Canada: Note on Bill C-58 Amending the Access to Information Act

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On 19 June, the government of Canada tabled Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts (Bill). This long-awaited Bill, the first to introduce significant changes to the Access to Information Act (Act) since it was originally introduced in 1982, purports to deliver on the government's 2015 election promises to reform the Act, instructions along these lines in the November 2015 mandate letters provided to Scott Brison, President of the Treasury Board of Canada, and various other ministers,[1] and various promises made by Brison and other ministers since that time. Looked at through a longer term prism, the Bill aims to address an overwhelming need to reform the by now seriously outdated Act. This is something which has been urged by successive Information Commissioners of Canada and parliamentary Standing Committees, and almost every civil society voice that has expressed a view on the matter over the last twenty years.

In light of this, there were high expectations for the Bill. These were driven in part by the bold vision of the government, which promised Canadians that it would be "open by default", in part by the specific promises of the government – which included giving binding order making powers to the Information Commissioner, the elimination of all fees for information, 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

[1] They were made public on 13 November 2015 and are undated.

parliament and the courts[2] – in part by the enormity of the need for reform, and in part by the fact that Canadians have already waited far too long for this.

After the government announced delays in March, over 60 Canadian organisations and individuals wrote a letter to the Prime Minister expressing their concerns and urging the government to continue to move forward with the promised reforms (amendment letter).[3] The letter identified five key priorities for reform, namely expanding the scope of the Act, streamlining procedures including by reducing response times and fees for requests, substantially narrowing the overbroad regime of exceptions, giving the Information Commissioner binding order making power, and instituting a "duty to document" key decision-making processes.

As a result of this background, CLD, no doubt along with many others, is relieved to see progress on this issue. At the same time, however, everyone who truly believes in access to information reform will be seriously disappointed by the Bill that has been tabled. The Bill does include some modest reforms – including formalising in law the fee waivers for responding to requests that had already been implemented in practice and formalising a number of proactive publication practices – and one major reform – namely granting the Information Commissioner binding order making power.

However, the Bill is far more conspicuous for what it fails to do, putting in place only one or at best one and one-half of the reforms called for by Canadians in the amendment letter noted above. It fails to expand the scope of the Act. It does place a number of proactive publication obligations on various actors – including the Prime Minister's and Ministers' Offices, and the administrative institutions that support Parliament and the courts – but this falls far short of bringing these bodies within the ambit of the Act. While more proactive disclosure is always welcome, as anyone who has used the Act knows, it is absolutely not a substitute for the right to be able to request the information one is interested in from public authorities. Furthermore, a large majority of the proactive publication obligations are already being implemented in practice by these bodies. While it is some progress to formalise these commitments, this is hardly groundbreaking.

The Bill also formalises the fee waivers for responding to requests, but it fails to address the serious problem of delays in responding to requests. It does nothing to address the broad regime of exceptions (if anything, expanding its scope slightly). And it does not put in place a duty to document. The Bill would also remove the

[2] See the Liberal Party's campaign promises in this area: *Real Change: A Fair and Open Government*. Available at: https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf.

[3] The letter is available at: https://www.law-democracy.org/live/wp-content/uploads/2017/04/17.04.04.ATIA-delay.let1_.pdf.

obligation on public authorities to publish about the classes of records it holds, which is designed to facilitate the making of requests for access to information.

More generally, the Bill would only result in minor improvements to Canada's score on the RTI Rating, a respected global methodology for assessing the strength of a country's legal framework for the right to information (RTI).[4] As the table below shows, Canada currently achieves a score of 90 out of a possible total of 150 points, putting it in a miserable 49th position globally. The Bill would only increase Canada's score by two points, to 92 points, lifting it only to 46th position globally. After waiting a full generation for these reforms, surely Canadians deserve better.

Section	Max Points	Act	Bill
1. Right of Access	6	5	5
2. Scope	30	14	14
3. Requesting Procedures	30	21	21
4. Exceptions and Refusals	30	12	12
5. Appeals	30	23	26
6. Sanctions and Protections	8	6	6
7. Promotional Measures	16	9	8
Total score	**150**	**90**	**92**

This Note[5] elaborates in more detail on what the Bill does and does not do. It was drafted by the Centre for Law and Democracy (CLD), an international human rights organisation based in Halifax, Nova Scotia.[6] It should be read in conjunction with two other CLD publications, *Canada: Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*[7] and *Canada: Recommendations for Reforming Canada's Access to Information Act*.[8] This Note

[4] Available at: www.RTI-Rating.org.

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[6] CLD provides expert legal services and advice on foundational rights for democracy. More information about CLD and its work is available at: www.law-democracy.org.

[7] January 2013. Available at: http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_.Jan13.pdf.

[8] A submission published in June 2016 in response to a Call for Comment on Government proposals to revitalise access to information put out by the Treasury Board of Canada Secretariat, prepared jointly with Lawyers' Rights Watch Canada and the British Columbia Freedom of Information and

focuses on the extent to which the Bill addresses the calls for reform in the amendment letter. CLD's other concerns with the Act, and its proposals for reform, are in the other two documents.

Scope

As noted above, and as is apparent from the scores on the RTI Rating, this is an area where both the current Act does very poorly, scoring just 47 percent, and the Bill would make no changes. This is despite expansive claims on the part of the government that the Bill would expand the scope of the Act substantially. While we can understand the government's motivation here – essentially so they can claim they are meeting their election promises – the simple fact is that the scope of the Act has not been expanded in any substantive sense.

The main reason for this is that while proactive publication obligations are important, and ensure that everyone has access to at least a minimum common platform of information from public authorities, the heart of a right to information system, and the essence of any claim to be open by default, is the right of individuals to request whatever information they want from government. This form of access is not restricted to the limited categories of information that are spelt out in proactive disclosure rules or that government chooses to disclose. It is restricted only by the imagination of individual citizens (and of course by the regime of exceptions).

Put differently, publishing all of the information on a list of types of information cannot possibly qualify as being open by default. That term can only sensibly be applied to a right to request whatever you want from public authorities, precisely what the Bill fails to do for the Prime Minister's and Ministers' Offices, and the administrative institutions that support Parliament and the courts.

It may be noted that extending the Act to cover these bodies is hardly a radical notion. Most of the countries ahead of Canada on the RTI Rating cover most of these bodies and so do many of the countries below Canada.

In addition, as noted above, the 'new' proactive obligations are, for the most part, only 'new' in the sense that they would be transformed from policy and practice into legal obligations. It is already standard practice to release many of the categories listed in the Bill, including travel and hospitality expenses, contracts over $10,000, grants and contributions, and reclassification of positions. We welcome the proposal to formalise these practices in a legal obligation, but it cannot be described as expanding the scope of the Act.

Privacy Association. Available at: http://www.law-democracy.org/live/wp-content/uploads/2016/07/Canada.RTI_.Jun16.pdf.

Another problem with the Bill is its failure to institute a duty to document important decision-making processes. This sort of duty is designed to address a growing problem whereby officials conduct business in ways that do not create permanent records, such as orally or via temporary storage communications tools. It also helps address the problem of officials using private devices to communicate official business. While these are formally covered by the Act, it can be very difficult to actually locate and access them. A duty to document would at least ensure that key decision-making information was maintained as official records.

Requesting Procedures

The May 2016 Interim Directive on the Administration of the *Access to Information Act*[9] did away with all fees for accessing information, apart from the initial $5 fee for filing a request. This was a major improvement inasmuch as it entirely removed an all too common barrier to accessing information. The Bill would institutionalise this into the law, thereby giving it greater status and rendering repeal of it more difficult, although the Bill preserves the possibility of the government adopting regulations providing for fees to be charged.[10] The proposal to formalise the fees waiver in law is welcome.

The Bill fails, however, to address the other very serious procedural problem with the current Act, namely the highly discretionary power of public authorities to extend the initial 30-day time limit for responding to requests. This power has been applied with disturbing regularity, often to create very lengthy delays in responding to requests. There are a number of options for reducing official discretion in this area, for example by requiring officials to obtain prior permission from the Information Commissioner for delays beyond a set period, say of 60 days. In many countries, there is an absolute maximum limit on the time for responding to requests (often of 60 days).

Exceptions and Refusals

Nothing has been done in the Bill to address the very serious problems with the regime of exceptions in the current Act, which results in the lowest score here for any category of the RTI Rating, namely just 40 percent. Several of the exceptions in the Act are either *per se* not recognised as legitimate under international law or are cast in overly broad or vague terms. An even more serious problem is that many of the exceptions are not subject to a harm test, whereby information may be withheld only where disclosure of that information would cause harm to the protected

[9] Available at: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310.
[10] The amended section 11(2) would provide: "The head of the government institution to which the request is made may require, in addition to the fee payable under subsection (1), payment of an amount prescribed by regulation or calculated in the manner prescribed by regulation and may require that the payment be made before access to the record is given."

interest (such as legal investigations or third party commercial interests). For these exceptions, it is enough if the information falls into a set category, even if no harm would flow from its release.

Finally, the Act contains only a very limited public interest override, whereby information should be released, even if this will cause harm, whenever the benefits to the public of accessing the information outweigh any harm caused. In *Criminal Lawyers' Association v. Ontario (Public Safety and Security)*, the Supreme Court of Canada read a form of public interest override into discretionary exceptions (i.e. those where the public authority 'may' but is not required to refuse to disclose the information).[11] But this leaves out mandatory exceptions and it would in any case be useful to make the override explicit in the legislation.

Appeals

The one really important amendment in the Bill is the allocation of binding order making powers to the Information Commissioner. This is a major change and something that CLD has been advocating for a long time, so we very much welcome the fact that the government is going ahead with it.

Recommendations:

- The government should deliver on its promise to expand the scope of the Act to cover Prime Minister's and Ministers' Offices, and the administrative institutions that support Parliament and the courts by allowing individuals to make requests for information from these bodies, as they may do with other public authorities, while retaining the proposed proactive publication obligations.
- The law should provide for a duty to document key decision making processes.
- The law should put in place a robust system for limiting the discretion of public authorities to extend the time limits for responding to requests, for example along the lines suggested above.
- Radical reforms to the regime of exceptions in the current law should be instituted, including by limiting the exceptions to those interests which are recognised under international law as being legitimate exceptions to the right of information, by attaching a harm test to all exceptions and by putting in place a clear public interest override for all exceptions.

[11] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, para. 48.