



**Your Data
Your Rights**



Submission to the President of the Treasury Board: Review of the Access to Information Act

August 2021

BC Freedom of Information and Privacy Association

PO Box 8308 Victoria Main

Victoria, BC V8W 3R9

Phone: 604-739-9788

Website: <https://fipa.bc.ca>

Email: fipa@fipa.bc.ca

Submission prepared by: Evan Brander, Legal Researcher

August 12, 2021

The Honourable Jean-Yves Duclos. P.C., M.P.
President of the Treasury Board
90 Elgin Street
Ottawa, Ontario K1A 0R5
President@sct-tbs.gc.ca

Dear Minister Duclos,

The BC Freedom of Information and Privacy Association welcomes this opportunity to provide input into the review of Canada's access to information system and the *Access to Information Act* (ATIA).

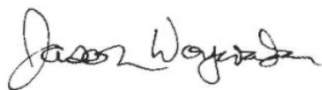
Access to information is a fundamental right of Canadians and a critical tool for providing oversight, ensuring transparency and strengthening democracy. We are supportive of the government's objective of improving openness and transparency and improving access to information for Canadians.

We hope that this review will reveal the major shortcomings of the access to information system as it currently exists and that it will lead to substantial reform.

In our enclosed submission, we make several recommendations for crucial changes to Canada's access to information regime. Such changes are long overdue and badly needed.

We hope our submission will be of assistance and look forward to the results of the review.

Sincerely,



Jason Woywada
Executive Director
BC Freedom of Information and Privacy Association

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About FIPA

The BC Freedom of Information and Privacy Association (FIPA) is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. While we are based in BC, our membership extends across Canada and we regularly partner with organizations throughout the country.

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. We are one of very few public interest groups in Canada devoted solely to the advancement of freedom of information and privacy rights.

Introduction

Access to information is a right for all Canadians and a crucial tool for promoting transparency and accountability within federal institutions. The Access to Information Act was developed in 1985 and has not been significantly modified since that time. It was drafted for an era prior to the advent of the internet and electronic communications. Extensive changes are required to bring the *Access to Information Act* and the broader access system into the current century.

The federal government began the process of changing the access system through Bill C-58 in 2019. While some of the changes made through C-58 were positive (e.g., eliminating all fees besides the \$5 application fee), others were counter-productive (e.g., imposing additional obligations on requesters to identify records they are seeking, while allowing institutions to decline to act on requests if these are not met). This review presents the

federal government an opportunity to course correct and move the access system in the right direction.

A number of extraordinary events over the past year have highlighted the crucial need for a strong access to information regime. For example:

- **The COVID-19 pandemic has led to broad reliance on public health data for individuals to keep themselves safe and for organizations to plan their emergency responses. Access to timely, reliable government information about the spread of the virus and how to respond have been critical.**
- **The tragic discovery of burial sites of children at numerous former Indian Residential Schools has highlighted the need for access to historical records for achieving lasting reconciliation.**

These events show how important access to government information can be and how critical it is to improve the current system. This review is an opportunity to address longstanding issues with Canada's access system and re-establish Canada as a leader in government transparency and accountability.

Our Research

Our submission is based on a review of all provincial and territorial freedom of information acts (conducted in collaboration with the Canadian Civil Liberties Association). This review identified best practices from provincial and territorial jurisdictions and gaps in the federal legislation. Our research also looked at access to information systems in international comparator jurisdictions, the academic literature, case law on access and public opinion polling. We would highlight a 2018 opinion poll that we commissioned

IPSOS to conduct on our behalf regarding British Columbians' views on access to information (See Appendix A for an overview of results).

Our research highlights the fact that Canada's access system has fallen behind that of peer nations and provincial / territorial systems, and the fact that the public strongly believes in the importance of the access system for improving government transparency.

The following recommendations are based on our research and highlight the most critically needed changes to improve Canada's access to information system.

Our Commitment to Reconciliation

FIPA acknowledges with respect the Indigenous peoples on whose traditional territory we conduct activities. While striving to increase privacy protection and access to information for everyone, we recognize that colonization and associated attitudes, policies and institutions have significantly changed Indigenous peoples' relationship with this land. For many years, those same things served to exclude Indigenous peoples from the privacy protection and access to information afforded to others. FIPA is committed to redressing those historic and continued barriers and considers the United Nations Declaration on the Rights of Indigenous Peoples in this submission.

We acknowledge the insight and knowledge of elders past, present, and emergent and their relationship to this land and these issues.

Recommendations

1. Resourcing, Culture and Training

The Problems

- **Access to Information teams and the Office of the Information Commissioner are not resourced to properly carry out their functions.**
- **Employees of government institutions are not trained in ATI requirements.**
- **A culture of secrecy treats the release of records as a risk, rather than a right.**

The Solutions

- **Increase staffing resources for access to information teams and the Office of the Information Commissioner to address the large increase in access requests.**
- **Provide mandatory training to federal employees on access to information.**
- **Encourage executive leadership in all government institutions to champion improved access to information to shift culture.**

Resourcing

The number of access requests received by the government of Canada has increased substantially in recent years. According to Treasury Board statistics, in 2019-20, federal government institutions received 156,222 access requests,¹ compared to 105,973 in 2016-17.² This represents 47 percent increase in only three years.

¹ Canada, Treasury Board Secretariat, *Access to Information and Privacy Statistical Report for the 2019 to 2020 Fiscal Year*, (Ottawa: 12 Dec 2020), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2019-2020.html>>. [TBS Report 2019-20]

² Canada, Treasury Board Secretariat, *Access to Information and Privacy Statistical Report, 2016-17*, (Ottawa: 21 Dec 2017), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2016-2017.html>>.

Despite this rise, there has not be a corresponding increase in resources allocated to Canada's access to information system. This has left many access to information teams badly understaffed and under resourced.³ For government departments to meet their obligations under the ATIA, they must have adequate resources to process and respond to requests. In addition to having an adequate number of staff, government institutions must make use of technology to improve the efficiency of the access to information system. The Treasury Board's *Access to Information Manual* outlines a highly labour-intensive process, with access to information coordinators manually analyzing each individual record.⁴ New technologies could be employed to expedite these processes.

There is also a critical need to expand resourcing for the Office of the Information Commissioner of Canada. The Information Commissioner plays a critical role in overseeing the access to information system and upholding Canadians' access rights. The media has reported that the Information Commissioner has a backlog of over 4,000 complaints to address (roughly equal to the number of complaints the office receives in a full year).⁵

The Office of the Information Commissioner was granted additional funding last year following the passage of Bill C-58. Further resources are needed to ensure the office can respond to the thousands of annual complaints it receives, to initiate its own investigations on systemic issues and to provide guidance to government institutions.

³ Information Commissioner of Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, (Gatineau: January 2021), online: <<https://www.oic-ci.gc.ca/en/resources/reports-publications/observations-and-recommendations-information-commissioner-review>> at 6-7. [Information Commissioner Submission]

⁴ Canada, Treasury Board Secretariat, *Access to Information Manual*, (Ottawa: 3 Aug 2018), online: <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha2_1>.

⁵ Jolson Lim, "Over 4,000 access-to-information complaints still backlogged," iPolitics (14 May 2021) online: <<https://ipolitics.ca/2021/05/14/over-4000-access-to-information-complaints-still-backlogged/>>.

Recommendation 1: Provide adequate resourcing to access to information teams (including access to new technologies) and the Office of the Information Commissioner to allow them to properly carry out their functions.

Culture

Individuals making use of the access to information system have long complained of a culture of secrecy within the federal government, where information is guarded and there is a presumption against disclosure. As just one example, the federal cabinet was recently named the winner of the “Code of Silence award” by the Centre for Free Expression for denying access to information about loans given through the “Canada Account.”⁶

Even where information is released, it often comes with large and unnecessary redactions. One story from the Toronto Star described receiving a heavily redacted document that had censored the word “Canada,” referring to the “Government of [redacted].”⁷

Federal government culture must shift broadly towards more openness and transparency. This cultural change needs to come from the top-down, with the Treasury Board and senior leadership in each institution articulating their support for the access to information system and setting a tone of openness. Former Information Commissioner Suzanne Legault wrote,

⁶ Centre for Free Expression, “Federal Cabinet wins the federal 2020 Code of Silence Award for Outstanding Achievement in Government Secrecy” (Toronto: 9 Feb 2021), online: <<https://cfe.ryerson.ca/news/federal-cabinet-wins-federal-2020-code-silence-award-outstanding-achievement-government-secrecy>>.

⁷ Alex Boutilier, “Government of [CENSORED] censors cyberbullying docs,” *The Toronto Star* (20 June 2014), online: <https://www.thestar.com/news/canada/2014/06/20/government_of_censored_censors_cyberbullying_docs.html>.

“Executive leadership is the key to how well institutions fulfill their obligations under the Act. As the policy centre, the Treasury Board of Canada Secretariat is responsible for giving institutions the guidance they need to implement the Act correctly. Within institutions, it is the head and the officials with delegated authority who are ultimately accountable.”⁸

It is difficult to change the culture of an organization, but such a change is badly needed if the access to information system is to remain relevant going forward.

Recommendation 2: Improve government culture surrounding access to information by clearly articulating the principles behind the access system and encouraging executive leadership in all government institutions to champion improved access to information.

Training

All employees of federal institutions need to have a better understanding of the purpose of the access to information system and their role within it. This extends beyond access to information coordinators to all employees creating records that can be accessed by external requesters.

In order to accomplish this, the Treasury Board Secretariat should provide mandatory training modules for all employees of federal institutions, explaining the purpose and importance of the *Access to Information Act*. It should also provide practical guidance on how to maintain, organize and search for records. Part of the training should include going through the

⁸ Suzanne Legault, *Out of Time: Systemic Issues Affecting Access to Information in Canada*, Office of the Information Commissioner of Canada (Ottawa: April 2010) at 12.

process of submitting an actual access to information request, so that employees see the system from the perspective of an external requester.

Federal employees should also be provided with ongoing communications about the importance of access to information. This should include positive stories about what requesters have accomplished using information they received through the access system.

Recommendation 3: Provide mandatory access to information training to all federal employees; provide ongoing communications on the importance of access rights.

2. Duty to Document

The Problem

- There is no legal requirement for employees of federal institutions to keep records of important business and decisions.

The Solution

- Legislate a duty to document within the ATIA.

A duty to document is a requirement for public officials to create full and accurate records of decisions made and processes followed to make decisions in government. This includes a requirement to create records about business activities carried out solely by phone, instant messaging or videoconferencing.

A duty to document is fundamental to the success of any access to information system. It ensures that records exist to be accessed and improves public trust. It benefits institutions themselves by preserving a historical record and facilitating evidence-based decision making.⁹

There are various acts and policies currently in place requiring records to be preserved or decisions documented (e.g., the *Library and Archives of Canada Act* and the Treasury Board *Policy on Information Management*). However, these are not an adequate replacement for a legal duty to document. They do not contain penalties or oversight mechanisms – and there is no indication that they are enforced.

⁹ Information and Privacy Commissioner of Canada, Statement of the Information and Privacy Commissioners of Canada on the Duty to Document, (Gatineau: January 2016), online: <<https://www.oic-ci.gc.ca/en/statement-information-and-privacy-commissioners-canada-duty-document>>.

Business practices have shifted over the course of the pandemic to accelerate the adoption of new communication technologies that facilitate remote work. This shift has led to concerns that important business decisions are not being properly documented.¹⁰ In light of the fundamental shifts in the way public bodies are carrying out their functions, it is now more important than ever to enshrine a legal duty to document within the ATIA.

Several international jurisdictions have a legal duty to document within their access to information legislation. New Zealand's *Public Records Act, 2005* requires every public office to create and maintain full and accurate records of its affairs in an accessible form for subsequent reference.¹¹ The US federal law requires institutions to make and preserve records containing adequate and proper documentation of decisions, procedures, and essential transactions.¹²

In designing a duty to document provision for Canada, these international best practices could be followed. Marc Kosciejew notes that there are several key components that should be included in any duty to document provision:

- 1. It must require the creation of appropriate records to describe the activities and decisions of public institutions;**
- 2. It should include practical guidance on records management standards to ensure records are authoritative and complete; and**

¹⁰ Duty to Document Webinar, Canadian Institute for Information and Privacy Studies (16 April, 2021), online: <https://www.infoandprivacy.ca/duty-to-document/>.

¹¹ *Public Records Act*, New Zealand, 2005 at s. 17 (assented to 20 April, 2005), online: <https://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345529.html#DLM345727>.

¹² 44 United States Code §3101, online: <https://uscode.house.gov/view.xhtml?path=/prelim@title44/chapter31&edition=prelim>.

3. It must be enforceable, with reasonable sanctions for non-compliance.¹³

Information commissioners in Canada at both the federal and provincial levels have been calling for a legislated duty to document since the 1990s.¹⁴ The time has come to finally meet these calls and create a legal duty to document within the ATIA.

Recommendation 4: Embed a legal duty to document within the ATIA.

¹³ Marc Kosciejew, “Establishing a Duty to Document: The Foundation for Access to Information” (2016) 50:3 Information Management 34.

¹⁴ James Ellard, Background: Duty to Document, Office of the Information Commissioner of Canada (25 January, 2016), online: <<https://www.oic-ci.gc.ca/en/resources/news-releases/background-duty-document>>.

3. Scope of the ATIA

The Problem

- **Organizations that were outsourced delivery of government services are outside the scope of the ATIA.**
- **Key bodies like the Prime Minister's Office and ministers' offices are not subject to Part 1 of the ATIA.**

The Solution

- **Expand the ATIA's scope to cover all organizations delivering public services.**
- **Expand Part 1 of the act to cover the PMO and ministers' offices.**

FIPA's position is that every organization delivering public services should be subject to the ATIA. All quasi-public and private organizations that have been subcontracted to deliver a public service should automatically be subject to disclosure requirements. If the same services were delivered within government, they would be subject to the ATIA; outsourcing services should not shield records from disclosure.

The ATIA applies to approximately 250 government institutions, including all departments of the federal public administration, parent crown corporations and wholly owned subsidiaries. However, there are a large and growing number of entities to which the act does not apply.

Since the ATIA was drafted, a major transformation has occurred, where many government functions have been sub-contracted, delegated or transferred to external organizations. Agencies and organizations that receive federal funding to deliver programs or provide government services – but that are not *wholly* owned by the federal government – are not subject to the ATIA. Various important quasi-governmental bodies like Canada

Blood Services, the Canadian Institute for Health and major airport authorities are not subject to the act.

Recommendation 5: The ATIA must be expanded to cover any entity to whom the government has outsourced the delivery of public programs or services.

In addition to extending the ATIA to organizations outside of government, the scope of the act must be expanded to cover all bodies *within* government. Several key public bodies are not included in the scope of Part 1 of the act, including the Prime Minister's Office and offices of ministers.

Since amendments were introduced to the ATIA in 2019, the PMO and ministers' offices are now subject to proactive disclosure requirements (Part 2 of the ATIA) – this is a positive first step. However, only a limited range of documents are required to be proactively disclosed; there are many more records held by these offices that are not accessible under the act.

Many provinces across Canada currently include the offices of ministers and legislative assemblies within the scope of their access to information legislation. As one example, Newfoundland and Labrador's *Access to Information Act* applies to the House of Assembly, officers of the legislature and constituency offices of members of the House of Assembly.¹⁵

Recommendation 6: The scope of Part 1 of the ATIA should be expanded to include the Prime Minister's Office and ministers' offices, while maintaining protections that would prevent the disclosure of sensitive or privileged information.

¹⁵ *Access to Information and Protection of Privacy Act*, SNL 2015, c. A-1.2, at s. 2.

4. Public Interest Clause

The Problem

- **Exemptions and exclusions can be used to prevent the release of information, even when there is an overwhelming public interest in its release.**

The Solution

- **A mandatory public interest override should be added to the ATIA requiring the disclosure of records if it is clearly in the public interest.**

Public interest “override” provisions in access to information legislation require records to be released if there is a strong public interest in their disclosure. They require public bodies to give access to documents, even if they would otherwise be exempt and even if no request has been made for their release. Examples of records typically subject to a public interest provision are those relating to the environment, health and public safety.

Public interest provisions have been called “the most significant drafting feature in terms of ensuring that the objects of FOI laws are met.”¹⁶ Their purpose is to ensure that the overall objective of access to information laws are achieved by improving transparency and providing the public with access to important information about their own wellbeing.

Additionally, the ongoing and tragic discovery of unmarked child graves at the sites of former Indian residential schools has understandably led to urgent calls for the release of relevant government records. This is a moment when the imperatives of reconciliation and justice run up against an

¹⁶ Moira Paterson & Maeve McDonagh, “Freedom of information and the public interest: The Commonwealth experience,” (2017) 17:2 Oxford University Commonwealth Law Journal 189.

access to information system that is characterized by delay and complexity. It is a good example of the need for a robust public interest clause.

In Canada, the ATIA includes a public interest clause that is both weak and limited in its scope. It is contained in section 20 and only overrides the third-party information exemption. It is discretionary, stating that a head *may* disclose a record if the public interest clearly outweighs the loss to a third party. It also applies only to records that have actually been requested, rather than creating a responsibility to release records in the public interest, whether or not they have been requested. This is significantly weaker than the public interest provisions contained in many provincial acts and many international comparator jurisdictions.

For example, Newfoundland and Labrador's *Access to information Act* contains a general public interest override. It states that if a head of a public body has the discretion to exempt records from disclosure, the exemption does not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exemption.¹⁷ This overrides many exemptions, including those for policy advice, legal advice, and disclosure harmful to the financial or economic interests of a public body.

Court rulings are consistent with allowing access to records that are clearly in the public interest. In *Barker v Ontario (IPC)*, the Ontario Court of Appeal ruled that Ontario's *Municipal Freedom of Information and Protection of Privacy Act* permits the disclosure of even sensitive personal information if there is a compelling public interest in its disclosure.¹⁸

¹⁷ *Access to Information and Protection of Privacy Act*, SNL 2015, c. A-1.2, at s. 9.

¹⁸ *Barker v Ontario (Information and Privacy Commissioner)* 2019 ONCA 275.

Internationally, the UK and Australia have broad public interest provisions that weigh in favour of disclosure. They create a presumption that records will be released, unless there is a public interest in *preventing* a record from being disclosed.

Recommendation 7: It is time for Canada to update the ATIA to align with provincial acts and international peers by including a broad, mandatory public interest override.

5. Timing and delays

The Problem

- **It takes far too long for some records to be released to requesters. Government bodies can extend timelines with impunity and delay the release of records.**

The Solution

- **Reduce the amount of time that government bodies have to respond to access requests and place a cap on the length of extensions.**

Perhaps the most significant challenge with the current federal access to information regime is the delays that requesters face before finally gaining access to records. Requesters often have a pressing need to obtain information quickly. They must be able to access information that they have a right to obtain within a reasonable timeframe. Information rapidly loses its currency and may be irrelevant by the time it is finally released months or years later. Delays in providing access to records reduce public confidence and trust in the access system.

The time limits outlined in the ATIA give institutions 30 days to respond to access requests. This base amount of time to respond to access requests is longer than in some provincial and territorial jurisdictions. For example, in Quebec, the time limit for responding is 20 days, in Newfoundland and Labrador, the time limit for responding is 20 business days and in Nunavut, the time limit is 25 days.

Recommendation 8: The ATIA should be amended to reduce the amount of time to respond to an access request from 30 days to 20 days.

In addition, there are far too many ways for public bodies to extend timelines and delay disclosure. According to Treasury Board statistics, in 2019-20, only 59.9 percent of all access requests to federal public bodies were processed within 30 days.¹⁹ More worryingly, only 67.4 percent of requests were closed within legislated timelines (including allowable extensions). This means that approximately one in three requests violated legal disclosure timelines.²⁰

The ATIA provides government institutions with several different means for extending timelines to respond to an access request. Under section 9(1), a head may extend the time for responding to a request for an unspecified “reasonable period of time”:

- If the request is for a large number of records or they must be searched and meeting the time limit would interfere with operations;
- If consultations with other departments are required; or
- If notice must be given to a third party.

If a request is transferred to another government institution, this resets the clock on the request. In addition, timelines are suspended if a public body asks the Information Commissioner for approval to decline to act on a request.

About half of all extensions (49.3 percent) were taken because public bodies said that completing the request on time would interfere with operations.²¹ While consulting with other institutions was a less frequent

¹⁹ *Treasury Board Report 2019-20*, *supra* note 1.

²⁰ *Ibid.*

²¹ *Ibid.*

reason for extending deadlines, the use of this reason for extension increased by 5.1 percentage points from 2018 to 2019.²²

The increasing use of extensions for consultations is concerning. According to the Information Commissioner, there is limited guidance for public bodies on determining whether they actually need to consult, and how long it should take to complete consultations. Institutions also tend to prioritize their own access requests, giving less importance to consultations with other public bodies on their requests.²³ This can lead to long delays in providing access, when consultations between institutions may not even be necessary.

Most provinces and territories have much more stringent requirements around extending timelines. In Quebec, a head may extend the timelines by only 10 days. In Newfoundland and Labrador, any request to extend timelines must be approved by the Information and Privacy Commissioner. The application must be made within 15 days of receiving the request and the Commissioner must decide within 3 days whether to grant the extension.

In most other jurisdictions, a head of a public body may extend the deadline to respond to a request by 30 days and any longer extension requires the approval of the Commissioner / Ombudsperson. There is no province or territory in Canada that allows a head to extend timelines by an unspecified “reasonable length of time” as is currently seen in the ATIA.

²² *Treasury Board Report 2019-20*, *supra* note 1.

²³ *Information Commissioner Submission*, *supra* note 3 at 12.

Recommendation 9: The ATIA must be amended to place a limit on the amount of time that the head of a public body can delay a response and provide further guidance on when extensions can and cannot be taken.

Finally, there is a lack of transparency around the use of time extensions. Public bodies have broad discretion to determine when they will take extensions and there are limited checks to ensure they are legitimate.

Currently, under section 9(2), a head must notify the Information Commissioner if he or she extends a time limit for more than 30 days. The act does not require heads to justify the reason for extending timelines by more than 30 days. It does not empower the Information Commissioner to refuse permission.

Recommendation 10: The ATIA should require the head of a public body to apply to the Information Commissioner for *approval* to extend timelines beyond the allowable amount.

6. Policy Advice

The Problem

- **Section 21 is overused to prevent the disclosure of information that does not constitute policy advice.**

The Solution

- **Amend section 21 to specify that the policy advice exemption does not apply to factual, technical and certain other types of information.**

Section 21 of the ATIA exempts the disclosure of records containing advice developed by or for a government institution or minister of the Crown, or accounts of consultations involving government officials. The exemption applies to records that are less than 20 years old.

According to Treasury Board Secretariat data, section 21 is among the most frequently used exemptions in the ATIA. In 2019-20, the advice or recommendations exemption (provision 21(1)(a)) was invoked a total of 3,516 times. The exemption for accounts of consultations or deliberations involving government officials (provision 21(1)(b)) was invoked 3,988 times.²⁴ In addition, the Office of the Information Commissioner of Canada found that nearly one third of the refusal complains they received related to the use of section 21 to deny disclosure of records.²⁵

While the purpose of section 21 is to allow government officials to engage in frank discussion and analysis of policy recommendations, the exemption is much broader than necessary to achieve this goal. Section 21 should be amended to ensure it does not prevent the disclosure of factual and

²⁴ Treasury Board Report 2019-20, *supra* note 1.

²⁵ Information Commissioner Submission, *supra* note 3 at 21.

background information that does not constitute advice or recommendations.

All provincial and territorial access to information acts contain an exemption for advice from officials, but there are key differences in the way that some are structured, which improves access. Several jurisdictions (including BC, Ontario, Nova Scotia and Newfoundland and Labrador) contain lists of material to which the advice exemption does not apply.

For example, BC's *Freedom of Information and Protection of Privacy Act* states that a public body must not use the policy advice exemption to refuse to disclose 14 different types of materials, including:

- (a) any factual material,
- (b) a public opinion poll,
- (c) a statistical survey,
- (d) an appraisal,
- (e) an economic forecast,
- (f) an environmental impact statement or similar information,
- (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,
- (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
- (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
- (j) a report on the results of field research undertaken before a policy proposal is formulated,
- (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body...²⁶

²⁶ *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, at s. 13(2).

Such a list helps ensure the advice exemption is not applied in an overbroad manner to deny access to background reports and factual materials that do not constitute advice. While we have concerns about the way that BC FIPPA's policy advice exemption has been interpreted in BC, the inclusion of a similar list in the ATIA would go a long way towards improving section 21 of the act.

Recommendation 11: Amend s. 21 to include a list of the types of information to which the policy advice exemption does not apply.

In addition, section 21 exempts records for far longer than is necessary. Currently, records will not be disclosed if they are less than 20 years old. This means that a record containing advice that was created on **August 1, 2001** during the Chretien administration would *still* be exempt from disclosure. This far exceeds the duration of the exemption in most provincial and territorial acts, as illustrated below.

Duration of Advice Exemption by Jurisdiction					
Duration of exemption	5 years	10 years	15 years	20 years	25 years
Jurisdiction	NS	BC, QC, YT	AB, PEI, NL, NWT, NT	Canada, MB, NB, ON	SK

Recommendation 12: Reduce the amount of time for which records containing advice are exempt from disclosure.

7. Cabinet Confidences

The Problem

- **Cabinet confidences are excluded from the act, meaning that the Information Commissioner and federal courts have no oversight over records the government designates as cabinet confidential.**

The Solution

- **Remove section 69 excluding cabinet records and instead create a limited exemption for cabinet confidences, subject to OIC oversight.**

Section 69 of the ATIA excludes confidences of the Queen's Privy Council of Canada, including memoranda, discussion papers, briefing materials and communications between ministers. The fact that the ATIA *excludes* rather than exempts cabinet records is very significant.

Since cabinet records are excluded, neither the Information Commissioner nor the federal courts can examine records under the ATIA. This means that there is no oversight of the use of section 69. This leaves a situation where, according to Vince Gogolek, public body officials “essentially have a free hand to refuse to release any record they don't want to release simply by calling it a cabinet confidence, secure in the knowledge that the law prevents anyone outside government from ever looking at it and challenging their refusal to release it.”²⁷

In the past, the federal government has stated that the rationale for excluding cabinet records is that this allows open and frank discussions at the cabinet table. However, Stanley Tromp notes that even records

²⁷ Vincent Gogolek, “Close the loophole shielding cabinet documents from Access to Information,” Policy Options (4 February, 2021), online: <<https://policyoptions.irpp.org/magazines/february-2021/close-the-loophole-shielding-cabinet-documents-from-access-to-information-requests/>>. [Gogolek]

prepared for, but not actually discussed by cabinet can still be excluded under section 69. These records cannot reveal the contents of cabinet discussions if they were never actually presented to cabinet.²⁸

The ATIA is the only freedom of information act in Canada that excludes cabinet records, rather than exempting them. Since every province and territory exempts cabinet records, the Information and Privacy Commissioner / Ombudsperson has the ability to examine records and determine whether or not they fit within the cabinet exemption. It also means that such records are subject to public interest override provisions, which requires their release if information is clearly in the public interest (for example, if it relates to a risk of significant harm to the environment or to the health and safety of the public).

In many international peer jurisdictions, including Australia, New Zealand and the UK, Cabinet records are subject to an exemption, rather than an exclusion – so they are reviewable by an appellate body and are subject to a public interest override.²⁹

Section 69 has become a “black hole” within the ATIA, preventing the disclosure of records without any explanation.³⁰ Immediate reform is needed to address this major barrier to access.

Recommendation 13: Section 69 should be removed and replaced with an exemption for cabinet confidences. The Information Commissioner and

²⁸ Stanley Tromp, *Fallen Behind: Canada's Freedom of Information Act in the World Context*, 2nd ed (Vancouver: BC Freedom of Information and Privacy Association, 2020), at 80.

²⁹ Library of Parliament, Parliamentary Information and Research Service, *Access to Information Legislation in Canada and Four Other Countries*, Kristen Douglas (Ottawa: 6 April, 2006), online: <<https://assembly.nu.ca/library/Edocs/2006/001232-e.pdf>>.

³⁰ Gogolek, *supra* note 28.

the Federal Court of Canada would then have authority to review cabinet records under the ATIA. An exemption would provide sufficient protection of sensitive cabinet documents.

In addition, 20 years is too long for Cabinet records to be exempt from disclosure. The majority of provinces and territories exempt Cabinet records for far less time, as illustrated below.

Duration of Cabinet Exemption by Jurisdiction				
Duration of exemption	10 years	15 years	20 years	25 years
Jurisdiction	NS	NB, PEI, NWT, NT, AB, BC	Canada, ON, MB	QC, SK

Recommendation 14: The duration of time for which federal Cabinet records are excluded from disclosure under section 69 should be reduced.

8. Proactive Disclosure

The Problems

- **Too few records are subject to proactive disclosure requirements.**
- **The Information Commissioner does not have oversight of proactive disclosure requirements.**

The Solutions

- **Proactively disclose types of records that are frequently requested and released, to deal with system backlogs.**
- **Make all proactive disclosure requirements subject to oversight by the Information Commissioner.**

Bill C-58 introduced changes to the ATIA subjecting certain types of records to proactive disclosure requirements. These include travel and hospitality expenses of the Senate, House of Commons and parliamentary entities. It also includes ministerial mandate letters and certain briefing materials.

While it is positive that these proactive disclosure requirements were added to the ATIA, they apply to too few records and could easily be expanded without any risk to government. Many types of records are frequently requested and routinely disclosed. A search of the federal government's database of completed ATI requests shows that certain officials' calendars, training manuals and consultation records are all frequently requested and disclosed.³¹

Recommendation 15: Part 2 of the Act should be expanded to proactively disclose categories of records that are routinely requested and disclosed. This would prevent individuals from having to request the same type of information time and again and reduce the workload for access teams,

³¹ Government of Canada, *Completed Access to Information Requests*, online: Treasury Board Secretariat <<https://open.canada.ca/en/search/ati>>.

who would no longer have to assess the same type of record every time it is requested.

The second issue with the proactive disclosure requirements added in Bill C-58 is that they are not subject to oversight by the Information Commissioner. This means that there is no objective third party reviewing records to ensure that proactive disclosure requirements are actually being complied with.

Recommendation 16: The ATIA should be amended to empower the information commissioner to have oversight of proactive disclosure requirements.

Conclusion

We reiterate the crucial importance of this review as an opportunity to make much needed changes to Canada's access to information system. Shifts in the way of doing work, in the delivery of government services and in the use and interpretation of the act have all left the ATIA out of date and unfit to achieve its intended purpose.

Adopting the recommendations contained in this submission would represent an important step in the direction of improving government transparency and accountability and restoring the health of Canada's access system.

Thank you again for the opportunity to contribute to this review; FIPA is available for further discussion should you have any questions.

Summary of Recommendations

1. Provide adequate resourcing to access teams in all government bodies and the Office of the Information Commissioner to ensure that they can meet ATIA requirements.
2. Improve government culture surrounding access by clearly articulating the purpose of the access system and encouraging leadership to champion improved access.
3. Provide mandatory access to information training to all employees of federal institutions and provide ongoing communications highlighting the importance of the access system for government accountability and for external requesters.
4. Amend the ATIA to include a duty to document, creating a requirement for employees of all public bodies to create full, accurate and complete records of business activities.
5. Include all entities delivering public programs and services in the scope of the ATIA.
6. Expand the scope of the ATIA to include the PMO and ministers' offices.
7. Include a public interest override in the legislation that requires the head of a public body to disclose information about a risk of significant harm to the environment, health, or safety of the public – whether or not a request has been made.
8. Reduce the amount of time to respond to an access request from 30 days to 20 days.
9. Place a limit on the amount of time that the head of a public body can delay a response to an access request from “a reasonable time” to 20 days.
10. Require the head of a public body to apply to the Information Commissioner for approval to extend timelines beyond the allowable amount.
11. Amend section 21 of the ATIA to specify the types of records to which the advice exemption does not apply. The list should mirror that included in BC's *Freedom of Information and Protection of Privacy Act*.

- 12. Reduce the duration of the exemption under section 21.**
- 13. Remove section 69 excluding cabinet confidences and create an exemption to protect Cabinet records, with oversight by the Information Commissioner and federal courts.**
- 14. Reduce the duration of time for which cabinet records are prevented from being disclosed (i.e., limit the duration of the cabinet exclusion currently under section 69).**
- 15. Expand the types of records subject to proactive disclosure requirements.**
- 16. Empower the OIC to provide oversight of proactive disclosure requirements.**

Appendix A: FIPA 2018 Survey on Access to Information

The following are the results of a survey completed by IPSOS on behalf of BC FIPA in 2018 regarding British Columbians' views on freedom of information issues. While some of the questions are specific to the provincial freedom of information system, the results highlight the general importance of access to information to British Columbians.

Overall, British Columbians strongly believed that government officials should be required to keep records of important business matters (i.e., that there should be a legal duty to document), that there should be penalties for interfering with access rights, that the scope of freedom of information legislation should be expanded to cover more organizations and that it was very important to do all of this in the near term.

1. In your opinion, how important is it that provincial government officials are legally required to keep accurate and complete records of what they do on the job?

- **Very important – 81%**
- **Somewhat important – 17%**
- **Not very important – 1%**
- **Not at all important – <1%**
- **Don't know – 2%**

2. BC's information and privacy law currently does not have penalties for interfering with information access rights. Many other Canadian jurisdictions do have such penalties. Should government officials who interfere with access to information rights face penalties?

- **Yes – 85%**
- **No – 3%**
- **Don't know – 12%**

3. BC's information and privacy law currently covers subsidiaries of municipal governments, but not those of school boards, colleges and universities. This means these education subsidiaries are not subject to freedom of information requests. How important do you think it is that these education subsidiaries be covered by Freedom of Information laws?

- **Very important – 53%**
- **Somewhat important – 33%**
- **Not very important – 4%**

- Not at all important – 1%
- Don't know – 8%

4. BC's new provincial government has made a number of commitments about changes they would make to BC's information and privacy law, but has yet to announce any new initiatives. How important do you think it is that the government bring in reforms to the information and privacy law before the next BC election?

- Very important – 47%
- Somewhat important – 38%
- Not very important – 7%
- Not at all important – 1%
- Don't know – 8%

For a breakdown of results by gender, education, age group, region, income and household composition, please visit: https://fipa.bc.ca/wp-content/uploads/2018/01/FIPA-2018-Omnibus_Detailed_Tables_Combined.pdf