

Submission to Session 44 of the Universal Periodic Review on the Right to Information in Canada



April 2023

Main submitting organisation:

Centre for Law and Democracy (CLD)

info@law-democracy.org

+1.902.431.3686

www.law-democracy.org

215-2099 Gottingen Street

Halifax, NS, B3K 3B2

Canada

Other submitting organisations:

Centre for Free Expression (CFE)

cfe@torontomu.ca

+1.437.995.7396

<https://cfe.torontomu.ca>

Toronto Metropolitan University, 350 Victoria Street, Toronto, ON, M5B 2K3, Canada

Canadian Institute for Information and Privacy Studies (CIIPS)

darrellevans.ciips@gmail.com

+1 604 441-3441

<https://www.infoandprivacy.ca>

2854 Paradise Road, Pinantan Lake, BC, V0E 3E1, Canada

Democracy Watch

info@democracywatch.ca

Tel: +1 613 241-5179

<https://democracywatch.ca>

P.O. Box 821, Stn. B, Ottawa, ON, K1P 5P9, Canada

Introduction

1. The rights to “receive” and “seek”, as well as to “impart” information were included in the guarantee of freedom of expression found in Article 19 of both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, which Canada ratified in 1976. It is now widely recognised that this encompasses the right of everyone to access information held by public authorities (the right to information or RTI), subject only to a limited set of exceptions to protect overriding public and private interests.
2. A major milestone in the development of this understanding of RTI came in 1999 when the (then) three international special mandates on freedom of expression at the United Nations, Organization of American States and Organization for Security and Co-operation in Europe explicitly defined it as a right vested in the public to oversee government action and as a tool for public participation.¹
3. Since then, further recognition of RTI has followed internationally, regionally and nationally.² The Inter-American Court of Human Rights recognised this right in the seminal case of *Claude-Reyes v. Chile* in 2006.³ The European Court of Human Rights followed suit in a 2009 case against Hungary,⁴ and the UN Human Rights Committee recognised the right in General Comment No. 34, adopted in 2011.⁵
4. For many years, Canadian civil society groups like the Centre for Law and Democracy (CLD) and the Centre for Free Expression (CFE), along with a wide array of other stakeholders across Canada, have been calling for Canada to live up to its human rights

¹ Joint Declaration of 26 November 1999, <https://www.osce.org/files/f/documents/c/9/40508.pdf>.

² Toby Mendel, “Global Recognition of the Right to Information as a Human Right” in J. S. Mann, ed., *Comparative RTI Laws in the SAARC Nations* (2017, New Delhi, Centre for Transparency and Accountability in Governance). It has also received constitutional protection under the Canadian Constitution as long as the information is being sought for an expressive purpose. See *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, <http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html>.

³ 16 September 2006, Series C, No. 151, https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

⁴ *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05.

⁵ 12 September 2011, CCPR/G/GC/34, paras. 18 and 19, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.



obligations by enacting major reforms to the federal Access to Information Act (ATIA),⁶ which guarantees the right to access information held by federal public authorities, albeit not in line with international standards. For just as long, successive Canadian governments of different political stripes have refused to adopt such reforms. Change seemed to be on the horizon when the Liberal Party made bold promises to reform the ATIA during the 2015 federal election campaign, including by giving binding order-making powers to the Information Commissioner of Canada, eliminating all fees for responding to requests, providing written responses within 30 days where access was being refused, and extending coverage of the Act to the offices of the Prime Minister and ministers and the administrative institutions that support Parliament and the courts.⁷

5. Unfortunately, the ATIA reform process initiated by the Liberal Party after they formed the government and Bill C-58, which was the result of that process, did not live up to expectations, as CLD pointed out in a series of publications between 2016 and 2018.⁸ When C-58 entered into force in 2019, the only major promises it delivered on were fee waivers for responding to requests, which had already been implemented at a policy level,⁹ and giving the Information Commissioner binding order-making power.
6. The buckling of the access to information system under the pressures of the COVID-19 pandemic illustrates both the inherent flaws with the ATIA and how they translate into serious implementation problems. For instance, several public authorities, acting

⁶ R.S.C., 1985, c. A-1, <https://laws-lois.justice.gc.ca/eng/acts/a-1/>. See, for example, CLD, Lawyers' Rights Watch Canada, Canadian Journalists for Free Expression, British Columbia Freedom of Information and Privacy Association and PEN Canada, *Submission to the 16th Session of the Universal Periodic Review on the State of Freedom of Expression in Canada*, October 2012, <http://www.law-democracy.org/live/canada-un-universal-periodic-review-submission/>; *Report of the Standing Committee on Access to Information, Privacy and Ethics*, June 2016, 42nd Parliament, 1st Session, <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf>; and Office of the Information Commissioner of Canada, *Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act*, March 2015, <https://www.oic-ci.gc.ca/en/resources/reports-publications/striking-right-balance-transparency>.

⁷ See the Liberal Party election manifesto, *Real Change: A Fair and Open Government*, August 2015, p. 4, <https://web.archive.org/web/20170209033208/https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.

⁸ CLD, Lawyers' Rights Watch Canada and British Columbia Freedom of Information and Privacy Association, *Canada: Recommendations for Reforming Canada's Access to Information Act*, June 2016, http://www.law-democracy.org/live/wp-content/uploads/2016/07/Canada.RTI_Jun16.pdf; *Canada: Note on Bill C-58 Amending the Access to Information Act*, June 2017, <https://www.law-democracy.org/live/wp-content/uploads/2017/06/Canada.RTI-Note.Jun17.pdf>; and *Canada: Note on Bill C-58 Amending the Access to Information Act*, February 2018, https://www.law-democracy.org/live/wp-content/uploads/2018/02/Canada.RTI_18-02.TM_docx.

⁹ See Interim Directive on the Administration of the Access to Information Act, 5 May 2016, <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310>.



without any legal authorisation, simply suspended their work in responding to requests for information during the early COVID period.¹⁰ This is especially unacceptable because, as the Information Commissioner of Canada pointed out, the overriding importance of access to information increases rather than decreases during emergencies.¹¹ In its leading report on this issue, drafted by CLD, UNESCO pointed out that maintaining RTI systems should be seen as part of the emergency response and certainly not something to suspend or weaken due to the emergency.¹² Such anti-democratic and lawless behaviour by public authorities might well not have happened if the ATIA were more robust, for example by giving the Information Commissioner more direct means to address abuses of this sort or providing for sanctions for violating its provisions.

7. This Submission highlights the key problems with the ATIA and makes recommendations for how Canada should reform its RTI system at the federal level to meet its international human rights obligations. There is an unfortunate continuity to the key problems that have plagued the ATIA since before CLD's first dedicated report on the Act, published in 2013, *Canada: Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*.¹³ Indeed, most of the concerns outlined in that report remain at issue in 2023: a problematically narrow scope that exempts too many public authorities from the law's remit; a significantly overbroad regime of exceptions that does not follow a human rights approach; and procedures which are anything but user friendly, including the power to extend the time limit for responding to requests which is frequently abused.
8. CLD in collaboration with another non-governmental organisation, Access Info Europe, developed a globally recognised tool for assessing the strength of legal frameworks for access to information, the RTI Rating, based on a methodology developed following

¹⁰ The Information Commissioner consistently held that this was a serious breach of the law. See, for example, *Canadian Heritage (Re)*, 2020 OIC 10, 5820-00645, 16 December 2020, <https://www.oic-ci.gc.ca/en/canadian-heritage-re-2020-oic-10>; and *Privy Council Office (Re)*, 2020 OIC 7, 3218-00618, 11 September 2020, <https://www.oic-ci.gc.ca/en/decisions/final-reports/final-report-3218-00618-privy-council-office>.

¹¹ Information Commissioner of Canada, *The importance of access to information during the COVID-19 pandemic*, 19 June 2020, <https://www.oic-ci.gc.ca/en/resources/speeches/importance-access-information-during-covid-19-pandemic>.

¹² *The Right to Information in Times of Crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope!*, September 2020, https://www.sdg16hub.org/system/files/2020-09/unesco_ati_iduai2020_english_sep_24.pdf.

¹³ January 2013, http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_Jan13.pdf.



extensive consultations with international experts.¹⁴ As the table below shows, Canada currently achieves a score of 93 out of a possible total of 150 points on the RTI Rating, putting it in an unimpressive 51st position globally from among the 136 countries currently assessed on the Rating.

Section	Max Points	ATIA	Percentage
1. Right of Access	6	5	83%
2. Scope	30	14	47%
3. Requesting Procedures	30	20	67%
4. Exceptions and Refusals	30	13	43%
5. Appeals	30	26	87%
6. Sanctions and Protections	8	6	75%
7. Promotional Measures	16	9	56%
Total score	150	93	65%

9. This Submission is divided into seven sections: scope and the right of access; requesting procedures, which covers unreasonable delays and fees; exceptions; the powers of the Information Commissioner; sanctions for violating the right to information and protections for whistleblowers; promotional measures; and the conclusion.

Scope and Right of Access

Scope

10. One of the most serious problems with the ATIA is the narrow range of public authorities it covers. Under international standards, openness obligations should apply to all information held by all authorities which engage the responsibility of the State.¹⁵ In other words, the law should cover all information held by the executive, legislative and judicial branches of government; constitutional, statutory and oversight bodies; crown corporations; and any entity, private or public, which is owned, controlled or substantially funded by a public authority or which performs a statutory or public function. All of these bodies should be subject to both the proactive disclosure (i.e.

¹⁴ Available at: www.RTI-Rating.org.

¹⁵ See, for example, *Claude-Reyes et al. v. Chile*, 16 September 2006, Series C No. 151, para 77 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.



obligations to publish certain kinds of information even in the absence of a request) and RTI request processing (i.e. reactive disclosure) obligations.

11. The ATIA does not apply to several types of public authorities. The Prime Minister, Cabinet and affiliated committees are explicitly excluded by section 69; information in the archives, National Gallery of Canada and numerous national museums which was not placed there by or on behalf of government institutions is excluded by section 68; the Canada Broadcasting Corporation and Atomic Energy Canada Limited are excluded by sections 68.1-68.2; numerous other public authorities are not listed in Schedule I, which defines the scope of coverage of the ATIA, such as the National Security Intelligence Review Agency (NSIRA; its Secretariat is listed but NSIRA itself is not); and private bodies which receive public funding or perform public functions are not generally covered.
12. As noted above, the Prime Minister's Office, Ministers' Offices and administrative bodies which support Parliament and the courts are not subject to reactive disclosure obligations, despite a 2015 Liberal election promise that they would be.¹⁶ Instead, proactive disclosure practices, largely already in place at these institutions, were codified through Bill C-58 (see sections 90.01-90.24). Proactive publication obligations are an important part of any RTI regime, as this helps ensure access by everyone to at least a minimum common platform of information from public authorities. However, the essence of a right to information system, and of any claim to be "open by default",¹⁷ is the right of individuals to request whatever information they want from government. That is fundamentally different from proactive disclosure, which only grants access to specific and therefore inherently limited categories of information, which are ultimately determined by the government.
13. These proactive disclosure obligations are also excluded from the oversight functions of Canada's federal Information Commissioner, who does not exercise any powers or perform any duties or functions in relation to this form of disclosure, including receiving and investigating complaints or exercising any other oversight powers, duties or functions (see section 91(1) of the ATIA).

Right of Access

¹⁶ See the Liberal Party election manifesto, *Real Change: A Fair and Open Government*, August 2015, p. 4, <https://web.archive.org/web/20170209033208/https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.

¹⁷ See the Liberal Party election manifesto, *Real Change: A Fair and Open Government*, August 2015, p. 4, <https://web.archive.org/web/20170209033208/https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.



14. In its current form, the ATIA only applies to citizens, permanent residents, other persons residing in Canada¹⁸ and legal entities, thus excluding foreign citizens who are not physically in the country. This discriminates against foreign nationals in terms of the human right to information and is not in line with international better practice.¹⁹ In fiscal year 2021-2022, requests to Immigrations, Refugees and Citizenship Canada accounted for nearly 80 per cent of all ATIA requests.²⁰ Many of these requests are for information on immigration applications sought by non-resident, non-Canadian citizens who are forced to pay in-country middlemen to file ATIA requests.

Recommendations

- The offices of the Prime Minister and Ministers and the administrative institutions that support Parliament and the courts should be subject to reactive disclosure obligations under the ATIA, and all other public authorities, as well as private bodies which undertake public functions or operate with public funding, should be subject to both reactive and proactive disclosure obligations.
- Everyone, including foreigners, wherever they happen to be, should have the right to make requests for information under the ATIA.

Requesting Procedures

Unreasonable Delays

15. One of the most serious problems with the ATIA, about which users have consistently complained, is that it allows, and public authorities often impose, long delays in responding to requests. The ATIA, in broad conformity with international law and practice, imposes a primary obligation on public authorities to respond to requests within 30 days (section 7). However, it also allows authorities to extend the 30-day period by “a reasonable period of time” by giving notice to the requester (section 9(1)) and, if the extension is longer than 30 additional days, by giving notice to the Information Commissioner (section 9(2)). These extensions are only supposed to apply in exceptional cases where requests are voluminous or compliance with a request

¹⁸ See section 4(1) of the ATIA and section 2 of the Access to Information Extension Order, No. 1, SOR/89-207, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-89-207/page-1.html>.

¹⁹ More than 70 countries extend the right to information to everyone. See Indicator 4 of the RTI Rating, on universal access, <https://www.rti-rating.org/country-data/by-indicator/4/>.

²⁰ Treasury Board of Canada Secretariat, Access to Information and Privacy Statistical Report for 2021–2022, <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/information-privacy-statistical-report-2021-2022.html>.



requires consultations which cannot reasonably be completed within the original time limit. In practice, however, public authorities very frequently take advantage of this highly discretionary power to claim long delays for responding to requests. This seriously undermines the right to information. Indeed, it can render time-sensitive requests entirely moot, for example where journalists are working on tight deadlines.

16. There are a number of practical options for limiting the scope of this discretion to delay. For example, public authorities could be required to obtain permission from the Information Commissioner for delays beyond the initial 30-day deadline, as is the case in some other Canadian jurisdictions.²¹ Alternatively, an absolute maximum limit, for example of 60 days, could be imposed for responding to requests. Slovenia, for example, allows for extensions of no more than 30 additional days²² and Sri Lanka requires responses within 14 working days, with an option to extend for no more than 21 additional working days.²³
17. Bold measures, such as penalties for failures to respect time limits, are also warranted to address unreasonable delays, which constitute one of the greatest weaknesses of Canada's RTI regime. In India, for example, information commissions can impose sanctions on officials who have, in bad faith, unduly delayed in responding to requests.²⁴
18. Another missing element from the ATIA is a legislated duty to respond to requests as soon as possible. This would help encourage simple requests to be processed more quickly instead of the often-practised approach of waiting until the legislated deadline of 30 days to respond to them.

Fees

19. The ATIA also fails to respect international standards regarding fees, although this problem used to be far more serious before the waiver of all fees for accessing information which was introduced by the May 2016 Interim Directive on the

²¹ See, for example, the Nova Scotian Freedom of Information and Protection of Privacy Act, Chapter 5 of the Acts of 1993, section 9, <https://nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf>.

²² *Access to Public Information Act*, Official Gazette of RS. No. 24/2003, Article 24(1), <https://www.rti-rating.org/wp-content/uploads/Slovenia.pdf>.

²³ *Right to Information Act*, No. 12 of 2016, section 25(5), <https://www.rti-rating.org/wp-content/uploads/Sri-Lanka.pdf>.

²⁴ *The Right to Information Act*, No. 22 of 2005, Articles 19(8)(a), 20(2) and 20(5), <https://www.rti-rating.org/wp-content/uploads/India.pdf>.



Administration of the Access to Information Act.²⁵ Since the right to information is a human right, no fees should be imposed simply for exercising that right through making a request for information. The ATIA currently allows for fees of up to \$25 to be charged for lodging a request (section 11) and the fee is presently set by the government at \$5 through regulation,²⁶ which can be changed by the Minister. The cost to collect these fees is more than the revenue they generate. More importantly, the underlying rationale for the fee – the deterrence of requests – runs counter to human rights and is unnecessary. The ATIA already has a mechanism by which frivolous or vexatious requests can be summarily rejected (section 6.1(1)). Furthermore, countries which do not impose fees for making requests have not found that this leads to large numbers of requests. Conversely, India, which does charge a fee, has a truly vast volume of requests. Most importantly, it is wrong as a matter of principle because people should not have to pay to exercise a human right.

Other Concerns

20. Certain other aspects of the requesting procedures under the ATIA fall short of best practices. Specifically:

- Although certain elements of the requesting procedures are set out in the Act and Regulations, there is no legally mandated uniform request procedure and, as a result, request procedures vary across public authorities. Better practice is to legislate uniform and simple request procedures for all public authorities so as to simplify matters for requestors.
- The ATIA allows public authorities to transfer requests directly to other public authorities. A proper system of transfers is important, since requestors do not always know which public authority holds the information they are seeking and an inadequate transfer system could force them to make time-consuming duplicative requests. However, allowing for transfers where the public authority which received the initial request has the information and is able to process the request undermines efficiency and creates delays for requestors. The ATIA unfortunately allows transfers simply because another public authority has a greater interest in the record (section 8), ultimately a subjective test. Better practice is to limit transfers to situations where the public authority which received the initial request does not have the requested information but knows of another public authority which does.

²⁵ 5 May 2016, <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310>.

²⁶ *Access to Information Regulations*, SOR/83-507, section 7(1)(a), <https://laws-lois.justice.gc.ca/eng/regulations/SOR-83-507/page-1.html#h-878462>.



Recommendations

- Extensions beyond the 30-day initial deadline should be subject either to a requirement to obtain prior permission from the Information Commissioner or, ideally, to a hard overall maximum limit, such as of 60 days.
- Effective measures should be put in place to deter officials from unduly delaying in responding to requests for information, such as by empowering the Information Commissioner to levy administrative fines for wilful abuse of the rules.
- The ATIA should abolish fees for lodging requests and establish uniform request procedures for all public authorities.
- Transfers of requests should be allowed only when the public authority concerned does not have the requested information and knows of another authority which does.

Exceptions

International Standards for Exceptions

21. An RTI law should create a presumption in favour of access to all information held by public authorities, subject only to a narrow regime of exceptions. Under international standards, the right to information may be subject to certain limited restrictions but only where they: 1) are set out in law and protect only limited legitimate interests; 2) apply only where disclosure would pose a risk of harm to a protected interest; and 3) do not apply where, notwithstanding a risk of harm, the public interest in disclosure outweighs that harm, known as the public interest override.²⁷ In addition, all exceptions that protect public interests (as opposed to private interests such as privacy) should be subject to sunset clauses, so that they no longer apply once sufficient time has passed such that the information is no longer sensitive. Sunset clauses should be set at no longer than 20 years, in line with international practice.²⁸
22. The list of legitimate interests is well established under international law and is limited to: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; the fair administration of justice; legal advice privilege; privacy; legitimate commercial and other economic interests;

²⁷ See Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents, 21 February 2002, clause IV, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc.

²⁸ See the better practice countries for Indicator 32 of the RTI Rating, <https://www.rti-rating.org/country-data/by-indicator/32/>.



management of the economy; conservation of the environment; and legitimate policy making and other operations of public authorities.²⁹

Complete Exclusions

23. The ATIA completely excludes from its scope “confidences of the Queen’s Privy Council for Canada”, also known as Cabinet confidences (section 69). Section 69 defines these confidences broadly to cover a wide range of information. Complete exclusions also apply to information held by the Canadian Broadcasting Corporation other than general administration information (section 68.1) and Atomic Energy of Canada Limited other than general administration information or information about the operation of regulated nuclear facilities (section 68.2). These exclusions are not subject to a harm test, a public interest override, review by the Information Commissioner or, other than Cabinet confidences, a sunset clause.

Overbroad Exceptions

24. Some of the exceptions in the ATIA are drafted too broadly so that, even if they do refer to legitimate confidentiality interests, they also cover material which should not be secret. For example, a series of exceptions cover information which was obtained during different sorts of investigations, such as law enforcement investigations (section 16(1)(a)), investigations conducted by various public authorities (section 16.1(1)), investigations conducted by the Commissioner of Lobbying (section 16.2(1)) and investigations under the Canada Elections Act (section 16.3). Such investigations may cover information which is exempt by virtue of other exceptions, such as privacy, and in some cases releasing information might harm the investigation but this is not a condition for withholding the information under these exceptions. Section 21(1) includes a number of vastly overbroad exceptions, including sub-section (a) which covers all advice developed by or for a public authority.
25. Another oft-abused exception is section 23, which provides an overbroad exception for solicitor-client privilege which extends to “the professional secrecy of advocates and notaries”. The ordinary role of solicitor-client privilege is to protect the frank exchange of information between individuals and their solicitors, including on topics which may be sensitive such as marital infidelity or criminal behaviour. However, no such sensitivity exists in communications between government lawyers and public officials which pertain to policy development or other (regular) forms of government decision-making. In the government context, we suggest that the scope of this exception be

²⁹ Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents, 21 February 2002, clause IV,

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc.



limited to “litigation privilege”, which is also specifically mentioned in that section.

Harm-tested Exceptions

26. Some exceptions protect legitimate interests but lack the necessary harm test and therefore allow for information to be withheld even when disclosure would cause no harm. These include exceptions covering information received in confidence from other States or governments (section 13(1)), information related to law enforcement investigative techniques (section 16(1)(b)), information treated as confidential by crown corporations (section 18.1(1)), financial or commercial information which is treated as confidential by a third party (section 20(1)(b)) and draft reports or internal working papers related to government audits (section 22.1). A number of other exceptions also lack harm tests. Some of these are “category-based” exceptions which protect entire classes of documents, such as “all draft reports related to government audits” rather than protecting an interest against harm. Class exceptions can never be legitimate since some records covered by the category will not be sensitive.

Public Interest Override

27. One step that would go a long way in terms of ameliorating problems with the regime of exceptions would be to enact a blanket public interest override. Currently, the ATIA contains only a limited public interest override which applies to third-party trade secrets and financial, scientific or technical information, allowing for disclosure if it “would be in the public interest as it relates to public health, public safety or protection of the environment” or where “the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party” (section 20(6)). The scope of this was effectively extended by the Supreme Court of Canada in *Criminal Lawyers’ Association v. Ontario (Public Safety and Security)*, which held that the public interest must be taken into account when deciding whether or not to apply discretionary exceptions (i.e. ones which provide that public authorities “may” refuse to disclose information as opposed to “shall” refuse.³⁰ As a result, these exceptions are now all subject to some form of public interest override. However, most mandatory exceptions are not (such as those found in sections 13, 16(3), 16.1, 16.2, 16.4, 16.5, 19(1), 20.1, 20.2 and 20.4).

28. Should the government have concerns about a lack of consistency in the application of the public interest override, it could stipulate in the ATIA a non-exhaustive list of considerations to be taken into account when assessing the public interest. Recommendation No. 17 of a 2016 parliamentary committee report on reforming the

³⁰ 2010 SCC 23, para. 48, <http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html>.



ATIA suggested that this list could include open government objectives; environmental, health or public safety implications; and whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.³¹ Additional factors, such as facilitating public participation and exposing corruption, should also be included in the list.

Secrecy Provisions in Other Laws

29. Schedule II of the ATIA contains a list of 65 secrecy provisions in other laws that apply notwithstanding its provisions (section 24(1)). Not all of these protect legitimate interests, are harm tested, and include public interest overrides and sunset clauses (for those that protect public interests) of 20 years or less. For example, section 107 of the Customs Act prohibits the disclosure of any information obtained by or on behalf of either the Minister of Public Safety and Emergency Preparedness or the Minister of National Revenue involving customs or the collection of public debts. This renders an entire category of information secret rather than narrowly protecting a legitimate interest against harm, and it also lacks a public interest override and sunset clause. A number of other provisions in this list are similarly problematical.

Sunset Clauses

30. The ATIA currently only provides for a few sunset clauses. Section 16(1)(a) creates a sunset clause of 20 years for information prepared or obtained by a public investigative body for purposes of a lawful investigation pertaining to a breach of the law or a threat to national security. However, many other exceptions, including those in sections 16(1)(b)-(d), overlap with the types of information covered in section 16(1)(a) and yet do not have a sunset clause, which would allow public authorities to avoid the sunset clause simply by relying on these other exceptions. Section 22.1(1) creates a sunset clause of 15 years for information pertaining to government audits, but it does not protect a legitimate interest to begin with. This leaves section 21(1) (government advice, 20 years), section 69(3)(a) (Cabinet confidences, 20 years) and section 69(3)(b)(ii) (certain background documents which inform non-public Cabinet decisions, four years since the decision was made) as the only effective sunset clauses. Better practice would be to create a standalone provision that subjects every exception in the ATIA which protects a public interest to a sunset clause whereby information is no longer exempt from disclosure after 20 years.

³¹ *Report of the Standing Committee on Access to Information, Privacy and Ethics*, June 2016, 42nd Parliament, 1st Session, p. 67, <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf>.



31. If necessary, a provision could be added to the ATIA to allow, exceptionally, for extensions to be made to sunset clauses through a special procedure where the information really did remain sensitive beyond 20 years, which might sometimes be the case for national security information.

Recommendations

- The ATIA should be amended to protect only interests which are recognised as legitimate under international law and to remove all blanket exclusions.
- All exceptions under the ATIA should be harm-tested and subject to a clear public interest override.
- All exceptions under the ATIA which protect public interests should be subject to sunset clauses so that they no longer apply after a maximum of 20 years.
- All of the provisions in Schedule II of the ATIA should be reviewed and retained only if they protect legitimate interests, are harm-tested and subject to a public override and, where they protect public interests, are subject to a sunset clause of not more than 20 years.

The Powers of the Information Commissioner

32. CLD and CFE welcome the fact that, with the adoption of Bill C-58, the Information Commissioner now has order-making powers (see section 36.1 of the ATIA). However, an effective system should be added for enforcing the orders of the Information Commissioner through the courts, for example by certifying them as orders of the Federal Court. While public authorities normally do comply with (or appeal) binding orders of the Information Commissioner, better practice would be to provide for an enforcement mechanism on the off chance that authorities do not comply. Such mechanisms exist, for example, in British Columbia,³² Alberta,³³ Quebec,³⁴ Prince Edward Island,³⁵ where public authorities must comply with the Information Commissioner's orders or face a contempt of court order. In Ontario, wilfully defying an order of the Information Commissioner is a criminal offence punishable by a fine of

³² *Freedom of Information and Protection of Privacy Act*, RSBC 1996, Chapter 165, sections 59 and 59.01, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96165_05#section59.

³³ *Freedom of Information and Protection of Privacy Act*, RSA 2000, Chapter F-25, sections 72(6) and 74, <https://www.qp.alberta.ca/documents/Acts/F25.pdf>.

³⁴ *Act respecting Access of documents held by public bodies and the Protection of personal Information*, Chapter A-2.1, section 144, <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-2.1>.

³⁵ *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, sections 66(6) and 68(1), https://www.princeedwardisland.ca/sites/default/files/legislation/f-15-01-freedom_of_information_and_protection_of_privacy_act.pdf.



CAD 5,000.³⁶

33. A second issue is the scope of appeals to the Federal Court from decisions of the Information Commissioner. Currently, the Federal Court conducts a *de novo* appeal of “matters” that are the subject of the Commissioner’s reports or orders (sections 41-48). Consideration should be given to amending this to provide instead for judicial review of the orders of the Information Commissioner. At minimum, public authorities should be precluded from introducing new claims about exceptions following an appeal before the Information Commissioner.

Recommendations

- The ATIA should provide for an effective enforcement mechanism for orders of the Information Commissioner.
- Consideration should be given to amending the ATIA to provide for judicial review of orders of the Information Commissioner rather than *de novo* appeals and, at a minimum, public authorities should be precluded from introducing new claims about exceptions upon appeal.

Sanctions and Protections

Sanctions for Breaching the Right to Information

34. Poor implementation remains a significant challenge in Canada’s RTI regime. Of 40,889 RTI requests which were responded to in fiscal year 2021–22, only 70.7% were completed within the legal timelines (including any extensions claimed by public authorities) with “workload” being cited as the reason for delays in 60.7% of the cases which were not completed within the legal timelines.³⁷ Canada’s Treasury Board has noted that a decade ago the proportion of requests completed within legal timelines was “stable at 86% and began to decline in 2015–16, reaching a low of 65% in 2020–21”.³⁸ Thus, although the proportion of responses to RTI requests which complied with legislated timelines reached its nadir during the initial part of the COVID-19 pandemic, the trend of deteriorating compliance with ATIA legal obligations began well before

³⁶ *Freedom of Information and Protection of Privacy Act*, RSO. 1990, c. F.31, s. 61(1)(f),

<https://www.canlii.org/en/on/laws/stat/rso-1990-c-f31/latest/rso-1990-c-f31.html>.

³⁷ Treasury Board of Canada Secretariat, Access to Information and Privacy Statistical Report for 2021–2022, <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/information-privacy-statistical-report-2021-2022.html>.

³⁸ Treasury Board of Canada Secretariat, Access to Information and Privacy Statistical Report for 2021–2022, <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/information-privacy-statistical-report-2021-2022.html>.



COVID-19 and reflects longstanding systemic issues in the RTI system.

35. The failure to respect legal obligations, including in respect of legal timelines, is a major impediment to the proper realisation of RTI in Canada. Key to ensuring respect for RTI is for there to be an effective system for accountability and sanctions for failing to respect the law. While the ATIA contains certain sanctions for obstructing the Information Commissioner (section 67) and for unauthorised destruction, altering, mutilation, concealment or falsification of records, as well as directing, proposing, counseling or causing others to do these offences (section 67.1), there is no sanction for more routine instances of obstructing RTI, such as by failing to respect time limits. Also missing from the ATIA is any system of redress for systemic failures to implement RTI obligations, which could be accomplished, for example, by authorising the Information Commissioner to order public authorities which are regularly failing in their RTI obligations to undertake measures to address those structural changes.

Protections for Whistleblowers

36. To give full effect to the public's right to know, RTI legislation should be accompanied by robust protections for whistleblowers to protect disclosures which are otherwise illegal but which are justified in the public interest. Such rules are needed generally as a safeguard for transparent and accountable democratic institutions but the need for such protections acquires even more salience where the regime for authorised disclosures is deficient, as is the case in Canada.
37. The Public Servants Disclosure Protection Act (PSDPA), which first came into effect in 2007, provides for Canada's current whistleblowing regime. Unfortunately, this legislation has proven to be ineffective at protecting whistleblowers. Its poor performance was highlighted in a 2021 global study by the Government Accountability Project and the International Bar Association which ranked Canada, Lebanon and Norway as tied for last place from among all of the 49 whistleblowing laws they assessed.³⁹
38. In 2017, the shortcomings of Canada's whistleblowing laws were set out comprehensively in a report by CFE, as well as in a report by a Parliamentary Committee, both of which recommended sweeping changes to Canada's whistleblowing

³⁹ Government Accountability Project and International Bar Association, "Are whistleblowing laws working? A global study of whistleblower protection litigation", 2021, pp. 10 and 75, https://s3.documentcloud.org/documents/21189854/are-whistleblowing-laws-working-report_02march21.pdf.



protections.⁴⁰ Despite this clear evidence of the inadequacy of Canada's whistleblowing regime and concrete recommendations for improvements, Canada has yet to reform the system.

Recommendations

- An effective regime of sanctions for wilfully undermining the right to information should be added to the ATIA.
- Canada's whistleblowing regime should be improved significantly, including by implementing the recommendations of the 2017 Report of the Standing Committee on Government Operations and Estimates.

Promotional Measures

Mandates to Promote RTI

39. For individuals to be able to exercise their right to information successfully, they must be informed of their right and how to go about exercising it. To this end, better practice is for independent oversight bodies to be specifically mandated to conduct promotional activities in support of RTI, such as by undertaking public outreach through user-friendly guides to RTI and or engaging in awareness raising activities at schools.⁴¹ The mandate of Canada's federal Information Commissioner does not extend to promoting RTI generally or to engaging in public awareness activities.

Duty to Document

40. The ATIA fails to impose any duty on public authorities to document important decision-making processes. Such a duty would address the problems of officials conducting business in ways that fail to create records which would be subject to the ATIA, such as orally. There should also be clearer prohibitions or at least strict limits on

⁴⁰ Centre for Free Expression, *What's Wrong with Canada's Federal Whistleblowing System: An analysis of the Public Servants Disclosure Protection Act (PSDPA) and its implementation*, 14 June 2017, <https://cfe.torontomu.ca/publications/whats-wrong-canadas-federal-whistleblower-legislation>; and Report of the Standing Committee on Government Operations and Estimates, *Strengthening the Public Interest within the Public Servants Disclosure Protection Act*, 42nd Parliament, First Session, June 2017, <https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf>.

⁴¹ See RTI Rating, Indicators 55 and 56 for examples of better practices in this respect, <https://www.rti-rating.org/country-data/by-indicator/55/> and <https://www.rti-rating.org/country-data/by-indicator/56/>.



the use of private devices to conduct official decision-making business. Although the ATIA technically covers these means of communication, it can be very difficult to capture content on them for purposes of responding to requests for information.

Recordkeeping Standards

41. For an RTI system to function properly, institutional recordkeeping should meet certain minimum standards. Under sections 70(1)(c) and 70(1)(d) of the ATIA, respectively, the designated minister is required to prepare directives and guidelines for government institutions and to cause statistics to be collected on an annual basis on ATIA implementation. However, other than these minimal requirements, the ATIA does not establish substantive recordkeeping requirements. Better practice is to legislate minimum standards of recordkeeping for public authorities to follow, as is the approach in the RTI laws of many other States.⁴²

Recommendations for Canada

- The ATIA should be amended to give the Information Commissioner a mandate to promote RTI and to impose a duty to document and minimum record-keeping standards on public authorities.

Conclusion

42. When it first adopted the ATIA in 1982, Canada was a world leader on the right to information but that accolade is now a thing of the past. Canadians have been calling for decades for root-and-branch reform of the ATIA; the piecemeal approach that successive Canadian governments have taken thus far is simply not good enough. The need for Canada to break the cycle of over-promising and under-delivering on access to information reform is now long overdue. Otherwise, Canada will continue to languish behind other countries, hardly moving from its current position of 51st place globally from among countries with national right to information laws.⁴³ It is time for the government to act decisively not only to deliver properly on the promises it made in 2015 but to address all of the major right to information law reform needs outlined in this Submission.

⁴² See RTI Rating, Indicator 57, <https://www.rti-rating.org/country-data/by-indicator/57/>.

⁴³ RTI Rating, Country Page, <http://www.rti-rating.org/country-data/>.

