CENTRE FOR LAW AND DEMOCRACY

Failing to Measure Up:

An Analysis of Access to Information Legislation in Canadian Jurisdictions

September 2012

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Executive Summary[1]

This Analysis discusses the strengths and weaknesses of Canada's federal, provincial and territorial access to information laws. It is based on an assessment of these laws using the RTI Rating, an internationally renowned analytical tool that involves 61 Indicators to assess the strength of right to information laws. The RTI Rating, which was developed by the Centre for Law and Democracy and its partner organisation, Access Info Europe, based in Spain, has previously been applied to assess every national access to information law as part of the Global RTI Rating.

British Colombia proved to have the strongest legal framework for the right to information in Canada, scoring 98 points out of a possible 150 (65%). New Brunswick, Alberta and Canada's national framework tied for last place, with just 79 points (53%). Every jurisdiction in Canada fared poorly from an international perspective. Using the Global RTI Rating, British Columbia would place 25th, tied with Uganda, just behind Indonesia and just ahead of Peru. By contrast, Alberta, New Brunswick and Canada would place 55th in the world, behind the Slovak Republic, Colombia and Mongolia and just ahead of Angola and Thailand.

The Analysis points to severe problems with access to information frameworks across the country. The three biggest problems, all of which recur in every Canadian law, are limits on scope in terms of public authorities, procedural weaknesses, and overly broad regimes of exceptions. Every access law in Canada contains gaping exclusions for important public authorities, which often either wholly or substantially exclude the legislature, judiciary and cabinet. Most laws allow public authorities to charge exorbitant fees of up to tens of thousands of dollars, and to delay granting access for far too long, with wait times of up to two-and-a-half years not being unknown. The problem of overly broad exceptions grants public authorities tremendous leeway to avoid disclosing information they would rather keep secret.

The Analysis probes these and other weaknesses in Canada's access laws, providing specific recommendations on how to bring these laws more fully into line with international standards.

It is hoped that this dismal performance, along with the accompanying detailed description of just what is wrong with Canada's access laws and how they should be improved, will trigger long overdue reforms to the Canadian framework for access to information.

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[1] This Analysis was authored by Michael Karanicolas, Legal Officer, Centre for Law and Democracy, with support and editing by by Toby Mendel, Executive Director, Centre for Law and Democracy.

Introduction

There is a story told among journalists of a provincial minister entering a Cabinet meeting and retrieving an enormous tranche of documents from his briefcase. He places them on the conference table and looks around the room, before packing them back into his briefcase. "Good," he says under his breath, "now I don't have to release them."

Although the story may be apocryphal, the official's behaviour would be a perfectly legal way to circumvent his disclosure obligations in most Canadian jurisdictions. What is more, his behaviour would be entirely consistent with the general approach towards openness found in access to information legislation across Canada. Through loopholes, charges, exceptions and extensions, Canada's access to information laws seem custom designed to enable politicians and bureaucrats to avoid disclosing anything that they would rather keep secret.

It is hardly revolutionary to suggest that Canada's approach to transparency is problematic. From taxpayer-funded helicopter holidays[2] to $16 glasses of orange juice,[3] any Canadian who follows the news will have seen the earmarks of a lax attitude towards accountability. But what this Analysis reveals is the extent to which legal regimes for access to information are outdated and weak in each of the 14 jurisdictions across Canada.

This Analysis is based on an assessment of the legal frameworks for access to information in each Canadian jurisdiction – the national framework, ten provinces and three territories – using the RTI Rating. The RTI Rating is an analytical tool which was developed by the Centre for Law and Democracy (CLD), along with another international NGO, Access Info Europe (AIE), based in Madrid. It measures the strength of legal frameworks for the right to information (RTI), assigning scores based on performance across 61 Indicators grouped into seven categories. The indicators are based on established international standards and better national practice around the world. This Canada-wide assessment follows the Global RTI Rating, launched on International Right to Know Day, 28 September 2011, in which CLD and AIE rated every national RTI law globally.[4]

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[2] CBC News, "MacKay helicopter story doesn't fly, MPs say", Canadian Broadcasting Corporation, 2 December 2011. Available at: http://www.cbc.ca/news/politics/story/2011/12/02/pol-mackay-friday.html.

[3] CBC News, "Bev Oda retiring with pride and no OJ regrets", Canadian Broadcasting Corporation, 31 July 2012. Available at: http://www.cbc.ca/news/politics/story/2012/07/31/pol-oda-retires.html.

[4] Detailed information about the rating, as well as the scores of each country, is available at: http://www.law-democracy.org/live/global-rti-rating/.

The results of the Canada-wide rating exercise are striking. Canada's best performing jurisdiction, British Columbia, scored only 97 points out of a possible total of 150. The worst performers, Alberta, New Brunswick and Canada nationally, were 20 points behind, with scores of just 79 points. The table below shows the total scores of all Canadian jurisdictions:

Jurisdiction	Total Score (out of 150)
1. British Columbia	97
2. Manitoba	94
3. Newfoundland	92
4. Yukon	91
5. Prince Edward Island	90
6. Ontario	89
7. Nova Scotia	85
8. Northwest Territories	82
8. Nunavut	82
10. Quebec	81
11. Saskatchewan	80
12. Alberta	79
12. Canada (national law)	79
12. New Brunswick	79

But before British Columbia celebrates her success, it is worth remarking that she still only achieved a 65% score, while the weakest jurisdictions got only 53%.[5] In stark contrast to this, the best international performer, Serbia, got 135 points, or a score of 90%, followed by India and Slovenia with 130 points (87%).

In 1982, when Canada's national law was first adopted, Canada was among the first countries to boast this important democratic achievement. But while standards around the world have advanced, Canada's access laws have stagnated and sometimes even regressed. Newfoundland, for example, passed an amending law in June 2012 that significantly weakened its access regime.[6] Comparing the scores for Canadian jurisdictions to the Global RTI Rating, British Columbia's score would place them 25th out of 93 national laws, tied with Uganda, just behind Indonesia and just ahead of Peru. By contrast, Alberta, New Brunswick and Canada would place

[5] The full scoresheets, as well as links to the different laws and regulations, are available at: http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/.

[6] See http://www.law-democracy.org/live/newfoundland-amendments-would-significantly-weaken-openness/.

55th in the world, behind the Slovak Republic, Colombia and Mongolia and just ahead of Angola and Thailand.[7]

It should be abhorrent to Canadians to know that their country rates 55th in the world in a vital human rights indicator. What is more, Canada's ranking will continue to decline so long as no action is taken to reform Canadian access laws, as more and more countries pass strong laws or improve their legislative frameworks. The past year has seen new RTI laws passed in Yemen and Brazil, both of which now rank far ahead of Canada.

By measuring Canada's access frameworks against international standards, this Analysis provides a useful mapping of the main weaknesses of these laws. It is hoped that the Analysis will help stimulate and focus advocacy and reform efforts across the country. Canadians deserve better than yet another year of stagnation and stonewalling on this key human right.

The Methodology

The RTI Rating is a tried and tested methodology for assessing the strength of a legal framework for RTI. At the heart of the RTI Rating is a set of 61 Indicators, each of which corresponds to a feature of a strong RTI law, such as clear timelines for responding to requests or the ability of oversight bodies to review information which a public authority claims is confidential. These are drawn primarily from the extensive body of international standards on RTI, developed the UN human rights bodies, as well as their regional counterparts. These standards are supplemented by accepted better practices at the national level. An Advisory Council of leading global experts on RTI worked with CLD and AIE to develop the Indicators.

The Indicators are grouped into seven main categories, as follows:

Section	Max Points
1. Right of Access	6
2. Scope	30
3. Requesting Procedures	30
4. Exceptions and Refusals	30
5. Appeals	30
6. Sanctions and Protections	8
7. Promotional Measures	16

[7] The full international RTI Rating is available at: http://www.law-democracy.org/live/global-rti-rating/.

Total score	150

The four central features of an RTI system – Scope, Requesting Procedures, Exceptions and Refusals, and Appeals – are given an equal weighting of 30 points, while the other three features are given less weight so that overall the Indicators establish a balance of weighting among the different legal features required to ensure respect for RTI in practice.

Three observations are in order. First, the RTI Rating only assesses the legal framework for RTI, not the way in which this framework is implemented. But although the strongest law in the world would be useless if it was not properly implemented, the fact remains that a strong legal framework is the backbone of a good RTI system. In addition, although this Analysis applies the RTI Rating in a comparative fashion, this comparison is merely the jumping off point for a substantive examination of the strengths and weaknesses of the different frameworks. Many other excellent studies have looked into Canadian jurisdictions' record at implementing their access to information laws, which have highlighted largely poor performances across the country. These studies have, among other problems, documented long wait times, poor responsiveness, overuse of exceptions and "creative" approaches to interpreting access provisions.[8] This strongly corroborates our point that a good law is a necessary precondition for strong implementation.

Second, the RTI Rating does not cover proactive publication, even though this is a key element of a strong RTI regime. The underlying reason for this is that in many countries, actual practice on proactive publication has gone so far that the minimum requirements set out in the law are no longer really relevant. Trends towards e-government and open data have rendered this even more the case. Many Canadian jurisdictions exemplify this. Canada's provincial and territorial laws contain almost no requirements for proactive disclosure, but across every jurisdiction in Canada public authorities have policies and practices of putting information in the public domain on a proactive basis.

Third, the RTI Rating is an extremely stringent assessment, based on the highest international and comparative standards. A perfect legal framework would score 150 points. However, no legal framework in the world is perfect, and even the "model" laws CLD has rated have fallen short on some indicators. However, the standards in the RTI Rating are not in any way unrealistic or unachievable. As noted

[8] Canadian Newspaper Association, *National Freedom of Information Audit 2012* (2012). Available at: http://www.newspaperscanada.ca/sites/default/files/Freedom-of-Information-Audit-2012-FINAL.pdf. See also: Vincent Gogolek, Huffington Post, "Staggering decline in B.C. Freedom of Information Responses", 13 September 2012. Available at: http://www.huffingtonpost.ca/vincent-gogolek/bc-foi-freedom-information-requests-response_b_1881543.html.

above, the top scoring country – Serbia – got 135 points, or 90%, closely followed by India and Slovenia with 130 points, demonstrating that very high values are possible.

1. Right of Access

Jurisdiction	Score (out of 6)
Manitoba	4
Newfoundland	4
Northwest Territories	4
Nova Scotia	4
Nunavut	4
Ontario	4
Yukon	4
Alberta	3
British Columbia	3
Canada (national law)	3
New Brunswick	3
Prince Edward Island	3
Saskatchewan	2
Quebec	1

The first category in the ranking, Right of Access, measures the degree to which the legislative framework recognises access to information as a fundamental right. All jurisdictions scored one point in this category by virtue of the Supreme Court case of *Criminal Lawyers' Association v. Ontario (Public Safety and Security)*.[9] In that case, the Supreme Court of Canada recognised a derivative right to information, based on the right to freedom of expression. However, this was limited to situations where access "is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned."[10] This falls well short of international standards, pursuant to which the right to information should be recognised as a freestanding right, which may be limited only where this is necessary to protect an overriding right (along the lines of the rights override recognised in section 1 of the Canadian Charter of Rights and Freedoms).

[9] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, [2010] 1 S.C.R. 815.
[10] *Ibid.*, para. 5.

This category also allocates points for laws which establish a clear presumption in favour of disclosure, and for strong and positive interpretive rules. These types of statements require decision makers to apply the law in a manner which best gives effect to the right of access, rather than using exceptions as a sort of shopping list of excuses not to provide information.

Generally, the several jurisdictions which scored three points included a statement that the law applies to all information subject only to limited and narrowly construed exceptions, while those that scored four points also included a purposive statement about the role of access to information in fostering accountability in government. The exceptions to this are Saskatchewan, where which scored just two points because their law contains only a weak formulation that requesters have "a right to records", and Quebec, whose law fails either to establish a presumption in favour of disclosure or to impose positive interpretive requirements on decision-makers.

Key Recommendations:

- The right to information should be recognised as being fully protected under the Constitution of Canada, subject to restriction only in accordance with the test for restrictions which applies to all rights.
- Quebec and Saskatchewan should amend their access laws to create a clear presumption in favour of access and to provide for positive interpretation of the law so as to give effect to the benefits that the right to information brings, including more accountable government.

2. Scope

Name	Score (out of 30)
Nova Scotia	23
British Columbia	21
Newfoundland	20
Northwest Territories	19
Nunavut	19
Ontario	19
Yukon	19
Manitoba	18
New Brunswick	18
Saskatchewan	17

Prince Edward Island	16
Quebec	15
Alberta	13
Canada (national law)	13

There are three aspects to scope of a right to information law. The first is whether the right of access extends to everyone, including foreigners and legal entities. Most Canadian jurisdictions performed well here, with the exception of Canada's national law, which only grants access to persons or legal entities based in Canada. This is problematic since human rights apply to everyone. Furthermore, international institutions and foreigners can play an important role in promoting accountability in Canada.

Second, scope refers to the categories of information that are covered by the law, which according to international standards should be extremely broad, basically including any communicative material in recorded form that public authorities hold or have access to. Canadian jurisdictions generally performed very well here, and in most jurisdictions the laws apply regardless of the form in which the information is recorded. The major exception to this is Quebec, which limits the ambit of their law to documents kept by a public authority in the exercise of its duties, meaning any ancillary information held by public authorities is out of bounds. Much more problematic is that Quebec's access law explicitly rules out any information the disclosure of which would require additional processing. This prevents users from getting information which a public authority holds, but which is spread across different documents or which needs to be extracted from a database. For example, if a requester wanted to know how much money an authority spent on a particular type of expenditure, and that expenditure was not specifically tracked, the authority would be justified in refusing the request, rather than totalling up their expenditures to find an answer to the question. This is obviously extremely problematic.

Third, scope refers to the public authorities to whom the law does and does not apply. Here, Canadian jurisdictions performed abysmally, with every law excluding major public authorities. Saskatchewan, Prince Edward Island and Northwest Territories exclude the Executive Council, and Cabinet is excluded from Canada's national law. Quebec's access law exempts ministers' offices, unless a minister deems the disclosure to be "expedient". This type of clause, which makes disclosures discretionary, is more or less useless as a tool of accountability, since any information that a Minister deems sensitive will obviously not be released.

Every jurisdiction except Nova Scotia also provides broad exclusions relating to the legislature. Alberta, British Columbia, Nunavut, Northwest Territories, Newfoundland, Canada, Saskatchewan, Yukon and New Brunswick all exclude the

offices of legislators, while Manitoba excludes all legislators except ministers. Quebec includes documents from their National Assembly, but only where its members deem the disclosures to be expedient. Ontario's access law only applies to expenses of opposition leaders and their employees, seemingly imposing stricter transparency obligations on the opposition parties than on government. Another puzzling clause is found in Prince Edward Island's access law, which includes officers of the legislature, and then provides an exception for records held or created by such an officer relating to their duty. This seems to imply that requesters will only be allowed access officers' personal correspondence.

As an internationally recognised human right, all public authorities should be subject to the right to information, including the judiciary. Canada's access legislation also falls short in this regard. The judiciary is broadly excluded from the ambit of the access to information laws in Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan, Yukon and Canada. Alberta, British Columbia and Prince Edward Island only apply their law to administrative judicial records, while Nova Scotia includes the judiciary as a whole but excludes administrative judicial records, records of judges and records of judges' support services, calling into question precisely what judicial information is covered.

Nearly every jurisdiction also excludes other boards and agencies, such as Canada's Commissioner of Official Languages, Nova Scotia's Conflict of Interest Commissioner and Alberta's Registrar of Corporations. No jurisdiction in Canada fulfils the international standard of applying the law to all private institutions that perform a public function or receive public money, though Ontario is notable in that its law applies to hospitals, and Quebec's law applies to documents held by professional orders and to private agencies that receive revenue from the Consolidated Revenue Fund.

In sum, the exclusion of major public authorities is a significant shortcoming and represents one of the biggest cross-jurisdictional weaknesses uncovered by this Analysis. Of the 22 points that the RTI Rating allocates to scope in terms of public authorities covered, only three provinces scored higher than 50%: Nova Scotia (15, 68%), British Columbia (13, 59%) and Newfoundland (12, 55%). Considering these exclusions, particularly for the very legislators that drafted and approved these laws, it is impossible to escape the conclusion that Canada's lawmakers think transparency is a fine thing, so long as it does not apply to them.

Key Recommendations:

- Canada should extend the right of access to everyone.
- Quebec should cover all information held by a public authority and remove the limitation relating to requests for information which requires further

processing.

- Every jurisdiction in Canada should amend their access to information law so that it covers all public authorities. This should, in particular, include the executive, legislature and judiciary, as well as statutory boards and tribunals, crown corporations, and private entities that perform a public function or receive significant public funding.

3. Requesting Procedures

Jurisdiction	Score (out of 30)
Newfoundland	21
Northwest Territories	21
Nunavut	21
Yukon	21
British Columbia	20
Prince Edward Island	20
Alberta	19
Manitoba	19
Quebec	19
New Brunswick	18
Saskatchewan	18
Nova Scotia	17
Canada (national law)	15
Ontario	14

Clear, fair and efficient procedures for access are a vital part of a strong access to information regime. By global standards, Canada's bureaucracy is organised and relatively well-resourced. Consequently, in indicators under this category, Canadian jurisdictions excel. For example, requesting forms across the country are clear and straightforward, and only require requesters to include a description of what they want and basic contact information. In addition, public officials generally have a duty to assist applicants in filing their requests, and to accommodate requesters with disabilities. Most jurisdictions also allow requesters to specify their preferred form of access, such as inspecting original documents or receiving a copy of them.

However, there are two major issues under this category where nearly every Canadian jurisdiction has severe problems. The first is with regard to timelines for responding to access requests. This is vital to the ability of the access system to function properly. Delay is a classical way of effectively denying requests.

Every access law in Canada states that public authorities should respond to requests within 30 days. However, every law in the country also provides for extensions to this timeframe. Apart from Yukon and Quebec, there are no firm limits as to how long timeline extensions may be. These jurisdictions also lack clear rules on the circumstances in which extensions can be imposed. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island have a default period of 30 additional days, but allow for further extensions with the permission of the oversight body (e.g. information commissioner). Canada, Ontario, Northwest Territories and Nunavut do not even include this protection, permitting extensions for "a reasonable period". In practice, this has led to delays in responding to requests of up to two-and-a-half years.[11] The problem is exacerbated by the fact that, apart from Newfoundland, Nunavut, Prince Edward Island and Northwest Territories, Canadian access laws fail to require public authorities to respond to requests as soon as possible, rather than just within 30 days, another breach of international standards.

The other major problem that manifests across all Canadian jurisdictions is the charging of exorbitant and unnecessary access fees. This begins at the front end of the requesting process, where every jurisdiction apart from Quebec and New Brunswick charges an access fee of between $5 and $25. This, in itself, runs counter to international standards, but what is even more disturbing is the evidence that at least some in government view these fees as a way of deterring information requests. In 2011 Canada's federal government proposed a hike in access fees "in order to control demand."[12] Access to information is a recognised human right, and the notion of charging fees in order to dissuade people from exercising their rights is offensive.

The initial application fees are only the very tip of the iceberg. According to international standards, public authorities should only charge fees to recoup direct costs incurred in reproducing or sending the information, such as photocopying or postage costs. Several Canadian jurisdictions pay lip service to this idea by stating, in their access law, that charges should be limited to the actual costs incurred by the agencies. However, every jurisdiction in Canada violates this principle by charging either $0.20 or $0.25 per page of photocopying, far greater than the costs charged by commercial providers. Considering that requests for database information can often run into the thousands of pages, these costs can quickly add up. Most jurisdictions also charge egregious fees for hardware, such $14.50 for a computer disk in Quebec, $25 for a videocassette in Northwest Territories and $10 for a CD in Ontario.

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[11] Gloria Galloway, "Pattern of delay: Ottawa's Kafkaesque information denial" *The Globe and Mail*, 3 February 2010. Available at: http://www.theglobeandmail.com/news/politics/pattern-of-delay-ottawas-kafkaesque-information-denial/article4305090/.

[12] Dean Beeby, "Feds eye access-to-information fee hike to 'control-demand'", *The Globe and Mail*, 13 March 2011. Available at: http://www.theglobeandmail.com/news/politics/feds-eye-access-to-information-fee-hike-to-control-demand/article571747/.

In addition to these costs, every jurisdiction charges requesters for employee time spent responding to the request. This is unjustifiable. Responding to access requests should be included within every public authority's general operating budget, since accountability to the public should be considered a basic part of their job. Expecting a requester to pay for time spent responding to an access request is no more appropriate than expecting a complainant to pay for the hours spent by a police officer investigating a crime, or a litigant to pay for the hours spent by a judge reviewing their case. Indeed, it is less appropriate, because the time spent on processing requests is often largely a function of the manner in which public authorities manage their records and the time they spend in deciding whether or not an exception may apply to the information. In other words, under these systems, requesters are effectively penalised for poor internal record management and the fact that a public authority is seeking ways to deny the request.

These problems are further exacerbated by the fact that, in some instances, the charges are absurdly high. Ontario and Alberta charge $60 and $80 per hour, respectively, for some types of computer-related processing. Canada's fee schedule includes a charge of $16.50 per minute for use of the "central processor and all locally attached devices", an ambiguous phrase that could potentially be applied to any computer within the public authority.

Collectively, these provisions make a mockery of the idea that public authorities should only levy fees consistent with their actual costs incurred. The end result is that requesters can be presented with an absurdly high bill, along with a demand for payment of 50% of the balance before any processing takes place. The National Freedom of Information Audit for 2009-2010 charted several examples of this in their survey of responses to access requests across Canada. In response to a request for information regarding the total number of cell phones and Blackberries in use within their department, British Columbia's Ministry of Transportation returned a cost estimate of $98,603. Although an extreme example, this is not an isolated one. A request by the 2009-2010 Audit to the Canadian Broadcasting Corporation was returned with a cost estimate of $20,825, and several other requests were returned with cost estimates of thousands of dollars.[13] A human right that costs nearly $100,000 to exercise is, quite obviously, no right at all. Exorbitant costs and unenforceable timeframes are often cited as the worst problems in Canada's access regimes. These two areas are in need of urgent reform since they undercut the entire functionality of Canada's access system, and they impact Canadians in every jurisdiction.

[13] Canadian Newspaper Association, *National Freedom of Information Audit 2009-2010* (2010), p. 10. Available at: http://www.newspaperscanada.ca/system/files/CNA%20FOI%20Audit%202010%20efinal.pdf.

Key Recommendations:

- Canadian laws should be reformed, where necessary, to mandate that all public authorities should respond to requests as soon as possible.
- Public authorities should be limited to one extension of no more than 30 days, applicable only in appropriate cases (i.e. where it is really necessary), breach of which should be treated as a refusal to disclose the information, triggering an appeal.
- Requesting fees should be eliminated entirely.
- Public authorities should only charge requesters for the costs they actually incur in reproducing and delivering requested information, not including employee time.

4. Exceptions and Refusals

Jurisdiction	Score (out of 30)
British Columbia	20
Ontario	18
Manitoba	16
Yukon	16
Prince Edward Island	15
Nova Scotia	14
Saskatchewan	14
Newfoundland	13
Alberta	12
Northwest Territories	12
Nunavut	12
Canada (national law)	11
New Brunswick	11
Quebec	11

This category is where most Canadian jurisdictions made their poorest showing. Only four jurisdictions scored higher than 50% here, and many earned scores close to some of the world's worst performers on the RTI Rating, such as Jordan, which scored 10 points and placed 88th in the world, and Greece and Russia, which each scored 13 points and placed 91st and 87th, respectively. It is also telling that Canadian jurisdictions scored so poorly here, since this category defines the all-important dividing line between openness and closure. If the regime of exceptions is not carefully crafted, public authorities will be able to abuse it to find reasons to

avoid having to disclose a particular document, even though it is not, in fact, sensitive. As these results show, Canadian lawmakers crafted Canada's access laws in such a way as to ensure that there are plenty of places for recalcitrant bureaucrats or politicians to hide from their openness obligations.

The problem starts with paramountcy clauses, which are an endemic issue in several laws. To be effective, an access framework should be the law of the land when it comes to disclosure. The most progressive law in the world will be of little use if it is overruled by a patchwork of regressive secrecy laws. Canada's national access law is overruled by 60 other pieces of legislation, while Alberta's law is overruled by 38 and Saskatchewan's by 26. Some of these laws fundamentally undermine the very notion of government openness, such as Quebec's Executive Power Act, which allows deferrals of the release of any order for 25 years.[14] It may be noted that if the regime of exceptions in an access law is properly crafted, so that it protects all legitimate confidentiality interests, there is no need for it to be overridden by other laws.

At the heart of this category is the list of specific exceptions to disclosure, which is another major weakness for Canadian laws. A common problem is that exceptions are overly sweeping or broad. The most notable in this regard, and a problem that is universal to Canadian access laws, is the exception for government deliberations. According to international standards, it is legitimate to protect the integrity of the decision-making process. But, because this is potentially an extremely broad category, it should be limited to information whose disclosure would demonstrably harm specific interests, such as the provision of free and frank advice within government and the integrity of policies. The protection of these interests should be subject to a harm test. The harm test is fundamental to international standards on the right to information, and a form of harm should always be required to be shown before a request may be refused. Information which relates to a particular decision should normally be disclosed once the decision has been taken.

Every Canadian jurisdiction contains an exception for internal deliberations, and every one of them is overly broad, fails to identify the specific interests that are being protected, and lacks a proper requirement of harm. Rather than only excluding information whose disclosure would harm the decision-making process, these exceptions are framed as broad catch-alls, for example excluding just about anything that is brought before Cabinet or the Executive Council. In addition, most Canadian laws prevent the disclosure of this information for 15 years, far longer than is justified by any ongoing deliberative process.

[14] RSQ, c E-18.

In addition to overly broad exceptions, there are several recurring exceptions that are simply illegitimate. For example, every jurisdiction in Canada has an exception for information whose disclosure would harm relations with another province. This is similar to an exception which is currently found in most national access laws, which exempts information whose disclosure would harm international relations. But international diplomacy is a complex and often highly adversarial process, where misunderstandings or a failure to communicate the proper message can have severe consequences, including the threat of armed conflict. Inter-provincial relationships are not nearly this delicate or dangerous. Equally importantly, there should be reciprocity in terms of openness among Canadian jurisdictions, so that there is a similar expectation of openness in each one. Then, no jurisdiction can complain if another discloses certain information, because it would also be subject to disclosure in the first.

Other recurring problems include an exception for information about the awarding of government contracts, which should always be disclosed in the interests of preventing corruption and promoting competition, and the absence of a harm test for many law enforcement exceptions.

Another fundamentally important aspect of an effective exceptions regime is a public interest override, whereby information that falls within the scope of the regime of exceptions should still be disclosed if the public interest in disclosure outweighs the harm that this could cause to the protected interest. Once again, most Canadian laws score poorly here. Several jurisdictions apply the public interest test to some but not all exceptions, while others only provide for an override in the case of grave threats to the environment or public health and safety, an overly restrictive approach. Nova Scotia, Nunavut and Northwest Territories do not provide for any public interest override at all.

Given that information should only be withheld if its disclosure is harmful, and that the harm of disclosure normally fades over time, international better practice also mandates the inclusion of sunset clauses in access laws, whereby information which is withheld to protect public interests – such as national security or decision making – as opposed to private interests, such as commercial competition and privacy, can be withheld beyond the time limit, say of 20 years, only in highly exceptional cases. Every jurisdiction in Canada contains some sunset clauses, but none apply to all exceptions.

Key Recommendations:

- Canadian legal frameworks should remove all paramountcy clauses for secrecy laws and instead provide that, in case of conflict, the access law shall prevail.
- Canadian access laws should only include legitimate, harm-tested exceptions.

- All exceptions should be subject to a broad public interest override.
- All Canadian laws should establish a strong presumption that exceptions protecting public interests expire after 20 years, which may only be overcome in exceptional circumstances and by a special procedure (such as approval of this by the oversight body).

5. Appeals

Jurisdiction	Score (out of 30)
British Columbia	25
Manitoba	25
Prince Edward Island	24
Alberta	23
Canada (national law)	23
Ontario	23
Quebec	23
Northwest Territories	20
Nunavut	20
New Brunswick	21
Yukon	21
Newfoundland	20
Saskatchewan	19
Nova Scotia	18

A right without a remedy is effectively not a right. In the context of access to information, this means an oversight body to which requesters can appeal refusals, or other actions that undermine the right to information, such as charging excessive fees or the breach of timelines. Every jurisdiction in Canada has an external oversight body to hear these appeals and this is an area where Canadian jurisdictions generally do well. Usually, this oversight body takes the form of either an information commissioner or an information and privacy commissioner. However, Manitoba and Yukon direct appeals to the Ombudsman. Although this is preferable to having no appeal mechanism at all, the fact that the Ombudsman is a generalised oversight body rather than one which specialises in the right to information is problematic.

A critical component of an effective appeals process is that the oversight body should be fully empowered to perform their functions. In order to investigate breaches of the law properly, the oversight body should have the power to review

classified information. An information commissioner or ombudsman can hardly be expected to decide whether or not a document falls under an exception if they are unable to actually see the document. Canadian jurisdictions are quite strong in this regard, and every oversight body has the power to review classified documents. The only exceptions to this are Newfoundland and New Brunswick, which prevent their information commissioners from reviewing records of the Executive Council or legally privileged information. This is a major problem, since it means that there is no effective oversight over documents withheld under these exceptions, and no mechanism for ensuring that the exceptions are being appropriately applied. Ancillary to the power to inspect documents is the ability to inspect the premises of public authorities, in order to confirm claims that particular documents do not exist. This is a power held by every Canadian oversight body except those of British Columbia, Nunavut, Northwest Territories and Prince Edward Island.

Although oversight bodies across Canada are by and large well-empowered to perform their investigative function, Canadian jurisdictions are divided on the enforceability of these judgements. In Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and Quebec, rulings by the information commissioner are directly binding. On the other hand, information commissioners in New Brunswick, Newfoundland, Northwest Territories, Nunavut, Nova Scotia, Saskatchewan, Yukon and Canada are only empowered to make recommendations. This is a critical flaw, which severely curtails the power of the oversight body to ensure compliance with the law. Although this is the subject of much debate in Canada, almost all international observers agree that binding decision making powers are necessary for these bodies to be effective.

In addition to an empowered oversight body, an effective appeals process should be governed by an appropriate regulatory framework. This should begin by allowing appeals for any breach of the right to information, including refusals of access requests but also the destruction of documents, breaches of timelines, charging excessive fees, etc. Most Canadian jurisdictions perform relatively well here, although several carve out an exception to the information commissioner's mandate, such as for material subject to parliamentary privilege in Ontario and Prince Edward Island. Saskatchewan's law does not allow for appeals against excessive fees, while Nova Scotia's appeals process is limited to refusals to disclose or administrative silence. These limitations are problematic, and limit the ability of the oversight body to act as an effective guardian of the right to information.

Appropriate regulations governing appeals procedures are also important. This should include firm timelines, which most jurisdictions set at 90 days. The exceptions to this are Nova Scotia, Ontario, Saskatchewan and Canada, which lack a proper timeframe for the appeals process.

Key Recommendations:

- Manitoba and the Yukon should create a specialised oversight body.
- Newfoundland and New Brunswick should grant their information commissioners the power to inspect any document.
- The information commissioners in New Brunswick, Newfoundland, Northwest Territories, Nunavut, Nova Scotia, Saskatchewan, Yukon and Canada should be granted order-making power.
- Nova Scotia, Ontario, Saskatchewan and Canada should impose a 90-day timeframe for resolving appeals.

6. Sanctions and Protections

Jurisdiction	Score (out of 8)
Manitoba	6
Prince Edward Island	6
Quebec	6
Alberta	5
Canada (national law)	5
Nova Scotia	5
Ontario	5
Saskatchewan	5
British Columbia	4
New Brunswick	4
Newfoundland	4
Yukon	4
Northwest Territories	3
Nunavut	3

The need for strong sanctions for the breach of the right to information is a key component of a strong legislative framework. It bears remembering that the right to information is, among other things, about accountability, and requests can often lead to officials being asked to disclose information that may paint them or their authority in a bad light. There are also other incentives that weigh against disclosure, for example based on the idea that control over information gives individuals power. Against this backdrop, it is important to back up the right to information with effective sanctions for noncompliance. What is important here is not necessarily the severity of the sanctions, which need only be severe enough to deter noncompliance, but rather the scope of the sanction, which should cover any breach of the right to information.

Every jurisdiction in Canada contains some sanctions for violating provisions of their access law, but few define the offence sufficiently broadly. For example, Northwest Territories, Nunavut, Prince Edward Island, Ontario and British Columbia only penalise obstructing the work of the information commissioner. New Brunswick and Yukon go slightly further, also penalising the improper destruction of documents. However, the only jurisdictions that provide for sanctions for anyone who undermines the right to information, are Quebec, Newfoundland and Canada.

In addition to effective sanctions, it is important to offer protections to anyone who wrongly discloses information in good faith, or who might otherwise risk incurring liability by complying with their responsibilities under the access law. Public employees should not have to fear that honest mistakes will lead to administrative, civil or criminal sanctions, since this can lead to an overly cautious approach to disclosure, whereby employees withhold information just to be safe. The employees of the oversight body should also be granted immunity for actions performed in line with their duties under the law. Every Canadian jurisdiction offers blanket immunity both to staff of the oversight body and to public employees more broadly.

The other key aspect of protections is for whistleblowers who disclose information about wrongdoing. Inadequate whisteblower protection is a problem across Canada, and one that goes beyond the right to information.[15] One of the chief overarching problems is that most frameworks rely exclusively on internal systems, where employees are protected if they disclose improper behaviour to the information commissioner (or some other accountability mechanism) but not if they go public with their concerns. This sort of system, which encourages public authorities to deal with problems internally, cannot address certain types of more widespread of sensitive wrongdoing, and better whistleblower regimes also recognise a need to protect external disclosures in certain situations.

Key Recommendations:

- Every jurisdiction in Canada should provide for sanctions for anyone who wilfully undermines the right to information.
- Canadian jurisdictions should expand their whistleblower protections to include disclosures to the public in appropriate cases.

[15] For a broader discussion of the inadequacies of Canada's whistleblower protection frameworks, see http://fairwhistleblower.ca/.

7. Promotional Measures

Jurisdiction	Score (out of 16)
Newfoundland	10
Canada (national law)	9
Manitoba	6
Ontario	6
Prince Edward Island	6
Quebec	6
Yukon	6
Saskatchewan	5
Alberta	4
British Columbia	4
New Brunswick	4
Nova Scotia	4
Northwest Territories	3
Nunavut	3

A strong right to information requires more than just responsiveness to access requests. Public authorities must also take the initiative, and take positive action to promote and entrench the right to information, creating conditions where a culture of openness can flourish. With the notable exceptions of Newfoundland and Canada, Canadian jurisdictions performed very poorly in terms of imposing legal obligations on various actors to promote the right to information.

The only indicator that was met in every jurisdiction was a requirement for the oversight body to present an annual report to the legislature. Very few jurisdictions included a concomitant requirement for all public authorities to report to the oversight body on what they had done to meet their obligations under the law, thus severely limiting the ability of oversight bodies to report comprehensively on the state of implementation in their jurisdiction as a whole.

Every Canadian jurisdiction, other than Nova Scotia, Northwest Territories and Nunavut, also included some mechanism to either promote or raise public awareness about the right to information.

Several jurisdictions imposed an obligation on all public authorities to create and publish a register of the documents they hold. Canada, Quebec and Newfoundland's laws require public authorities to listing of all the documents they hold, while Prince Edward Island and Saskatchewan only require the publication of a list of categories

of documents. Yukon's law contains only a requirement to create some kind of directory to assist requesters.

Other than this, most Canadian laws are conspicuously bare in terms of promotional measures. Newfoundland requires the heads of public authorities to educate their staff about the right to information, while Yukon requires its Ombudsman to set standards for document management. However, on the whole, this is an area of significant weakness across Canada.

Key Recommendations:

- Every Canadian jurisdiction should require all public authorities to provide appropriate training for officials, and should establish an effective system for setting and implementing minimum standards for record management.
- Canada's oversight bodies should have a mandate to promote the right to information and to educate the public about their rights under the law. Nova Scotia, Northwest Territories and Nunavut should expand the mandate of their information commissioners to include this duty.
- Every Canadian jurisdiction should require all public authorities to publish registers of all of the documents they hold.
- Every public authority in Canada should be required to report to the central oversight body annually on the activities they have undertaken to meet their obligations under the law.

Conclusion

The immediate conclusion to be drawn from this Analysis is that Canada's access to information frameworks are in dire need of reform. There was no winner in this comparison. Although British Columbia's access law proved to be the strongest in Canada, it is distinctly mediocre when compared to laws in other countries. Every access to information law in Canada requires significant and immediate reform in order to be capable of providing a reasonable base for ensuring that Canadians can exercise their right to information.

Although this Analysis pinpoints problems with every law across every category, the most serious recurring problems have to do with scope, requesting procedures and exceptions. Far too many public authorities are entirely excluded from the ambit of Canada's access laws. The right to information is about accountability for all public authorities. The most common problems are exclusions relating to the judiciary and legislature. The latter is particularly outrageous given that these were the very

bodies that adopted these laws in the first place, imposing openness obligations on others while simultaneously preserving their own cloaks of secrecy.

In terms of requesting procedures, lax timelines and high fees are hallmarks of Canada's access system. This is ultimately a practical issue, and the most common source of complaints by journalists and others who make regular access to information requests. There is simply no reason for this, and many countries that are much poorer than Canada, and with far less efficient bureaucracies, manage to comply with far more stringent standards.

Third, the regimes of exceptions found in most Canadian access laws are seriously overbroad and in many cases rank alongside some of the worst access to information frameworks in the world. Most access laws fall short on every structural aspect of a good regime of exceptions, with too many paramountcy rules, overbroad and vague exceptions that are not subject to harm tests, weak public interest overrides, and limited sunset clauses. The regime of exceptions is the heart of an access law, and if this is failing, the system as a whole cannot be healthy.

Most Canadians view their country's human rights record as a source of pride. From the Charter of Rights and Freedoms, which has been used to model constitutional protections around the world, to Canada's multicultural values, Canadians like to believe that the world could learn something from Canada. In many areas of human rights and democracy, this belief is well-founded. But when it comes to the right to information, the opposite is true. It is tempting to say that, when it comes to the right to information, Canada is a third world country. Unfortunately, this phrasing is far too kind since, as the Global RTI Rating shows, when it comes to the right to information, many third world countries have a lot to teach Canada.

If Canada were languishing in 55th place on any other human rights or democracy indicator, most Canadians would be incensed. But there is little of this sense regarding the right to information. One conclusion seems unavoidable. Canadians still do not regard this as the fundamental right in the same way that citizens of other countries do. This Right to Know Day, 28 September, should be a wakeup call for Canadians on the need for broad and effective reform of all of our access to information frameworks. Canada was once a world leader in delivering the right to information. There is no reason why we should not regain that status.