>

<sup>3</sup> Justice [Peter Cory](#) once wrote that it "is difficult to imagine a guaranteed right more important to a democratic society." *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 1326, page 1336.

<sup>4</sup> [Ontario v. Criminal Lawyers' Association](#), 2010 SCC 23

We strongly believe that without access to information (ATI), freedom of expression is a hollow freedom. Free speech advocates must emphasize the link between freedom of expression and ATI, examine ATI regimes, and work to maximize both the scope of these regimes and their usefulness to citizens.

We also concur with Justice Gérard La Forest when he argued in the landmark Supreme Court of Canada decision in *Dagg vs. Canada* that access to information facilitates democracy in two ways:

*“It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.”<sup>5</sup>*

In this spirit, CJFE respectfully submits the following to the Office of the Information Commissioner’s (OIC) review of the Access to Information Act (ATIA).

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## Access to Information — Desperately in Need of Repair

Once an international leader for its access to information legislation, Canada has fallen far behind due to a failure to reform the act and modernize its procedures. A recent study by the Centre for Law and Democracy (CLD) assessed each country with right to information legislation. **Out of 93 countries, Canada is now ranks 55<sup>th</sup>**, far behind many developing countries and just ahead of Malta and Angola.<sup>6</sup>

In our annual *Reviews of Free Expression in Canada*,<sup>7</sup> Canadian Journalists for Free Expression has tracked the sorry state of access to information at the federal level. Here are some of our findings:

- ◆ It has never been harder to pry information that’s often essential to a functioning democracy out of the federal bureaucracy. For example, it took the Privy Council Office four years to respond to an *Ottawa Citizen* ATI request for information on a 2006 junket to Edmonton, on a Challenger jet, for the Prime Minister and six colleagues to watch game six of the Stanley Cup.<sup>8</sup>

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<sup>5</sup> *Dagg v. Canada* (Minister of Finance) [1997] 2 S.C.R. 403: [http://www.hrcr.org/safrica/privacy/dagg\\_canada.html](http://www.hrcr.org/safrica/privacy/dagg_canada.html)

<sup>6</sup> [Global RTI Rating](#), Centre for Law and Democracy, September 28, 2012.

<sup>7</sup> Available each year on May 3, World Press Freedom Day, and archived at: <http://cjfe.org/resources/publications>

<sup>8</sup> OILERS in the 2006 playoffs.  
[http://en.wikipedia.org/wiki/2005%E2%80%9306\\_Edmonton\\_Oilers\\_season#Playoffs](http://en.wikipedia.org/wiki/2005%E2%80%9306_Edmonton_Oilers_season#Playoffs)

- ◆ Politicization of the Access process, with political appointees in various departments “red-flagging” requests (or putting them in yellow, or amber or purple folders) because they were made by journalists or critics, and, at least on one occasion, even attempting to “unrelease” information already approved for release.<sup>9</sup>
- ◆ A dozen years ago, in 1999-2000, the federal ATI system disclosed all the requested information 40.6 % of the time. By 2006, when the Conservative Party of Canada came to power, that rate had already dropped to 28.4%. Then it plummeted by almost half - in 2009-2010 in only 15% of cases did requesters get everything they demanded. The level has since recovered marginally to a still-dismal 21% in 2011-12. (In comparison, in the United Kingdom in 2008, 60% of all freedom of information requests received full disclosure. In the United States, for the same year, 43% received all they asked for.)<sup>10</sup>
- ◆ Currently, 22% of all exemptions invoked on a government-wide basis cite international affairs and defence as reasons for refusing to release information – a startling increase from just 5% in 2001.<sup>11</sup>
- ◆ There has been a steady growth in the proportion of requests not responded to in the 30-day time limit; in 1999-2000, 36.8% of all requests were not responded to within the deadline, whereas by 2011-12 the figure has risen to 44.7%. Delays in the release of information, as will be seen below, are a major concern of CJFE supporters, constituting a barrier to using the access system.
- ◆ The proportion of ATI requests initiated by the media has been declining in recent years (accounting for 11.8% of all requests in 2011/12 compared to 14% in 2008-09) often because the delays in releasing information and degree to which it is redacted makes the ATI system an irrelevant tool for daily, weekly or even monthly journalistic planning.<sup>12</sup>

Nonetheless, even as the access system has withered, it still accounts for numerous major news stories every year concerning political corruption, environmental regulation, health and safety standards and many other topics.<sup>13</sup> The access to information system is worth

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<sup>9</sup> See “[Remarks prepared by Dean Beeby](#)”, Sept. 30, 2010, panel at Carleton University, Ottawa.

<sup>10</sup> <http://www2.macleans.ca/2010/05/12/500-ways-to-say-no/2/>

<sup>11</sup> “Letter on open government for the President of the Treasury Board,” by the Information and Privacy Commissioners of Canada, January 19, 2012. [http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi\\_2012\\_1.aspx](http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx)

<sup>12</sup> See: “How Access To Information Fails Journalists,” by Dana Lacey, in CJFE’s Review of Free Expression in Canada 2010/2011. <http://www.cjfe.org/resources/publications/review-free-expression-canada-2011>

<sup>13</sup> Some of these have been well-documented in Stanley Tromp’s excellent *Notable Canadian News Stories Based on ATIA requests*, 19 March 2010. <http://www.freedominfo.org/2010/03/notable-canadian-news-stories-based-on-atia-requests/>

saving – in fact, we would argue that more than ever it is critical to our free speech and democratic government.

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## **CJFE Survey of Concerns about Access to Information**

CJFE initiated a survey of its online readers in early December 2012, explicitly seeking input from our stakeholders for the OIC Dialogue on the Access to Information Act.<sup>14</sup> In the following six weeks we received 95 responses to a ten-part questionnaire from both members and the general public. A large majority (79%) of those responders were either very or somewhat familiar with the ATI system.

Not surprisingly, there was almost complete agreement with the statement: To serve democratic discourse, access to information responses must be delivered quickly and comprehensively. 97% agreed. And 92% agreed that the government should proactively release information, with exclusions being exceptional and subject to review.

Respondents were also asked what they believe are their biggest barriers to using the access to information system. 77% identified the lengthy wait times as the greatest barrier to using the ATI system. One respondent noted woefully that when he finished his doctorate he was “still receiving information requested under ATIP from requests I made three years earlier ... For the most part, all the information I received was both late and useless/redacted beyond all recognition.”

Our survey respondents said that the next greatest barrier to use of the ATI system was that the Act allows too many exemptions (51%). It is also interesting to note that the topic of fees did emerge as a significant obstacle for 43% of our survey takers. A similar proportion found the current system to be complex to the point of erecting a barrier to use.

Regarding the scope of the ATIA's - what it covers - only 1% of our respondents would keep things the way they are. There was overwhelming support (90%) for extending the Act to all Crown corporations and agencies and very strong endorsement of the ACT covering the House of Commons (76%), the Senate (74%), and the Cabinet (68%).

The CJFE survey also indicated a concern for more public education about Access to information. As one respondent noted, the government should “have a dedicated program of education for citizens so that we know how to access information, this would better enable us to participate in Democratic Process.”

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<sup>14</sup> This was never intended to be a scientific or comprehensive survey, but we believe there is value in hearing responses from a varied cross-section of the Canadian public who have taken the time to provide us with their views. For the questions see: <http://cjfe.org/resources/features/our-right-information-disappearing>

We have included more details from the survey, including additional commentary from respondents, as an Appendix to this document. This survey and other research reinforces our belief that an efficient access to information system is a critical component of the right to freedom of expression and our ability to keep those in authority accountable. Without a robust access to information system, free expression is only half a right and claims of democratic accountability will never be more than lip service.

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## The Right to Information

Amendments to the current Access to Information Act (ATIA) will not work unless and until there is a **major attitudinal shift in the federal government away from the culture of secrecy**. Often, it seems, the dominant attitude in government today is that information must be kept away from citizens – the less they, and their media know, the better. Within this mindset, access to information is not seen as a right, only as a nuisance.

Therefore, CJFE holds that any new or reformed access to information legislation must be preceded by a strong statement of support of several key principles:

- 1) The government, its agencies and its employees have a duty to create records about their deliberations, communications and policy decisions.** There are continuing concerns about the federal government’s commitment to this duty. Throughout the federal bureaucracy there are reports of meetings where minutes are not taken, the use of pin-to-pin communications, and the use of private email addresses – all measures for avoiding the creation of an information trail by “going off-grid.”<sup>15</sup> This has been noted before. We recall that the 2006 election platform of the Conservative Party of Canada promised that upon being elected it would “**oblige public officials to create the records necessary to document their actions and decisions.**”<sup>16</sup> And, in his 2008 proposed amendments to the ATIA, former Commissioner John Reid explained that “[t]he right of access to information is not meaningful if records are not routinely created by public officials. [...] too often, there is a practice of avoiding making records in order to avoid application of the Act and insulate officials from public accountability.”<sup>17</sup> **We recommend that a preamble to access to information legislation insists clearly and strongly upon the duty of those who work for the taxpayer to record the process of their work.**

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<sup>15</sup> <http://cnews.canoe.ca/CNEWS/Features/2010/04/14/13593906-qmi.html>

<sup>16</sup> [Stand Up for Canada](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf), The 2006 Conservative Party federal election platform.  
[http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative\\_platform20060113.pdf](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf)

<sup>17</sup> “[Open Government Act: Notes, Sources and References](#)”, Office of the Information Commissioner, 2008.

**2) Access to information needs to be “embedded into the design of public programs from the outset.”<sup>18</sup>**

As the Information and Privacy Commissioner of Ontario has pointed out:

“When access is embedded into the design of public programs from the outset, it delivers the maximum degree of access to government-held information by making proactive disclosure the default. The benefits are twofold: the public can access information more directly; and government institutions can save significant resources by making their information available on a routine basis – *by default.*”

**3) The default action for dealing with information should be to release it, not refuse it. Access should be the norm, secrecy the exception.**

That means that governments should instruct all departments, agencies and employees to find ways to disclose information before it is requested. As the CJFE survey noted, there appears to be very strong support for the government releasing information pro-actively. The idea should be to reduce the need for the access system by providing information – about finances, health and safety, the environment, consumer products, etc – as soon as it is available.

CJFE therefore welcomes the government initiatives such as the [Open Data Portal](#) to create a central location for making government data freely available in machine-readable formats. However, we have some reservations. Treasury Board President Tony Clement has stated that under Conservatives “(t)here has never been a time when Canadians have had as much access to government information.”<sup>19</sup> This is at extreme variance with most analyses of the current dismal condition of the ATI system. In our view it appears the government is attempting to mask its poor performance on Access to Information with the provision of large amounts of unrequested data. Again, that freely-released disclosed data is welcome – and there should be more of it. However, this is data “pushed” out by government. Access to Information is about the right of citizens to “pull” information out of a government unwilling to let it go. In the case of journalists, for example, a central concern is to obtain, as quickly as possible, information about policy creation, spending, decision-making, and a wide range of politically-sensitive topics. For that kind of information the Access system is vital. If ATI is dysfunctional, no amount of “pushed” data will set things straight.

**4) Exceptions and exemptions to the right of access must be discretionary, narrowly defined and subject to both a test of actual harm and a mandatory**

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<sup>18</sup> [Access by Design](#), by Ann Cavoukian, Information and Privacy Commissioner of Ontario, April 2012.

<sup>19</sup> “Ottawa running late on access-to-information responses, watchdog says” Jim Bronskill, Canadian Press, Jan. 14, 2013

**public interest override.**

In other words, when the public benefit of release outweighs the potential public harm, information should be released. And the burden of proof to justify a refusal to release information should always fall on the holder of information. Finally, there should be clear penalties and sanctions for non-compliance by public officials.

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## **Reforming the Access System**

We now turn to specific recommendations for reform of Access to Information legislation, following the general questions guideline suggested by the OIC consultation.

### **1) Right of Access: Who can use Access to Information?**

Currently, the ATIA can only be used by Canadian citizens, permanent residents, and individuals and incorporated entities present in Canada. However, the spirit of Article 19 of the UDHR is universal – it states that “everyone” has the freedom to seek, receive and impart information. Fifty-one other countries with access laws have such provisions and former Commissioner John Reid, among others, thought Canada should modernized its law accordingly. **CJFE believes that Canada’s ATIA should be reformed to permit anyone to request information.**

### **2) Coverage of the Act: Which institutions should be subject to the right of access found in the Act?**

The ATIA currently lacks a clear definition of which institutions should be subject to the right of access. Instead it relies on a list in appended schedules. The Conservative government did extend coverage to a number of previously uncovered crown corporations and arms length bodies in the 2006 Federal Accountability Act (bringing, among others, the Canadian Broadcasting Corporation, the Export Development Corporation and Atomic Energy of Canada under the ATIA – although also introducing a new list of troublesome exemptions). However, there are still more than 100 “other corporate interests” of the Government of Canada that should be subject to the ATIA. And there is still a lack of principled consistency. Port authorities are subject to the act but Canada’s major airport authorities are not. The Canada Health Infoway, the Canada Media Fund, the international development banks, Wildlife Habitat Canada and the Olympic organizing committees are examples of major institutions with government financing and government-like functions



that are not covered to this day.<sup>20</sup> And a list system will always fall behind the ongoing evolution of government and its agencies.

Therefore, **we recommend that new access to information legislation contain a clear and principled definition of who the act covers**, a definition such as that in the [Model Freedom of Information Law](#) of the organization *Article 19*:

**For purposes of this Act, a public body includes any body: (a) established by or under the Constitution; (b) established by statute; (c) which forms part of any level or branch of Government; (d) owned, controlled or substantially financed by funds provided by Government or the State; or (e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.**

**The ATIA should also cover the House of Commons and Senate** with appropriate exceptions to protect information that is a Parliamentary privilege. It is hard to comprehend how two of the most significant institutions in the functioning of Canadian democracy are not subject to access to information inquiries. It means that Canadian Parliamentarians have no direct experience in being subject to Access to Information requests – a fact that might help explain the culture of secrecy in Ottawa. In the UK, both of these legislative branches are covered.

**The ATIA should also cover the administration and financial activities of the federal courts.** We agree with the B.C. Freedom to Information and Privacy Association that in subjecting the courts to the ATIA there would be appropriate exemptions for legal issues and for “a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity.”<sup>21</sup>

### **3) Limitations on the Right of Access: Should there be limitations or exemptions on the information that governments are required to make public?**

CJFE accepts that some exemptions are appropriate. But **exemptions must be discretionary, narrowly defined and limited by a proof of harm test and a public interest override** (as in B.C. and Alberta). Under the current system many exemptions are automatic, not discretionary and the onus is on the requester or the Commissioner to show

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<sup>20</sup> Open Outlook, Open Access, A Special Report to Parliament by Suzanne Legault Information Commissioner of Canada, March 2011, Chapter 1.

<sup>21</sup> [Submission to Consultation on Access to Information Act](#), British Columbia Freedom to Information and Privacy Association, December 4, 2012.

that there would be no harm in releasing the information. The onus should be reversed. This means that the government department or agency wishing to enjoy an exemption would have to prove:

- (a) there is a legitimate interest in need of protection
- (b) the release of information would be harmful to this legitimate interest, and
- (c) the likely harm outweighs the public's interest in the specific information.

#### **4) Cabinet Confidences: Should the Access to Information Act exclude records that directly inform Cabinet decisions?**

No, **Cabinet documents and information in Ministers' offices should be subject to the Act.** This is the case in all Canadian provinces where Cabinet documents are reviewed by the Commissioner in the case of a dispute between the requester and the public body. Internationally, only South Africa's freedom to information law follows Canada's example of exempting Cabinet documents.

As we have argued before, the failure of the ATIA to cover Cabinet documents and Ministers' offices has created a black hole in the Access to Information Act. Former Commissioner John Grace said that "no single provision brings the Access to Information Act into greater disrepute than section 69,"<sup>22</sup> the section which excludes cabinet documents. Former Information Commissioner John Reid says with this exemption "accountability, transparency and openness in our governmental system has taken a back seat to the protection of the elite."<sup>23</sup> We agree with reporter Dean Beeby's observation that the federal government has too often invoked this section with the effect of "drawing a black curtain across vast swaths of government information." Furthermore, it is precisely the offices of Ministers where we have already witnessed cases of direct political interference in the release of documents.

CJFE is particularly concerned with the national security provisions in an amendment to the ATIA in 2001 under the post 9/11 Bill C-36. This amendment was unnecessary and made a bad section of the Act even worse. As we stated in 2001 in [our analysis of C-36](#):

The government already has sweeping powers to prohibit the release of sensitive information to protect Canada's international relations. Quite properly, they are subject to review by an independent commissioner appointed specifically for the purpose. To our knowledge, during the life of the Access to Information Act there have been no instances in which the security of Canadians has been compromised

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<sup>22</sup> [Annual Report Information Commissioner 1993-1994](#)

<sup>23</sup> "The "Dark Magic" in the Law," Notes for remarks by John Reid at a CJFE panel discussion on ATI, September 13, 2011. <http://www.cjfe.org/resources/features/john-reid-dark-magic-law>

through release of information under the Act ... We note that the United States, the country directly attacked on Sept. 11, is not seeking additional powers to restrict the disclosure of information as part of its anti-terrorist response ...we strongly recommend the removal of this section from the bill.<sup>24</sup>

A decade later, we were quite concerned with the recent Supreme Court of Canada finding in 2011 (*Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25) exempting records produced in and/or held by ministers' offices. It is not well defined what information can be considered a Cabinet confidence. While there may be narrow exemptions in some types of Cabinet records we are very worried that this broad and automatic exemption allows the government to hide information critical to accountability and democratic governance. For example, on March 25, 2011, the Government of Canada was found in contempt of Parliament for its refusal to produce information regarding the costs associated with government crime bills, cuts to corporate tax and purchasing fighter jets. The government had argued that these were matters of Cabinet confidence – and therefore exempt from the Access to Information Act. A Parliamentary committee concluded that the failure to produce the documents impeded the House of Commons in performing its functions. This loophole – so large it is sometimes called the “Mac Truck” exemption - is not acceptable and must be corrected.

As the CJFE survey indicated, there appears to be strong public support for the Cabinet being subject to the ATIA. We again recall that this was another promise of the Conservative Party of Canada in its 2006 election platform:

**“A Conservative government will ... Subject the exclusion of Cabinet confidences to review by the Information Commissioner.”**

## **5) Empowering the Information Commissioner:**

CJFE believes that for many of the above reforms to work, and for the delays in the Access system to be significantly reduced, **the powers of the Information Commissioner should be transformed from those of an ombudsman to those of an order-making tribunal.**

In most modern access to information legislation either the Information Commissioner or some oversight body has power (a) to make decisions concerning administrative matters (e.g. time extensions for release of documents) and (b) to order disclosure over most

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<sup>24</sup> CJFE submission on Bill C-36 (Anti-terrorism Act) Delivered to the House of Commons Standing Committee on Justice and Human Rights November 13, 2001

requests after reviewing materials and to make a determination on the tests of harm and public interest override arguments. There would still be recourse to the courts for appeals, but the Commissioner would be able to decide many cases – reviewing Cabinet documents, for example, to see if any harm would be done in releasing them, and, even if there is some harm, to decide if release is nonetheless justified by a strong public interest.

The 2002 report by the Treasury Board and the Department of Justice on ATIA reform states that **“in Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful.”**<sup>25</sup>

Once again this was a Conservative Party promise in the 2006 election campaign: **“A Conservative government will ... give the Information Commissioner the power to order the release of information.”**<sup>26</sup>

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## Other Recommendations

### 1) End the practice of charging of a fee for submitting an access request:

According to former Commissioner Robert Marleau, it costs \$55 to process the \$5 check currently required; eliminating application fees would save money for both requesters and the government. In more principled terms, **there should be no fee associated with requesting information, because it is an exercise of a fundamental human right to freedom of expression.**

### 2) Costs associated with searching for, copying and delivering information should be set at market rates or lower, again simply because it is a core duty of government to release information to the public.

We are also mindful of the fact that government information was, in the first instance, created at taxpayer expense presumably for the purpose of serving the people. Financial charges should not become a barrier to using the access system. In fact, a measure could be included to allow for waiving all costs in the case of requests that are strongly in the public interest. We also recommend that when response times exceed the stipulated deadlines, **costs should be dismissed as a penalty to the government institution for failing to meet its obligations.** As we note below, requesters should be able to receive release documents electronically – which would significantly reduce copying costs.

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<sup>25</sup> *Access to Information: Making it Work for Canadians*. Access to Information Review Task Force report, 2002, at pages 112-113.

<sup>26</sup> [Stand Up for Canada](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf), The 2006 Conservative Party federal election platform. [http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative\\_platform20060113.pdf](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf)

- 3) **Modernization:** The current Access system was designed before the advent of the Internet, social media and much of our modern digital technology. It is time to bring the system into the 21<sup>st</sup> century. Modernization requires that information systems be designed to facilitate access and that digital technologies be employed for submitting requests (replacing the current awkward process of allowing submissions only by surface mail accompanied by a cheque), and for monitoring their progress and delivering information.
- 4) **Digital Release:** Frequent users of the Access system have noticed a deliberate strategy on the part of some parts of government to frustrate the purpose of the access system by releasing information in formats that make it difficult to be manipulated and analyzed – such as turning spreadsheet or database information into encrypted *pdf* files. These practices, clear affronts to the spirit of the Act, must be stopped. To serve citizens, the customers of government, information should be available for release in electronic formats to avoid copying costs. Public agencies should be open to negotiate with requesters regarding the format in which information is released.
- 5) **A Database of Completed Requests:** The Coordination of Access to Information Requests System (CAIRS), which was a highly efficient method of sharing released information, was scrapped by the Harper administration. Users of access would benefit from a centralized database that consolidates, across the federal government, all completed access requests – and which then makes these released documents available for easy download. An enhanced CAIRS, or something similar, should be restored.

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## Conclusion

Canadian Journalists for Free Expression is engaged not only in Canada. We are deeply involved in promoting and defending free speech rights around the world through our management of IFEX, the global network of free expression organizations. As a result, we are keenly aware of many governments that refuse to legislate or implement modern access to information laws. It is one way for the powers that be to hide corruption, deny the violation of other human rights, protect the privileges of elites, and keep themselves in power perpetually. A functioning access to information system is something tyrants deeply fear.

In Canada, it is long past the time when the ATIA should have been amended. Countless politicians and political parties (including the current governing party) have called for changes. The time has come to translate this talk into action. We fear that if it is not

modernized and reformed **now**, it will become so dysfunctional as to be of questionable usefulness. Canadians will not trust it as a reliable way they can find out how government decisions are made, and to whose benefit. If that happens, there will be consequences. A country that does not maintain a healthy and modern access to information system will find its economy corroded and corrupted by the lack of accountability, possibly leading to economic meltdowns as we have seen only too recently. Without an up-to-date, comprehensive and rapid access to information system, a country risks debasing its democracy and eroding the rights of its citizens. Certainly, governments will lose the trust of the people.

CJFE looks forward to the day that Canada's access law will no longer be ranked #55 in the world, but will once again take its place among the world leaders on this important right. One way we will be able to measure the success of the reforms we and many others are suggesting, will be when we find more and more Canadians using the system and more and more stories written each year on the basis of access requests.

## Appendix One

# **CJFE'S Survey on the State of Access to Information in Canada**

## **Background**

CJFE initiated a survey of its online readers in early December 2012. In the six weeks that the survey was open we received 95 submissions. Some of the people who responded were CJFE members (16%), but the vast majority had little or no affiliation with CJFE.

This was never intended to be a scientific or comprehensive study of the Canadian public at large. From the very fact that the survey was housed on CJFE's website, next to information which outlines CJFE's very strong concerns about the state of access to information in this country, this survey cannot be viewed as either objective or impartial. However, we believe that there is value in hearing these responses from a varied cross-section of the Canadian public who have taken the time to provide us with their views on this subject. It should be noted that respondents were informed that their input would be used in CJFE's submission to the public consultations launched by your Office.

## **Respondents**

The majority of survey respondents were journalists and media workers (45%), students (17%), researchers and academics (34%) and government employees (9%). Other respondents identified themselves as artists, writers, lawyers and paralegals, workers in the non-profit sector, retail workers, a nurse and a bus driver.

By far the majority of the respondents described themselves as being somewhat familiar with the Access to Information system (60%). 19% were very familiar with the system, i.e. they understand what information is covered and is excluded, 9% were extremely familiar – i.e. they would feel comfortable explaining the system and its intricacies to others, and 12% were unfamiliar – i.e. they would not know how to file an access to information request, and had no knowledge of how the system works.

## **Areas of Agreement**

Not surprisingly, there was almost complete agreement with the statement: To serve democratic discourse, access to information responses must be delivered quickly and comprehensively. 96.84% said they agreed. And when asked: Should the government proactively release information? 92% said: Yes, government databases should be made open to the public, with exclusions being exceptional and subject to review, only 8% believed: No, government information should remain accessible by request only.

There was also some degree of unanimity in response to the following question.

**What do you find are the major barriers to using the access to information system?**

<b>Costly fees</b>	43.00%
<b>Complex process for filing requests</b>	41.00%
<b>Lengthy wait times for responses</b>	77.00%
<b>Too many exemptions</b>	51.00%
<b>The information I receive is not useful</b>	17.00%
<b>I did not know that I could file a request</b>	8.00%
<b>I do not believe that there are any barriers to using the system</b>	0.00%

We were not surprised to see that 77% of respondents identified the lengthy wait times as perhaps the greatest barrier to using the ATI system. One would expect that this percentage would be even higher among those who have used the system.

Respondents also identified other barriers:

- Lack of a timely or effective appeal system.
- Too much requested information is redacted
- No standardized information format (ex. uniform digital spreadsheets across all departments)
- Uncertainty if I'll waste my time because I am unclear what is available for access.

There was slightly more variety of response to this question:

**What should Canada's Access to Information Act be extended to include?**

<b>All Crown corporations and agencies</b>	90.53%
<b>All government departments</b>	94.74%
<b>Courts</b>	58.95%
<b>The Cabinet</b>	68.42%
<b>The House of Commons</b>	75.79%
<b>The Prime Minister's Office</b>	81.05%
<b>The Senate</b>	73.68%
<b>No additional entities should be added, the current coverage is adequate</b>	1.05%

Respondents were given the option to choose more than one category. As you can see, many respondents chose all crown corporations (90%), government departments (95%) and the Prime Minister's Office (81%), but when it came to extending the ATIA's coverage



to the Courts, only 59% agreed. Only 1% of respondents believed that no additional entities should be added.

The Survey invited respondents to identify other areas that might be added. Here are some of their suggestions:

- Government funded agencies and charities
- Environment Canada
- Any private company that conducts business in the public sector
- Prisons and Police Departments
- Ministers' Offices, which the SCC recently decided were not covered, to the dismay of many
- Also, all statutory bodies and bodies owned, controlled or substantially funded by government, or which carry out public functions

### **Additional Input**

Finally, we asked Survey respondents for additional input on the subject. More than a third of respondents included their views on access to information. Here are a few excerpts:

- ◆ If our tax dollars are involved it is the right and responsibility of the citizens to evaluate these expenditures. General Accounting Principles as I understand depend on open disclosure rather than hidden agendas and misappropriations.
- ◆ documents that have been released to an individual should then be made available to all Canadians. To prevent duplication of efforts
- ◆ Have a dedicated program of education for citizens so that we know how to access information, this would better enable us to participate in Democratic Process
- ◆ There should be an exhaustive list of mandatory release requirements. A public interest override is a good idea but is something that would likely have to be fought out on appeal, which takes years. The appeal system should be overhauled or abolished perhaps in favour of a speedy court process as in the U.S. (where organizations sometimes sue for disclosure.) There could be an autonomous agency that examines all ATIP responses to ensure they meet the requirements of the law. Too often, a government agency's own ATIP staff take direction from program heads (bureaucrats) on when to deny a request. This defeats the purpose of having staff trained in ATIP legislation. The staff processing the request need to be at arms-length from the government department that receives the request and must be given the authority to have the final say on what should be released. This office must

be well-staffed to avoid delays. Perhaps stiff monetary penalties for delays and improper denials will achieve the same effect.

- ◆ I finished a doctorate in May 2011. I was still receiving information requested under ATIP from requests I made three years earlier at the very beginning of my research. For the most part, all the information I received was both late and useless/redacted beyond all recognition.

Some comments also speak to the personal reasons that may inform an individual's need to access information:

- ◆ Documents pertaining to me that I should have access to are being exempt, and I am being given excuses that mean there is no accountability for what is being covered. I am fighting to find out about the lack of oversight over the nurses that were caring for him the night that he died. I am being denied access to notes and documents from my own hearings, and there are too many mechanisms and strategies for how to avoid giving me access to information pertaining directly to me and my husband. I have been unable to get documents in one piece, and have to pick everything together in bits and pieces.
- ◆ More public education on how to use the system. It's not just journalists who need to use it but individuals pursuing law cases against the government and its agencies (and I suppose lawyers, too).