Bill C-58 An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts

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

November 1, 2017

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FIPA would like to acknowledge the Law Foundation of British Columbia. Their ongoing support of our work in the areas of law reform, research, and education makes submissions like this possible.

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, including appearing before this honourable Committee last year on the issue of reform to the Access to Information Act.

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

Bill C-58 makes the situation worse, not better

We agree with Commissioner Legault in her overall assessment of the Bill, that it is "very disappointing" and regressive overall. This submission deals with the numerous problems with Bill C-58, not with the many additional reforms that are both urgent and necessary.

Fees

The government should get rid of fees for ATI requests in their entirety.

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.[1] The government confirmed this earlier in a consultation document.[2]

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.[3] 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.

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[1] 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

[2] 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.

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

Since then, the number of requests has risen by more than 50 %, and even with potential cost reductions with the move to online request processing, there is likely still a loss of millions of dollars.

This Committee agreed with the elimination of the wasteful $5 application in its report on the ATIA.[4]

Elimination of all fees would also make Section 11 redundant, and it should be removed.

Order-making power for the Information Commissioner

Although the creation of an order-making model is a positive development, there are a number of problems with what is being proposed in C-58.

Aside from vital areas the Commissioner would still have no jurisdiction to investigate or make orders on (Ministers offices, cabinet confidences), the system being proposed would be unnecessarily expensive and wasteful, and would undermine requesters' rights.

Under 44.1 of Bill C-58, the court application is *de novo*, or a completely new proceeding. Rather than reviewing the Commissioner's decision, a *de novo* hearing allows institutions to present new evidence and claim new exemptions.

This is the opposite of the real order-making model we have in BC and other provinces, where the Commissioner's order is subject to judicial review, and the appeal court review the decision of the Commissioner rather than re-hearing the matter (and reviewing the same or possibly new evidence). The standard of review is usually whether the Order was reasonable, and considerable deference is given to the Commissioner's decision. None of this is true of what is being proposed under C-58.

Furthermore, the 'orders' made under C-58 would not be certified as they are in BC and other provinces. This raises the possibility of an order sitting in limbo should an institution refuse to follow it nor apply to the Federal Court for a de novo review, since C-58 does not let the Commissioner initiate proceedings as an applicant before the Federal Court.[5]

The government has not provided any rationale for adopting this deficient system rather than giving the Commissioner full order making power. We recommend that the bill be amended to provide the federal Commissioner with order making power similar to that of her provincial counterparts.

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[4] http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-72#16 Rec 14
[5] http://www.ci-oic.gc.ca/eng/rapport-special-c-58_special-report-c-58.aspx#4 Part 4.

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

The expansion of the scope of the *ATIA* to include the PMO and Ministers' offices is vital for the proper functioning of the *Act*. However, that is not what is being done in C-58.

Canadians will continue to have no right to request records from these bodies. Instead, C-58 sets up a legislated posting system for various categories of information. Furthermore, the Commissioner will also be shut out of the process.

Another problem with the approach taken in C-58 is that the people working in ministers' offices will continue to be 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 ministers' offices (and those of Secretaries of State) should not also be covered in the same way.

Cabinet confidences exclusion and other exemptions

Bill C-58 does not deal with the need to reform the cabinet confidences exclusion, nor does it fix any of the problems related to the exceptions to release under the ATIA. This is unacceptable.

FIPA and many others 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.[6] 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.

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

Duty to document

There is nothing about the duty to document in the Bill, which is very disturbing and should be corrected.

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[6] 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.

An Ipsos Canada poll[7] conducted for FIPA 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.

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

Every information commissioner in the country signed on to a declaration calling for a legislated duty to "document their deliberations, actions and decisions", [8] and the federal Commissioner has reiterated this in her commentary on C-58,[9] in addition to calling for penalties for violation of this duty. So has this Committee.

The absence of such a legislated duty in the face of overwhelming expert and popular opinion undermines the credibility of the entire Bill.

Listing requirements of valid ATI request

Bill C-58 adds several requirements government officials will be able to use to refuse to process any given request.

Proposed amendments to section 6 will allow officials to refuse to handle a request where the request is missing any one of the following elements:

- The specific subject matter of the request;
- The type of record being requested; or
- The period for which the record is being requested or the date of the record.

This section sets up a conflict with the duty to assist requesters set out in s.4.1. These three elements should be something that officials should be reviewing with requesters as part of the duty to assist them in getting the information they are seeking rather than being set up in a separate section, using mandatory language. This is the way these elements are dealt with now (or how they should be being dealt with) in light of the duty in s.4.1

The addition of these elements in s.6, combined with the new power to decline to process a request in s.6.1 sets up a situation where increasing numbers of requests will be refused, especially from less sophisticated or experienced requesters. Given members of the general public make up the largest category of ATI requesters, it will be the access rights of ordinary Canadians that are most likely to suffer from this change.

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[7] https://fipa.bc.ca/vast-majority-of-british-columbians-want-government-to-have-duty-to-document-penalties-for-interfering-with-information-rights-poll/
[8] http://www.oic-ci.gc.ca/eng/resolution-obligation-de-documenter_resolution-duty-to-document.aspx
[9] http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx Chapter 2.

Former BC Commissioner Denham identified this problem in a 2013 report, finding that one ministry said there were no responsive records where a request was made for the calendar of the *Assistant* Deputy Minister rather than the *Associate* Deputy Minister. [10]

This section should be removed to avoid both confusion and semantic games with requesters that will always be decided by the bureaucrats in favour of the bureaucrats.

Responding to frivolous and vexatious requests

The issue of frivolous and vexatious requests was the focus of much of the testimony before this Committee from Minister Brison and Minister Gould, and the proposal they have brought forward in C-58 to deal with this issue is highly problematic for a number of reasons.

Despite the importance placed on this provision by the Ministers, they were unable to provide any detailed accounting of just how many such requests are actually in the system. An official suggested the number might be about one percent, which is far beyond the numbers we have been able to find for the provinces of British Columbia and Manitoba where legislative provisions deal with frivolous or vexatious requests.

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 (which covers these situations), or 0.01 percent.

In Manitoba, where (as in C-58) departments are able to invoke these provisions directly 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 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.[11] 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

[10] https://www.oipc.bc.ca/investigation-reports/1510 pp 13-14

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

certainty in its application, compared with the problems that will result with the use of the term "bad faith" currently in C-58.

We are concerned that the government is 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.

It is also wasteful, because virtually any requester who is in a situation where they are making a number of requests to the same department will be unlikely to accept the diktat of that same department that their request will not be handled because they are acting vexatiously or in bad faith. It is a certainty that these claims by the government will end up before the Commissioner, as requesters will demand a review of the department's refusal to handle their requests.

Finally, 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.

CONCLUSION

We note that Minister Brison has emphasized the opportunity to make changes to the ATIA at the review a year after C-58 receives Royal Assent.[12]

To that we would urge you to avoid the need for further amendments by avoiding the pitfalls we have outlined above. The problems are obvious, and there is no need for waiting a year to fix the obvious deficiencies.

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[12] http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-71/evidence