

Submission to the 2021 Review of Canada's Federal Access to Information Act (ATIA)

August 2021



Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

Introduction

For many years, civil society groups like the Centre for Law and Democracy (CLD) and the British Columbia Civil Liberties Association (BCCLA), along with a wide array of other stakeholders across Canada, have been calling for major reforms to the federal Access to Information Act (ATIA), which gives individuals a right to access information held by public bodies, or the right to information (RTI).¹ For just as long, successive Canadian governments, of different political stripes, refused to entertain 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, including 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.²

¹ 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, the 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-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>; 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>.

² See the Liberal Party election manifesto, *Real Change: A Fair and Open Government*, August 2015, pg. 4, <https://web.archive.org/web/20170209033208/https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.

Unfortunately, the ATIA reform process initiated by the Liberal Party after they entered government and the resultant Bill C-58 did not live up to expectations, as CLD pointed out in a series of publications between 2016 and 2018.³ 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,⁴ and giving the Information Commissioner binding order-making power.

The buckling of the access to information system under the pressures of the ongoing 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 without any legal authorisation, simply suspended their work in responding to requests for information.⁵ 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 such as pandemics.⁶ 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.⁷ Such anti-democratic 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.

This submission is pursuant to the first quintennial review of the ATIA (section 93(1)). The submission identifies the key problems with the ATIA and makes

³ CLD, Lawyers' Rights Watch Canada and the 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.

⁴ 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>.

⁵ 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>.

⁶ 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>.

⁷ *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.

recommendations to reform the Act so as to address them. 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*.⁸ Indeed, most of the concerns outlined in that report remain at issue in 2021: 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.

CLD has, 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.⁹ As the table below shows, Canada currently achieves a score of 93 out of a possible total of 150 points, putting it in a miserable 52nd position globally from among the 128 countries currently assessed on the RTI Rating. It is shameful that Canada does so poorly in this area of human rights.¹⁰

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%

This Submission is divided into five sections: scope, the right of access and the duty to document; requesting procedures, which covers unreasonable delays and fees;

⁸ January 2013, http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_Jan13.pdf.

⁹ Available at: www.RTI-Rating.org.

¹⁰ The right to information has long been recognised as a human right under international law. See 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 it information is being sought for an expressive purpose. See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815. <http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html>.

exceptions; the powers of the Information Commissioner; and this submission's conclusion.

Scope, the Right of Access, and the Duty to Document

Scope

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.¹¹ In other words, 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, that is owned, controlled or substantially funded by a public authority or which performs a statutory or public function should be covered by both the proactive and request processing regimes in the Act.

The ATIA does not apply to several types of public authorities. Coverage should be extended to all executive, legislative and judicial branches of government (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 that was not placed there by or on behalf of government institutions (excluded by section 68); the Canada Broadcasting Corporation and Atomic Energy Canada Limited (excluded by sections 68.1-68.2); the numerous other public authorities which are not listed in Schedule I of the ATIA, such as the National Security Intelligence Review Agency (NSIRA; its Secretariat is listed but NSIRA itself is not); and private bodies that receive public funding or perform public functions.

The Prime Minister's Office, Ministers' Offices and administrative bodies that support Parliament and the courts are not subject to reactive disclosure obligations, despite a 2015 Liberal election promise that they would be.¹² 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 to at least a minimum common platform of information from public authorities for all. However, the essence of a right to information system, and of any claim to be "open by default",¹³ is the right of

¹¹ 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.

¹² Note 2.

¹³ *Ibid.*

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.

These proactive disclosure obligations are also excluded from the oversight functions of the Information Commissioner, who does not exercise any powers or perform any duties or functions in relation to proactive disclosure, including receiving and investigating complaints or exercising any other oversight-related powers, duties or functions (s. 91(1)).

Right of Access

In its current form, the ATIA only applies to citizens, permanent residents, other persons residing in Canada¹⁴ and legal entities, thus excluding foreign nationals who are not physically in the country. This formally discriminates against foreign nationals in terms of the human right to information and is not in line with international better practice.¹⁵ Most external users of the ATIA are foreigners trying to obtain their information for immigration purposes.¹⁶ Denying foreigners their right to information forces them to go through in-country middlemen to whom they have to pay fees.

Duty to Document

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 create no paper trail, such as orally, and the use of private devices to conduct official decision-making business. Although the ATIA technically covers these latter means of communication, it can be very difficult to capture this content for purposes of responding to requests for information. A duty to

¹⁴ 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>.

¹⁵ More than 70 countries extend the right to information to everyone. See the RTI Rating, as sorted by Indicator 4 on universal access, <https://www.rti-rating.org/country-data/by-indicator/4/>.

¹⁶ Treasury Board Secretariat, *Access to Information Review Workshop 1: Right of Access & Scope of the Act*, June 2021, Slide 7, https://ehq-production-canada.s3.ca-central-1.amazonaws.com/a6942cc186a30f5c8048cd54aac6a5b0f6b89e36/original/1623436103/3010eb1bc3ec6018370744d3dc5aaeab_Workshop_1_-_Right_of_Access___Scope_of_the_Act.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIBJCUK4Z04WUUA%2F20210810%2Fca-central-1%2Fs3%2Faws4_request&X-Amz-Date=20210810T181538Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=e2694981ba6bed7ef887a3bac9a980ba28f3c3aaab104b48ac20f9ed0f2af183.

document would ensure that key decision-making information was maintained in official records as a matter of course.

Recommendations

- The offices of the Prime Minister, offices of Ministers and the administrative institutions that support Parliament and the courts should be subject to reactive disclosure obligations.
- 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 be able to make requests for information.
- Public authorities should be under a duty to document key decision-making processes.

Requesting Procedures

Unreasonable Delays

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 runs to 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 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 create long delays in 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.

There are a number of practical ways to reduce the scope of this discretion to delay. For example, public authorities could be required to obtain prior permission from the Information Commissioner for delays beyond the initial 30-day deadline, as is the case

in some other Canadian jurisdictions.¹⁷ Alternatively, an absolute maximum limit, say of 60 days maximum, could be imposed for responding to requests. Slovenia, for example, allows for extensions of no more than 30 additional days¹⁸ and Sri Lanka requires responses within 14 working days, with an option to extend for no more than 21 additional working days.¹⁹

Bold measures, such as penalties for failures to respect time limits, are also called for to address unreasonable delays, which constitute one of the greatest weaknesses of Canada's right to information regime. In India, for example, information commissions can impose sanctions on officials who have, in bad faith, unduly delayed in responding to requests.²⁰

Fees

The ATIA also falls short of international standards in terms of fees, although this problem used to be far more serious before the waiver of all fees for accessing information which was imposed by the May 2016 Interim Directive on the Administration of the Access to Information Act.²¹ 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,²² which can be changed by the Minister. It is very likely that collecting these payments costs more than the revenue they generate. More importantly, the underlying rationale for the fee – the deterrence of requests – is unnecessary, unfounded and undemocratic. It is unnecessary because the ATIA already contains a mechanism by which frivolous or vexatious requests can be summarily rejected (section 6.1(1)). It is unfounded because countries which do not impose fees for making requests have not found that this leads to large numbers of requests.

¹⁷ See, for example, the Nova Scotian Freedom of Information and Protection of Privacy Act, Chapter 5 of the Acts of 1993, section 9, <https://nslslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf>.

¹⁸ *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>.

¹⁹ *Right to Information Act*, No. 12 of 2016, section 25(5), <https://www.rti-rating.org/wp-content/uploads/Sri-Lanka.pdf>.

²⁰ *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>.

²¹ Note 4.

²² *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>.

Conversely, India, which does charge a fee, has a truly vast volume of requests. Finally, it is undemocratic because, as noted above, fees should not be imposed for exercising a human right.

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 60 days.
- Effective measures should be put in place to deter officials from unduly delaying in responding to requests in bad faith, such as being empowering the Information Commissioner to levy administrative fines on them.
- The ATIA should abolish fees for lodging requests.

Exceptions

International Standards for Exceptions

An RTI law should create a specific presumption in favour of access to all information held by public authorities, subject only to a narrow regime of exceptions. Under international law, the right to information may be subject to certain limited restrictions but only where exceptions are: 1) 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, otherwise known as the public interest override.²³ Finally, all exceptions that protect public interests (excluding private interests such as privacy) should be subject to sunset clauses, which invalidate the exception 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.²⁴

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,

²³ 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.

²⁴ See the better practice countries listed under Indicator 32 of the RTI Rating, <https://www.rti-rating.org/country-data/by-indicator/32/>.

investigation and prosecution of legal wrongs, the fair administration of justice and legal advice privilege; privacy; legitimate commercial and other economic interests; management of the economy; conservation of the environment; and legitimate policy making and other operations of public authorities.²⁵

Overbroad Exceptions

Some of the exceptions in the ATIA are drafted so broadly that even if they do cover certain legitimate confidentiality interests, they go much further than that to also cover material that should not be secret. For example, a series of exceptions cover information that 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 in 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.

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, even on topics that may be sensitive such as marital infidelity or criminal behaviour. However, no such sensitivity exists in the 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 limited to “litigation privilege”, which is also specifically mentioned in that section.

Harm-tested Exceptions

Other 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 provisions protecting 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

²⁵ Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents, note 23, clause IV.

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 that 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

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 Act 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.²⁶ As a result, all discretionary exceptions are now subject to some form of public interest override, but this still leaves out mandatory exceptions (such as sections 13, 16(3), 16.1, 16.2, 16.4, 16.5, 19(1), 20.1, 20.2 and 20.4).

Should the government have concerns about a lack of consistency in the application of the public interest override, it could include within the ATIA a non-exhaustive list of considerations to be taken into account in assessing the public interest. Recommendation No. 17 of a 2016 ETHI Committee Report on reforming the 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.²⁷ Additional factors, such as facilitating public participation and exposing corruption, should also be included in the list.

Complete Exclusions

²⁶ Note 10, para. 48.

²⁷ *Report of the Standing Committee on Access to Information, Privacy and Ethics*, note 1, p. 67.

The ATIA completely excludes “confidences of the Queen’s Privy Council for Canada”, also known as Cabinet confidences, from its scope (section 69). Section 69 defines these confidences broadly to cover a very wide range of information. The same complete exclusion applies 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). As a result, these exceptions are not subject to a harm test, a public interest override, review by the Information Commissioner and, other than Cabinet confidences, a sunset clause.

Secrecy Provisions in Other Laws

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

The ATIA currently has only a few sunset clauses in place. 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 by simply relying on these 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 that 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 that protects a public interest to a sunset clause, whereby the information is no longer exempt from disclosure after 20 years.

If necessary, a provision could be added to the ATIA to allow, highly 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

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

The Powers of the Information Commissioner

CLD and BCCLA 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, clear procedures should be added for certifying the orders of the Information Commissioner as orders of the Federal Court, or for these orders otherwise to be enforced through the courts. Such procedures exist, for example, in British Columbia,²⁸ Alberta,²⁹ Quebec,³⁰ Prince Edward Island,³¹ where public authorities must comply with the Information Commissioner's orders or face a contempt of court order. In Ontario,

²⁸ *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.

²⁹ *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>.

³⁰ *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>.

³¹ *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.

wilfully defying an order of the Information Commissioner is a criminal offence punishable by a \$5,000 fine.³² While a binding order from the Information Commissioner will often carry sufficient weight to compel compliance from public authorities, better practice would be to provide for an enforcement mechanism on the off-chance that authorities do not comply.

A second issue is the standard of the Federal Court's review of the Information Commissioner's decisions. Currently, upon appeal, the Federal Court reviews "matters" that are the subject of the Commissioner's reports or orders, not the reports or orders themselves (sections 41-48). The sections 41-48 procedure should be changed to clarify that it is the orders of the Information Commissioner, not the decisions of the public authority, that are reviewed by the Federal Court. At minimum, a modified *de novo* review standard should be employed that precludes public authorities from introducing new claims about exceptions following an appeal before the Information Commissioner.

Recommendations

- The Information Commissioner's orders should be made directly enforceable by the Federal Court.
- The judicial review process should be amended so that it is the Information Commissioner's orders, not the decisions of public authorities, that are under consideration.

Conclusion

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. This review of the ATIA is an opportunity for Canada to break the cycle of over-promising

³² *Freedom of Information and Protection of Privacy Act*, RSO. 1990, c. F.31, s. 61(1)(f).

and under-delivering on access to information reform. Otherwise, Canada will continue to languish behind other countries, hardly moving from its current position of 52nd place globally from among countries with right to information laws.³³ It is time for the government to act decisively, to deliver properly on the promises it made in 2015 and, indeed, to address other major right to information law reform needs.

³³ RTI Rating, Country Page, <http://www.rti-rating.org/country-data/>.