Reform of the *Access to Information Act*: Past time for Action

Submission to the House of Commons Standing Committee on Access to Information, Privacy and Ethics

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INTRODUCTION

FIPA is a non-partisan, non-profit society that was established a quarter century ago to promote and defend freedom of information and privacy rights in Canada. Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform.

While we maintain a focus on access and information rights in British Columbia, we have played an active role in federal access to information issues. In 2009, we prepared a submission for this committee focused on former Information Commissioner Robert Marleau's twelve reform proposals for the *Access to Information Act (ATIA)*, and have made a number of additional submissions since.[1]

For example, we prepared a very extensive submission to the Information Commissioner Suzanne Legault's consultation in 2012,[2] and we have made a number of submissions to the federal government regarding its participation in the Open Government Partnership (OGP). [3]

This submission builds on those past efforts; we hope you will find it helpful.

ACCESS TO INFORMATION NEEDS HELP NOW

Given the oft acknowledged and longstanding crisis in the access to information system in this country, it is surprising and disappointing that the government has postponed the comprehensive review of the *Access to Information Act* to 2018. As you have heard from a number of witnesses—including from the Information Commissioner—the backlog of needed amendments is extensive. That work should be started sooner rather than later.

Treasury Board President Brison has referred to a limited package of amendments coming this fall, which he described as "quick wins". The governing party set out a number of useful improvements to the system in its platform during the election last year,[4] and these have now made their appearance again in the proposed amendments that the government released on Sunday May 1.[5]

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[1] http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_Sub_to_ETHI_Committee-Feb_2_2011.pdf
[2] https://fipa.bc.ca/bc-fipa-responds-to-consultation-on-atia-reform/
[3] https://fipa.bc.ca/wordpress/wp-content/uploads/2014/06/Submission-OGP-Plans-June-2014.pdf
[4] https://www.liberal.ca/realchange/access-to-information/
[5] http://open.canada.ca/en/consultation/government-proposals-to-revitalize-access-to-information

It is vital that these proposals not be the sum and total of reform to the *ATIA*. It is important for the government to listen to what they hear not just from their consultation process but also from this Committee, and to act accordingly.

We draw some comfort from the fact that the government has seen fit to go beyond a simple restatement of what the Liberal Party promised during their election campaign. Hopefully the government will be as quick to adopt a number of vital changes which have already been proposed by a number of witnesses before this Committee, such as removal of the Cabinet exclusion and creation of a 'duty to document'.

We are much less pleased to see that a number of the added changes set out in the proposals could have the effect of reducing or negating the promised improvements, including a ministerial override of the Information Commissioner's orders and handing government departments the power to bar requesters by claiming their requests are frivolous or vexatious.

Recognizing what the government has imposed by way of a time-limited consultation process and legislative agenda, we are only dealing with relatively few recommendations in detail in this submission. This does not reduce the importance of the dozens of other recommendations we made to the Commissioner in 2012, and we recommend that you review those as well.[6]

Fees

We will make it easier for Canadians to access information by eliminating all fees, except for the initial $5 filing fee.

We applaud the government for its carry through on this commitment last week.[7]

However there is still one remaining fee-related problem, which the government could easily solve, and which would both save money and improve the efficiency and transparency of the system.

In 2009, Commissioner Marleau estimated that it cost the government $55 to process the $5 cheques that information requesters are required to include with their requests.[8] The government confirmed this in their recently-released proposal for reform.[9]

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[6] FIPA response to OIC consultation, 2012 https://fipa.bc.ca/wordpress/wp-content/uploads/2014/03/FIPAResponses_2012ATIAConsultation.pdf
[7] http://news.gc.ca/web/article-en.do?nid=1061499&tp=1
[8] Standing Committee on ATI Ethics and Privacy, #23, Second Session 40th Parliament May 27, 2009 http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3924567&Language=E
[9] The government states that electronic processing has a cost of fifty cents. However, if only ten percent of the total requests came with cheques instead of being processed online, the government would still be losing money by charging requesters the five dollar fee.

Eliminating application fees would save both requesters and the government considerable sums of money. In 2008-09, more than 40,000 ATI requests were received by the federal government.[10] If each of those requests came with a $5 cheque, the preventable loss to the federal treasury would have been more than two million dollars that year alone.

Since then, the number of requests has risen by more than 50%, with members of the public being the largest category of requesters. Even with potential cost reductions with the move to online request processing, there is likely still a substantial financial loss. Elimination of this fee would be a 'quick win' both for improved transparency and for the financial health of the system.

Fees should never be a barrier to access. The information that governments create belongs to the public. Taxpayers have already paid for its production, and should not have to pay once again to retrieve it.

Mandatory five year legislative review

To ensure that the system continues to serve Canadians, we will undertake a full legislative review of the Access to Information Act every five years.

Commissioner Marleau had this as one of his twelve essential reforms, and the recommendation has been echoed by the current Commissioner. FIPA strongly supports this initiative as well. Parliament should be required to conduct a review of the *Access to Information Act* every five years. The current archaic law is the result of the failure to modernize legislation on a regular basis.

Order-making power for the Information Commissioner

We will expand the role of the Information Commissioner, giving them the power to issue binding orders for disclosure.

Former Information Commissioner John Reid expressed the view that order-making powers would change the nature of his office. He was right, and we believe this would be a positive change The current Commissioner has stated that she requires full order-making power in order to properly carry out her responsibilities.

In 2009, Commissioner Marleau said he wanted the ability to try to mediate some complaints (as opposed to launching into full and costly investigations). This would be a necessary part of having order-making power, and is part of the system in BC and elsewhere.

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[10] InfoSource Bulletin 32B http://www.infosource.gc.ca/bulletin/2009/b/bulletin32b/bulletin32b02-eng.asp#k

Clearly there has been an evolution in the thinking of those who hold the office.

FIPA recommends against taking half measures, when clearly full order-making power is what is needed. As well, the current powers of the Information Commissioner should not be further restricted in any way.

The government's own studies have supported this move for years.

A 2002 report by the Treasury Board and the Department of Justice on *ATIA* reform stated:

> *In the final analysis we believe that the structural model in place in most jurisdictions, a quasi-judicial body with order-making powers combined with a strong mediation function, would best achieve this [dispute resolution]. In our view, it would be the model most conducive to achieving consistent compliance and a robust culture of access. We encourage government to give serious consideration to moving to such a model in the medium-term….*
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> *As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness…. It is an economical model for taxpayers and for requesters, with more than 99 per cent of all complaints being resolved without recourse to the courts.*[11]

In Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful. This model has been shown to work in BC and elsewhere in this country over a period of decades, and we recommend it to you for the federal Commissioner as well.

We are very concerned about the inclusion of ministerial or Cabinet override as a potential element of granting the Commissioner order-making power.[12] In the United Kingdom, where this model is in place, we have seen a number of cases of abuse by government. In one recent case the exercise of a ministerial override was struck down by the courts, and its operation thrown into question.[13]

The UK Supreme Court found that the section of the ATI law granting the override power "would be unique in the laws of the United Kingdom and would cut across two constitutional principles which are fundamental components of the rule of law, namely that a decision of a

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[11] Op cit *Access to Information: Making it Work for Canadians,* Recommendation 6-25, p. 114
[12] http://open.canada.ca/en/consultation/order-making-powers-for-the-information-commissioner
[13] R (on the application of Evans) and another (Respondents) v Her Majesty's Attorney General (Appellant), [2015] UKSC 21; see also http://www.theguardian.com/uk-news/2015/mar/26/supreme-court-clears-way-release-secret-prince-charles-letters-black-spider-memos

court is binding between the parties and cannot be set aside, and that decisions and actions of the executive are reviewable by the courts, and not vice versa."[14]

Expanding coverage of *ATIA* to include PMO and Ministers' offices

We will ensure that Access to Information applies to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.

We are of the view that expansion of the scope of the *ATIA* to include the PMO and Ministers' offices is vital for the proper functioning of the *Act*.

However, we are concerned about the qualification now being introduced in the restatement of this promise in the consultation proposal:

> *Ensure that the* Access to Information Act *applies* ***appropriately*** *to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts* (emphasis added).

It is not clear what the government intends by the change in wording. Surely the platform wording does not imply that the Liberal Party was planning to apply the *Act* inappropriately.

The current state of the law, as a result of the Supreme Court of Canada decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (2011 SCC 25), exempts records produced in and/or held by ministers' offices. This is not acceptable.

In that case, the Supreme Court rejected the Information Commissioner's (in our view, well-founded) argument that excluding these offices would create a "black hole" for accountability and transparency[15] by setting out an elaborate series of steps that a requester would have to take before a Minister's office could even be asked to conduct a search for records.[16]

An additional effect of the Court's ruling was that the people working in ministers' offices are also outside the operation of the law. This means that the people most likely to interfere with a requester's information rights, and thereby violate contrary to section 67.1 of the *ATIA*, are outside the operation of that section and therefore not subject to the penalties. This cannot be allowed to continue.

In BC, ministers' offices have been covered by the *Freedom of Information and Protection of Privacy Act* since the *Act*'s inception more than twenty years ago, and there has been no adverse effect on responsible government in the province. There is no reason why federal

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[14] Quote from press summary, citing para 52 of the judgement.
https://www.supremecourt.uk/cases/docs/uksc-2014-0137-press-summary.pdf
[15] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* at para 51
[16] Ibid., paras 52- 59

ministers' offices (and those of Secretaries of State) should not also be covered in the same way.

As for more general coverage issues, the basic ATI regime in many nations is not to list specific covered entities in schedules to the *Act*, but rather to include criteria outlining what kinds of entities are covered. A mixed system that uses both definitions and listings, such as that used in the UK, could also be considered.[17]

Cabinet confidences exclusion and other exemptions

In 1994, former Information Commissioner John Grace wrote "no single provision brings the *Access to Information Act* into greater disrepute than section 69," which excludes cabinet documents from our federal access regime.

We have long recommended that the Cabinet records exclusion be turned into a harm-based, discretionary exemption with a ten-year time limit, and be subject to review by the Commissioner.[18] It should also be amended to limit only the revealing of the substance of Cabinet deliberations, rather than to limit Cabinet records as a class.

The federal Commissioner and a number of other witnesses before this Committee have also recommended this type of change.

Justice Canada set out the need for change in 2005:

> *While the Government strongly believes that the Cabinet decision-making process must continue to be protected, it also recognizes that the current regime is twenty years old and needs to be modernized…The Government is considering the following changes to the Cabinet confidence regime: On the scope of protection, the Government would narrow the ambit of Cabinet confidentiality by focusing on its essence in a manner largely similar to what exists in the provinces and in most other Commonwealth countries.*[19]

The Commissioner's (and the Federal Court's) inability to review excluded records is not merely a theoretical problem.

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[17] The following terms, found in Article 19's Model Freedom of Information Law, 2001 are a good example: "For purposes of this Act, a public body includes any body: (a) established by or under the Constitution; (b) established by statute; (c) which forms part of any level or branch of Government; (d) owned, controlled or substantially financed by funds provided by Government or the State; or (e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions. "

[18] UK *Freedom of Information Act 2000*, s.36, and *Freedom of Information (Scotland) Act 2002*, s.30 both incorporate a harms test for cabinet confidences.

[19] A Comprehensive Framework for Access to Information Reform: A Discussion Paper (2005)Department of Justice Canada, para 2.1

In her latest annual report, Commissioner Legault found that "Institutions invoked section 69 more than 3,100 times in 2013–2014. This is a 49-percent increase from 2012–2013, which followed a 15-percent jump the previous year."[20]

It is interesting to compare this to what happened when Newfoundland and Labrador amended its access to information law to prevent its Commissioner from reviewing records excluded from access requests due to legal privilege – the number of legal privilege claims shot up.

As one official told the committee reviewing the Newfoundland ATI law:

> *…the person [the public official] said yes, we thought we'd claim [legal privilege] because we just heard about this court decision, and we heard that you can't review claims of solicitor-client privilege so we thought we'd claim it. That is…we were flabbergasted…but it's a fact that a head of a public body actually admitted to us – that the reason they claim that section of the Act, solicitor-client privilege, was because we couldn't review it.*[21]

When, following a change in that province's access regime, the Newfoundland Information Commissioner was finally able to review files where privilege had been claimed, they found that 80 percent "had nothing to do with solicitor-client privilege whatsoever and only 20 percent of the records were properly claimed."

Although there is no way to prove the same thing is going on at the federal level with claims of Cabinet confidence, there is also no way to verify that it is not happening, since neither the federal Commissioner nor the courts can review the documents in question.

In British Columbia and elsewhere in this country, provincial information commissioners have been examining claims of provincial Cabinet confidences for decades. There have been no problems with leaks or with Cabinet ministers being unable to frankly discuss important issues.

It is also instructive to review the testimony the Committee received earlier from the Newfoundland Commissioner's office, discussing the difficulties they are having with their province's law on cabinet records:

> We also have the Clerk of Executive Council can exercise a type of public interest override in relation to cabinet records as well." "Our cabinet confidences exception was revised. We don't have a full substance of deliberations test. There is a substance of deliberations that's applied to cabinet confidences material which might be found in records that are not cabinet records per se, but it's more of a categorical exception. That

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[20] Office of the Information Commissioner of Canada Annual Report 2014-15 http://www.ci-oic.gc.ca/eng/rapport-annuel-annual-report_2014-2015.aspx

[21] Transcript of the Public Hearings of the Statutory Review Committee on Access to Information and Protection of Privacy, June 26, 2014 http://www.parcnl.ca/documents/oipc_june 26 2014.pdf

> one probably could be better. I'm sure Commissioner Legault has put forward arguments as to what she believes it should be. I would recommend you have a look at those closely. [22]

Unless this black hole is filled in, other valuable reforms to the *Act* could be easily circumvented. It is essential for any reform of the *Act* worthy of the name.

It is our view that all exceptions set out on the *Act* (save for section 19, which protects personal privacy) be discretionary.

For a detailed discussion of the various exemptions, please see our submission to the Commissioner's consultation.[23]

Duty to document

There was nothing about the duty to document in the Liberal Party platform, and more disturbingly there is nothing in the government's proposal for reform of the *Act*.

The duty to document has been a matter of considerable interest in British Columbia, after being brought to a head during what has come to be known as the "Triple Delete scandal". There are also a number of criminal proceedings underway in Ontario related to a mass e-mail deletion scandal.[24]

An investigation report by the BC Commissioner [25] showed the extensive failure by many bureaucrats and political staff to keep proper—or indeed any—records of important decisions and discussions, usually under the pretense that such records were 'transitory', and therefore of no permanent value. Not one, but two consecutive deputy chiefs of staff to the Premier stated that they deleted all their e-mail at the end of the day (ensuring no record was kept).

In January of this year, FIPA commissioned Ipsos Canada to conduct a poll[26] on a number of Freedom of Information questions, including whether it was important to have a legistlated duty to document in place. The poll showed that 78 percent of respondents thought it was very important that government officials be required to keep accurate and complete records of what they do on the job, while another 18 percent thought it was somewhat important, for a total of 96 percent.

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[22] Minutes of Proceedings, Standing Committee on Access to Information, Privacy and Ethics (ETHI) 42nd Parliament, 1st Session, Meeting No. 9, April 19, 2016 - Sean Murray, Director of Special Projects
[23] November 2012 https://fipa.bc.ca/wordpress/wp-content/uploads/library/Reports_and_Submissions/FIPAResponses_2012ATIAConsultation.pdf
[24] http://www.cbc.ca/news/canada/toronto/gas-plant-charges-1.3369470
[25] IR F15-03 Access Denied: Record Retention and Disposal Practices of the Government of British Columbia October 22, 2015 https://www.oipc.bc.ca/investigation-reports/1874
[26] https://fipa.bc.ca/vast-majority-of-british-columbians-want-government-to-have-duty-to-document-penalties-for-interfering-with-information-rights-poll/

There has been a consensus building on this reform for some time.

In his 2006 report, Restoring Accountability, Justice John Gomery recommended:

> *The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions." The conservative Party agreed and in their 2006 election platform, stated that a Conservative government would: Oblige public officials to create the records necessary to document their actions and decisions*. [27]

The federal Information Commissioner has repeatedly called for a duty to document to be included in the *Act*,[28] and earlier this year, every information commissioner in the country signed on to a declaration calling for a legislated duty to "document their deliberations, actions and decisions".[29]

It would be a serious blow if the federal government was to fail to make this important addition to the *Act*.

Open by default

Government data and information should be open by default, in formats that are modern and easy to use. We will update the Access to Information Act to meet this standard.

Under section 5 of the *Access to Information Act* the government must annually publish a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution, manuals, and a description of all classes of records under their control. This section also sets out the principle "that every person is entitled to reasonable access thereto."

FIPA recommends that there should also be a mechanism to challenge the redactions made in records being proactively released by the government.

Responding to frivolous and vexatious requests

The issue of frivolous and vexatious requests was not in the Liberal Party platform document, but it has been included in the government's proposal for *ATIA* reform:

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[27] Recommendation 16
[28] http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx
[29] http://www.oic-ci.gc.ca/eng/resolution-obligation-de-documenter_resolution-duty-to-document.aspx

Give Government institutions and the Information Commissioner authority to decline to process requests that are frivolous or vexatious[30]

A requester whose requests are designed to impede the functioning of the public body rather than to elicit information should be subject to some sanction, but the wording of the government's proposal gives us cause for concern.

We recommend the government adopt the BC model if it is to include such an amendment: Under the BC *Freedom of Information and Protection of Privacy Act,* a public body must apply to the Commissioner for permission to disregard requests.[31] The Commissioner determines whether a request is frivolous or vexatious using criteria in many ways similar to those used by the courts to determine whether a court case is frivolous or vexatious. The use of this term allows the importation of existing jurisprudence, which provides for a measure of clarity and certainty in its application.

Although this could be a useful amendment, the problem it is attempting to deal with is very rare. Since the government released this proposal last week, we were able to pull together some statistics on how often these provisions are used.

In BC, there were 20,261 requests for general (as opposed to personal) information between 2010 and 2015. Over the same period there were only 20 applications to the Office of the Information and Privacy Commissioner for relief under section 43, or 0.01 percent.

In Manitoba, where the departments are able to invoke these provisions without having to go to the Commissioner, they received 10,455 requests between 2010 and 2014. Over that same period the 'frivolous and vexatious' provision was invoked 72 times or 0.69 percent.

These numbers show two things. First, the absolute and percentage numbers are tiny under both regimes. Second, there is an indication is that the jurisdiction that allows government to invoke this clause has much more frequent use than the jurisdiction where the public body has to seek a remedy from the Commissioner.

We are concerned that the government is considering giving this drastic power to government bodies rather than to the Commissioner. This is a very serious restriction on the rights of requesters, which should only be used in extreme cases and after consideration by a neutral third party – the Commissioner.

Furthermore, we note that the creation of a power to deprive requesters of their right is not mirrored by penalties for a public body that does not carry out its duty to assist requesters.

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[30] http://open.canada.ca/en/consultation/government-proposals-to-revitalize-access-to-information

[31] *Freedom of Information and Protection of Privacy Act*, s.43

RECOMMENDATIONS FOR IMMEDIATE REFORM

1. Eliminate all fees
2. Implement mandatory five year review of the *Act*
3. Provide the Information Commissioner with full order-making power
4. Ensure ministers' offices and PMO are covered by the *Act*
5. Make Cabinet records an exemption instead of an exclusion
6. Create a legislated duty to document
7. Make government information open by default
8. Any provision to restrain frivolous or vexatious requests should be obtained from the Commissioner's office, not invoked by government

CONCLUSION

The BC Freedom of Information and Privacy Association thanks the House Standing Committee for the opportunity to provide these thoughts and recommendations, and we look forward to your own recommendations for action on this important issue.

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