A Chance for Transparency: The Federal Accountability Act and public access to information

Submission to
The Committee to Consider Bill C-2,
The Federal Accountability Act
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FIPA wishes to acknowledge the Law Foundation of British Columbia
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research and public education

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Table of Contents

Introduction

As Canada emerges from the atmosphere of mistrust and the administrative malaise created by the advertising sponsorship problems, it is clear that swift and tough reforms are needed to transform the secretive culture of Ottawa and prevent the occurrence of similar scandals. Delay can only weaken our momentum toward this historic reform.

Government transparency and accountability are basic principles that transcend political parties and ideologies. That government and those Members of Parliament who help to foster them will establish a lasting legacy for good governance in Canada.

When the tenure of former Prime Minister Paul Martin began in December 2003, he promised to improve the quality of Canada's democracy, including the transparency of its federal institutions, to repair a "democratic deficit." It was a great disappointment to FIPA that the Liberal government, even *in extremis*, failed to fulfill its promises to reform the *Access to Information Act*.

So it was with high hopes and enthusiasm that we greeted the Conservative Party's election promises to strengthen transparency and public access to information. A few days before the election, we posted a news release on our website stating, "On January 23, for the first time in 20 years, a Canadian federal election may deliver real reform in government transparency and accountability."

The new Conservative administration has a unique opportunity to deliver a new era of open and transparent government, because there is unanimous agreement among all parties that this reform is a necessary step toward restoring trust between Canadian citizens and their government.

We urge this committee and all Members of Parliament to move quickly and decisively to implement the necessary legislative reforms needed to strengthen access to information legislation. These reforms were outlined very well in the election platform of the Conservative party, and are further described below.

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Strengthening Public Access to Information

The BC Freedom of Information and Privacy Association (FIPA) is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

In this submission, we have focused on the aspects of Bill C2, the *Federal Accountability Act,* that affect public access to information and the *Access to Information Act*.

FIPA is an enthusiastic supporter of the reforms to the *Access to Information Act* (ATI Act) proposed by Justice John Gomery, Information Commissioner John Reid, and the federal Conservative Party during the recent federal election.

Genuine opportunities for reform of this vital Act are rare, and we are concerned because we perceive, along with many other interested parties, that this opportunity may be slipping away. Significant reforms of the ATI Act have been deferred, and the minor measures included in the Accountability Act that increase access to information afford us little comfort. We urge the members of this committee to restore the deferred measures to the Act and amend several sections that we consider regressive.

While we point out needed improvements in the Accountability Act, we would also like to congratulate this government for the many positive measures in the Act, such as strengthening some rules, enforcement processes and penalties in the key areas of Cabinet appointments, political donations, truth-in-budgeting, government spending, regulation of lobbying, and provisions to improve accountability in First Nations communities.

Justice John Gomery advocated many reforms of the ATI Act in his final report on the advertising sponsorship problems, as one key way of restoring public faith in the federal government. We continue to hope that the new administration and all the opposition parties support that goal. Our group, along with a large segment of the Canadian public, is anxiously awaiting the fulfillment of promises of a new era of transparency and access to information.

FIPA urges the federal government to fulfill all the seven promises of ATI reform made in the Conservative election platform of 2005, and we urge that the Accountability Act be amended to include these reforms.

In its platform to "Strengthen Access to Information legislation", the Conservative Party pledged to:

1. "Implement the Information Commissioner's recommendations for reform of the ATIA"

FIPA is disappointed that the government has chosen to defer most of these reforms and have them dealt with by the Standing Committee on Access to Information, Privacy and Ethics. The tone of the government's discussion paper on ATI Act reform is regressive, and there is no firm timeline set for achieving these reforms.

We disagree with comments by the Information Commissioner that more study of ATI reform may be needed; the ATI Act has been "studied to death" by many committees over two decades without producing reform. We are concerned that reference to the Standing Committee could once again prove to be a graveyard for positive action.

2. "Give the Information Commissioner the power to order the release of information"

Order-making power is essential to ensure the proper functioning of the ATI Act. The Information Commissioners in four provinces have this power, and those systems work far better than the current federal regime.

In a report to the last federal government, Justice LaForest strongly recommended this reform be considered, and the Access to Information Review Task Force of 2002 concluded that order-making power is "the model most conducive to achieving consistent compliance and a robust culture of access."

3. "Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions"

Of Ottawa's 246 Crown corporations, agencies and foundations, only 49 are subject to the ATI Act. These "quasi-public bodies" create or carry out public policy, spend billions of taxpayer dollars, and in some cases make decisions that have major effects on public health and safety; yet many remain opaque and unaccountable to Parliament, the auditor-general, and the taxpaying citizen.

Some examples of quasi-public bodies tasked with spending an estimated $9-billion of tax money are Canadian Blood Services, the Waste Management Organization, Canada Pension Investment Board, and Canada Health Info-way Inc. There is no valid reason for this failure of transparency and accountability; most entities of this kind are covered by the ATI laws of Australia and Great Britain, and Canadian provinces.

Some quasi-public bodies have objected vociferously to being covered by the ATI Act, arguing that their financial and competitive interests may be put at risk. Such arguments are spurious, because the ATI Act has always contained strong sections to prevent disclosures that could cause such harm. In fact, FIPA and other advocates for freedom of information consider them to be too strong.

The need for extending coverage to this sector is obvious and has been restated for more than two decades.

On September 29, 1997, Conservative (then Reform) MP Myron Thompson introduced private member's Bill C-216 to include all Crowns under the ATIA, presumably with the approval of the then-Reform leader. It was defeated by the Liberal majority. If this action was right for the Reform party then, and could have been made law, then why not now?

In August 2002, a Canadian Press story reported that Prime Minister Chrétien's office was "working overtime" to draft amendments to extend the ATI Act to these entities, but this extension never happened.

The Chrétien government shelved a major study by its own senior bureaucrats that advised much more coverage of quasi-governmental entities. The June 2002 report, entitled *Access to Information: Making it Work for Canadians*, was the result of two year's work that included foreign travel and cross-Canada consultations by a 14-member task force of senior specialists in the federal bureaucracy. The government released the report, but never officially commented on it.

FIPA recommends that the ATI Act be amended to require Cabinet to add all Crown corporations and institutions to the list of institutions covered by the law if the institution:

- is an administrative part of the institution of Parliament (including Minister's offices);
- is wholly or majority owned by the federal government;
- is owned by a parent institution, which is wholly or majority-owned by the federal government;
- is funded in whole or in significant part by the federal government;
- is managed (or its parent institution is managed) by one or more people appointed under federal law;
- is listed in Schedule I, I.1, II or III of the Financial Administration Act; or
- is created or mandated by the federal government to perform essential public interest functions (e.g., in the areas of health, safety, environmental protection, economic security), or holds information the disclosure of which is essential to the protection of a basic citizen interest.

4. "Subject the exclusion of Cabinet confidences to review by the Information Commissioner"

Canadian federal and provincial access-to-information acts protect Cabinet confidences for substantial periods of time, but the ultimate principle is that eventually, confidentiality will yield to the public's right to know about most deliberations of Cabinet.

Cabinet records are excluded from review under the *Access to Information Act*. If the government decides that a requested record must remain secret because it is a Cabinet confidence, no independent review is available.

In most Canadian provinces, Cabinet documents are not excluded from review by the Information and Privacy Commissioner. This recognizes the fact that a Cabinet confidences exception, like all exceptions from disclosure, can be misapplied or abused.

FIPA has never seen a case where an Information Commissioner has abused the right to review such records or where Cabinet confidences have been improperly disclosed as a result of review. We strongly recommend that the current administration follow through with its promise to subject Cabinet records to review by the Commissioner.

Information Commissioner John Reid was critical of the government's proposal on this topic in its discussion paper of April 11, 2006, entitled *Strengthening the Access to Information Act*. He stated "This proposal is the status quo. That is what happens now. The government's proposal will not, in any sense, ensure that cabinet secrecy is not abused." We agree.

5. "Oblige public officials to create the records necessary to document their actions and decisions."

It is difficult to see how one could fail to recognize the clear benefit of this long-overdue proposal to good governance and the public interest.

True public access to information cannot exist without an accurate record of government decisions and actions – and above all, the Canadian public has a right to a clear and honest view of its history and how the decisions and actions of the government of the day fit into that history.

The MPs' Committee on Access to Information, chaired by MP John Bryden, expressed it well:

> As in the U.S., United Kingdom, Australia and New Zealand, the federal government should amend the *ATI Act* or enact a separate law to require a clear, accurate, detailed, meaningful and useable record be created and routinely disclosed (and preserved for an appropriate period) of each government institutions' organization, functions, policies, decisions, procedures and essential transactions to ensure that the details of each action by the institution are accessible to the public.
>
> — *A Call to Openness*, MPs' Committee on Access to Information, November 2001

6. "Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government."

The cornerstone and ethical yardstick of good access legislation is a workable "public interest paramount" section, such as are found in the Freedom of Information and privacy acts of Ontario, British Columbia, Alberta, and others.

The purpose of such a provision is to ensure that, regardless of other interests that may tend to influence the decision of a public body, the final point of reference regarding the disclosure of records is regard for the public interest.

The Information Commissioner should explicitly be given the power to apply this section and override decisions of public bodies to deny access when it is clearly in the public interest.

7. "Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules."

Such harms tests are essential to public accountability. The drafters of the ATI Act recognized this by providing that even the most sensitive information held by the government of Canada – that pertaining to national security, national defense, security and intelligence, international relations, detection and suppression of subversive or hostile activities – is protected by an exemption that is both discretionary and subject to a "reasonable expectation of injury" test (section 15).

8. "Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts."

Justice Gomery proposed deleting section 24 of the ATI Act, which allows such circumvention, and we agree with his recommendation.

9. "Provide real protection for whistleblowers."

Whistleblower protection is an integral part of the Accountability Act and so we wish to deal with it briefly here. We hope that the new administration will act quickly on its promise to "Provide real protection for whistleblowers" by adding to the Accountability Act or amending the *Whistleblower Protection Act* passed in the last days of the Liberal government.

Justice Gomery proposed six ways of improving the *Whistleblower Protection Act*, and FIPA endorses these amendments. They are:

1. the definition of the class of persons authorized to make disclosures under the Act ("public servants") should be broadened to include anyone who is carrying out work on behalf of the Government;

2. the list of "wrongdoings" that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;
3. the list of actions that are forbidden "reprisals" should also be an open list;
4. in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;
5. there should be an explicit deadline for all chief executives to establish internal procedures for managing disclosures; and
6. the Act's consequential amendments to the Access to Information Act and to the Privacy Act should be revoked as unjustified.

10. Two Serious Flaws in the Accountability Act

In addition to the above, we wish the Committee to know that FIPA disagrees strongly with two elements of the Accountability Act:

- the proposal to keep secret permanently all records relating to investigations of wrongdoing in government; and
- the imposition of secrecy over draft internal audit reports and working papers for 15 years.

This kind of blanket secrecy is a clear violation of the public's right to know and we feel it cannot be justified. We hope that the committee will amend the relevant sections of the Act.

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FIPA wishes to thank the Committee members for their attention and for affording us this opportunity to be heard by Parliament.

Summary of Recommendations

1. Implement the Information Commissioner's recommendations for reform of the Access to Information Act.

2. Give the Information Commissioner the power to order the release of information.

3. Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.

4. Subject the exclusion of Cabinet confidences to review by the Information Commissioner.

5. Oblige public officials to create the records necessary to document their actions and decisions.

6. Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.

7. Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.

8. Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts.

9. Provide real protection for whistleblowers by amending the Accountability Act or the Whistleblower Protection Act to reflect the recommendations of Justice Gomery.

10. Amend the Accountability Act to remove two regressive provisions:
    - the proposal to keep secret permanently all records relating to investigations of wrongdoing in government; and
    - the imposition of secrecy over draft internal audit reports and working papers for 15 years.