



BC FREEDOM OF  
INFORMATION  
AND PRIVACY  
ASSOCIATION

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## **FIPA response to consultation on Open Government Partnership commitments**

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**September 9, 2013**

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.

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well.

Please find below our response to the consultation on the Government of Canada's commitments to the Open Government Partnership. Our submission deals primarily with the final question, since the government's commitments largely ignore the main stumbling block to improved transparency, which is reform of the Access to Information regime.

- **How do you think we did in meeting our year-1 commitments within the Action Plan? (e.g. Open Government Licence, Modernizing the administration of Access to Information, new data.gc.ca site, etc.)**
- **Of the 12 Action Plan commitments, which do you think still require the most attention to achieve the objectives identified, and why?**
- **Are there any other comments or suggestions you would like to make pertaining to the Government of Canada's Open Government initiative?**

## **Ignoring Access to Information**

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The most obvious defect in the government's Action Plan is the complete absence of any improvements to the outdated and archaic *Access to Information Act*.

This absence is despite repeated pleas for updates to the *Access to Information Act* and trenchant criticisms for the functioning of the actual system; the government chose to ignore these concerns almost entirely.

As Information Commissioner Suzanne Legault stated earlier this year:

"The act has grown tired and out-of-date. Worst of all, over that period our access to information rights have been slowly eroded by a variety of constraints, practices and amendments to the act."

[http://www.thestar.com/opinion/commentary/2013/06/27/bring\\_canadas\\_parliament\\_under\\_access\\_to\\_information\\_act.html](http://www.thestar.com/opinion/commentary/2013/06/27/bring_canadas_parliament_under_access_to_information_act.html)

The only attempt to improve the system is contained in Commitment 3, which promises a pilot project that will allow Canadians (and only Canadians and Canadian residents) to make ATI requests electronically, including the mandated \$5.00 fee.

This would be an improvement on the current system of writing a cheque for five dollars to the Receiver-General for Canada and sending it in the mail along with a hard copy of the access request. It would be an improvement for users of the system, and will presumably save a considerable sum for the Government of Canada.

Former Information Commissioner Robert Marleau estimated that it cost the government more than \$50 to process each \$5 fee it received. It should be expected that an electronic payment system will greatly reduce this deficit, although the government has not provided any figures on that aspect of its plan.

Perhaps the implementation of this electronic system will improve responsiveness at the Royal Canadian Mounted Police ATI office. The Information Commissioner has more than 80 complaints about the lack of responses to ATI requests, and an electronic application and processing system would at least provide requesters with acknowledgement that their request (and payment) had been received.

## **Ignoring Information Commissioners**

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Prior to the government's development of its OGP commitments, Canada's federal and provincial Information Commissioners urged the federal government to make the reform of the Access to Information Act and improved compliance part of the Open Government action plan.

The recommendations were included in a joint "Letter on Open Government" sent to President of the Treasury Board Tony Clement.

The letter ([click here](#)) expressed support for the federal government's move to join the international Open Government Partnership (OGP) and urged that "the Government of Canada commit to increasing public integrity by modernizing the federal Access to Information Act."

The government chose to ignore the Commissioners, and included nothing in its commitments to make legislative changes to the ATIA. This is not the first government to avoid making desperately needed improvements to the access law. We have yet to see action on the first recommendations for updating the act, made in 1986.

In 2007-08, then Commissioner Robert Marleau issued a special report on what he referred to as a crisis in government information management generally, and the ATI system in particular.

He identified 12 points which he said were essential to deal with the immediate crisis in the system.

In 2009 the ETHI Committee issued a unanimous all-party report responding to that urgent request for action from the Commissioner.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E&Mode=1&Parl=40&Ses=2&File=21>

The Minister then responsible for the ATI Act, Rob Nicholson, summarily rejected the unanimous report, claiming that additional training would solve the issues:

"Legislative amendments must be examined in the context of administrative alternatives, such as enhanced guidance and training that can be equally effective to realize continued improvements."

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=4139070&File=0>

Since then, we have had a Supreme Court ruling that ministers' offices (and the people who work in them) are outside the scope of the ATIA. This amounts to the creation of another black hole where information that Canadians are entitled to have access to can disappear.

This problem is now showing up in statistics.

The Information Commissioner's office is reporting that so far in 2013, 34 percent of the complaints it receives are related to 'no responsive records' responses to ATI requests. This is up from the 19 percent recorded for 2011-12 fiscal year.

<http://www.canada.com/news/Prime+Minister+Office+tipped+access+information+requests+Senate/8880105/story.html>

Whether these documents are resting comfortably in ministers' offices, or bureaucrats are not keeping proper written records, this growing gap in available information needs to be addressed. The government's current commitments fail to do that.

## **Commitments on the Government web presence**

Several of the commitments on which you seek responses from Canadians relate to the updating of the government of Canada's web presence. However the ministry responsible for the website has been less than forthcoming about requests for information about those plans.

In late 2012, FIPA requested information through Access to Information about the government's plans to redo its websites and those of related entities. The initial response from the Treasury Board Secretariat was to demand thousands of dollars in fees.

After reducing the scope of our request to eliminate the thousands of dollars of fees, Treasury Board took 150 days for "consultations" before releasing the records.

Of course, they didn't release all the records. In fact, of 92 pages identified, 80 were redacted entirely as either 'advice to the minister' and/or 'cabinet documents'.

Because of the archaic ATIA, there is no point in complaining to the Information Commissioner, because she and the courts are prevented from even looking at records claimed to be cabinet documents, which are excluded from the operation of the law.

Again, the holes in the Access to Information system and the failure of the government to patch those holes undermines the credibility of its commitments in other transparency initiatives.

## **Open Government is more than just open data**

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As we can see from the list of the government's commitments, open government is viewed by the government as a subset of open data. Even the Treasury Board website highlights this hierarchy; in order to reach the Open Government page, you must get there through the Open Data page. There is no link on the Treasury Board main page for Open Government, only for Open Data.

This likely has an effect on the number of people who will visit the open government page, as there are a number of people interested in open government who may not be interested in open data and would not think that one is subsumed by the other.

It may also have an effect on responses to this consultation. There is no announcement on the main Treasury Board page, no press release and no direct access to the open government page.

The government's commitments for the most part deal with technology and open data. They do not address the rights of citizens to have access to information, but concentrate on how the government can best make available the information it wants to make available.

That is not good enough.

However well the open data system may operate, at the end of the day citizens must be in a position to ask for (and actually receive) the information they want or need.

## **Consultation issues**

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Once again, the government is consulting with Canadians during a major holiday period.

This consultation was posted to the government's Open Data site on August 20, 2013. There was apparently no press release or other announcement made that the consultation was now underway, and that the deadline for responses was September 9, 2013. This means Canadians have to first find

out about the consultation, and then prepare their submission during the peak summer vacation period and the return to school for many families.

The timing of this consultation is not conducive to receiving the best input from Canadians on how they see the need for improvement to transparency in this country.

In addition, the federal government has a website called 'Consulting Canadians', where such consultations are normally listed.

<http://www.consultingcanadians.gc.ca/dp.jsp?dd=51&lang=eng&tp=c>

Interestingly, this one does not appear there, but only inside the Treasury Board website. So an individual or group looking at the most obvious place for government consultations would not be able to find it.

In terms of the government's commitment to improving consultation with Canadians (Commitment 11) this is not auspicious.

## **Conclusion**

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Lack of transparency is a serious issue in this country, and not just for this government. However, the Government of Canada labours under the most archaic Access to Information law, and has shown no inclination to improve the legislation. This is despite credible critiques from a series of Commissioners, experts, media and civil society groups.

The current OGP commitments are tinkering around the edges of a very serious problem. This government has in the past made credible proposals for reform which it has seen fit to ignore while in office. Until serious proposals for reform are included as commitments to the OGP, the government's commitment to open government has to be questioned.

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