

Brief from Dean Beeby submitted to Treasury Board Secretariat for its public consultation on the Access to Information Act review

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The Access to Information Act (ATIA) and its administration have been significantly critiqued more than a dozen times since the law came into force in 1983. These in-depth analyses have been carried out by information commissioners, a government-appointed task force, Parliamentary committees and the government itself, among others. They each have identified the same basic weaknesses, proposed similar solutions, and they each have been largely ignored. So it's with a sense of resignation that I submit yet another account of the Act's weaknesses, and yet another assessment of failures in its administration. Governments, chronically allergic to transparency, appear to welcome these repeated exercises as yet another opportunity to delay and dodge. The review process becomes a reset button rather than a diligent re-assessment of problems and solutions identified over the last 38 years.

Treasury Board's latest review is legislatively driven. Bill C-58, which received Royal Assent in June 2019, requires a review of the legislation within one year but is silent on a deadline for a report or action. Treasury Board officially announced the mandatory review just days before the one-year period was to expire.

Since the so-called "launch" of the review on June 18, 2020, Treasury Board has taken an inordinate amount of time to act (despite a year's notice that a review was required). A public-consultation process was promised at the "launch." That promise was repeated Sept. 22, 2020. Treasury Board finally announced an actual public consultation (i.e., an online process) on March 31, 2021, nine months after the "launch." Treasury Board has also said its report for the review, which is not the end of the process but only the middle, will not appear until January 2022. The languid pace mirrors the delay-plagued Access to Information process itself, and suggests reform is once again a low government priority.

Treasury Board's consultation webpage contains a facile list of "issues" on which the government is seeking public input. For example: "Tell us your thoughts on the process of submitting an access to information request – what works and what doesn't?" The open-ended, unfocused invitation suggests a check-the-box exercise rather than informed dialogue. Surely a government intent on fixing the problem could find more probing questions after a year of preparation?

I am a long-serving journalist (The Canadian Press, 31 years; CBC, 5 years), so the observations and recommendations that follow arise from the day-to-day experience of a working reporter. I also recognize and support the legitimate interests of other types of requesters, including Indigenous peoples, human-rights advocates and environmental NGOs. Indeed, there is no conflict between their

demands and my own – we are all united in seeking a truly open federal government that responds with alacrity to information requests from all its citizens. The current prime minister recognized this aspiration when he said government should be “open by default.”

The federal Access to Information Act chronically fails to deliver timely responses, especially in areas vital to public discourse, such as health and safety information. Journalists routinely wait months and years for responses to simple requests, responses that are often so heavily redacted as to be meaningless. The most recent Treasury Board statistics (2019-2020) show that one-third of responses now are in “deemed refusal,” that is either delivered beyond the 30-day deadline in the Act or delivered after the extension date an institution has unilaterally given itself. The number of “deemed refusals” has increased year after year, with no sanctions or penalties imposed on institutions that violate the law in this way. (The inadequate method used by Treasury Board to collect statistics on “deemed refusals” undercounts the true numbers, so the extent of unjustified delays is actually worse than officially reported.) For journalists responsible for informing Canadians about current events, these delays are often fatal to their work. Stale information about long-ago government actions often makes it impossible to avoid or fix problems with policy, programs or spending.

Complaints to the Information Commissioner of Canada (ICC) are also subject to enormous delays, as that office struggles with a growing backlog. There are too many documented cases in which the ICC has not reported findings on a complaint until 10 years or more after it was made. Journalists routinely must wait nine months and more for an ICC investigation to conclude. The office remains understaffed and, equally concerning, not subject to any legislated deadlines for its investigations.

The records journalists do receive are often blacked out based on spurious claims that they are “advice,” security-related or based on other too-broad exemptions and exclusions in the Act. The government’s claim to be “open by default” has become a cruel joke in the journalism profession. Every day, reporters in the news trenches are reminded that government information is “secret by default,” especially during the COVID-19 health emergency.

Here then is a checklist of fundamental flaws in the existing legislation and its administration, and the remedies:

Cabinet confidences (Section 69)

Problem: Section 69 of the Act protects “cabinet confidences” for 20 years by excluding them from the reach of the legislation, and from the investigative authority of the Information Commissioner of Canada. This loophole has long been exploited by government, with increasing regularity, as a safe refuge. For example,

Section 69 was invoked 4,660 times in 2018-2019, a level that is 50 per cent higher than five years earlier. A declaration by government that a requested record is a cabinet confidence is unassailable. The ICC cannot challenge the claim, cannot even inspect the records. The cards are thus stacked against requestors. Many journalists are resigned to restricting their requests only to those records not considered cabinet confidences, in order to expedite processing.

Solution: Decision- and policy-making by cabinet is at the core of Canada's federal government. Cabinet cannot remain a black box if "open by default" is to have any meaning. Cabinet records must shed their umbrella protection from the Act, and be made subject to requests and to complaint investigations by the ICC. The government could still invoke the existing exemption clauses in the Act to protect cabinet information, but should no longer enjoy a free pass from legally justifying its decisions to withhold.

Advice (Section 21)

Problem: The notorious Section 21, the "advice" exemption of the Act, has been abused for decades. The exemption has been invoked repeatedly to withhold public-opinion surveys, economic forecasts, background information and other records that by no stretch can be construed as "advice." As in Section 69, too many public officials regard the exemption as a handy catch-all, which can protect from scrutiny the ordinary conduct of government. Section 21 was cited more than 8,700 times in 2019-2020 to justify withholding records from requestors, and the exemption is cited in about one third of all the complaints received by the ICC.

Solution: Abuse of Section 21 must be curtailed with more explicit language in the legislation defining what can and cannot be withheld. The list of record types impervious to redaction must include factual materials, such as background papers, surveys of opinion, economic data, databases, chronologies, inventories and the like. Where the narrower protection for genuine "advice" is legitimately invoked, the Section 21 must limit its applicability to no more than five years after the record was created, and no protection at all in a case of overriding public interest such as a health, environmental or safety threat.

Ministers' offices

Problem: In the 2015 election campaign, the current prime minister promised to "ensure that Access to Information applies to the Prime Minister's and Ministers' Offices." Bill C-58, which purportedly enacted this commitment, in fact did no such thing. Rather, the government established a proactive release schedule that comprised only a subset of records related to ministers' work. Indeed, almost all of these now proactively released records (briefing note titles, briefing books and

Question Period notes, for example), had never been classified as ministerial office documents, and had already been accessible under the Access to Information Act. Bill C-58 also prevented the Information Commissioner of Canada from investigating failures and lapses in this proactive-release regime, thus carving out another safe space for unchallenged decisions and behavior by the government.

Solution: The remedy for this failure is simple: close the loophole. The government must fulfill its clear promise to Canadians to make ministers' offices, including the prime minister's office, subject to requests under the Access to Information Act. By doing so, the Information Commissioner of Canada will also be authorized to investigate complaints.

Public interest override

Problem: The Access to Information Act has weak public-interest override provisions, unlike most parallel legislation in Canada's provinces and indeed elsewhere in the world. COVID-19 has reminded Canadians how dependent their health and safety is on timely access to uncensored government information about life-threatening risks. Some jurisdictions compel public bodies to release such information even in the absence of specific requests for it from the public or news media. Conflicts between government confidentiality and imminent public threats must always resolve in favour of public safety. And yet, the Act as currently written defaults to "just trust us."

Solution: The Act requires a general public-interest override clause that compels public institutions to disclose information about significant risks to safety, health and the environment, notwithstanding any other exemption or exclusion available in the legislation.

Powers of the Information Commissioner of Canada

Problem: Bill C-58 conferred limited order-making power on the Information Commissioner of Canada. Orders from the commissioner lack the authority of a federal judge's order, can be challenged in federal court, and the case can be heard "de novo," allowing a federal institution to advance new secrecy arguments not previously provided to the ICC. Thus, federal institutions opposed to disclosure have an attractive legal option to drag out the case for months or years. Indeed, some institutions may be incentivized to withhold arguments from the ICC's initial investigation, reserving them for a later federal case.

In addition, Bill C-58 excludes the ICC from policing the proactive-disclosure regime set out in the new Part 2 of the Act. There is therefore no independent check on recalcitrant institutions who fail to abide by the Act, whether by withholding

records altogether or by ignoring legislated timelines. No Parliamentary or independent government body is made responsible for overseeing and enforcing the new Part 2.

Solution: Provide true order-making power to the ICC by giving that office's decisions the effect of a federal judge's order. Make the ICC responsible for independent review of Part 2 of the Act.

Delays

Problem: In 2019-2020, almost 50,000 requests made under the Access to Information Act were completed beyond legislated timelines, representing one of every three requests completed that year. The Act requires institutions to provide requested records within 30 days or within an extended deadline set by the institutions themselves, often an additional 90 days or more. A third of all completed requests are now violating even these lax requirements. Journalists especially struggle with this reality, unable to provide timely information on current issues because of a chronically deficient access regime. Governments are not held to account, and the public's democratic right to participate in policy formation is undermined. The problem is exacerbated by delays within the Office of the Information Commissioner of Canada. Complaints from requestors typically are not even assigned to investigators for months, and final reports can take years to appear. As previous information commissioners themselves have declared, "Access delayed is access denied."

In recent years, many delays have been attributed to excessive consultations with other federal institutions. Such consultations are often open-ended, as the originating body does not police delays caused by the negligence of the consulted body. Currently, consultations with other institutions are cited for about half of all time extensions taken under the Act, a level that has been rising each year.

Solutions: The Act contains no reference to sanctions, penalties or adverse consequences for institutions that violate legislated deadlines. The legislation urgently requires amendments to reduce chronic delays. First, institutions that violate deadlines must forfeit the ability to invoke any of the Act's non-mandatory exemptions to withhold records. Second, there must be legislated limits on the ability of institutions to initiate a consultation, restricting the measure to cases in which there are legal, security and safety issues. Third, if a consultation is undertaken, a time limit of 30 days must be imposed after which the consulted department loses its ability to request non-disclosure of records. Fourth, institutions found to have violated legislated deadlines must be fined sufficient dollar amounts to discourage the practice, with such fines made public quarterly (and proceeds paid to the Office of the Information Commissioner of Canada to support the office's general investigative activities). Fifth, the ICC itself must be subject to deadlines for

completion of investigations, albeit with the ability to invoke reasonable time extensions. Legislated deadlines for this office would allow complainants who do not receive a timely report to go directly to Federal Court to seek a remedy. Currently, open-ended and years'-long ICC investigations preclude complainants' timely access to the justice system because the Act requires the ICC to file a final report first.

Duty to document (and preserve)

Problem: Motivated partly by the existence of the Access to Information Act, some public servants and government officials decline to properly document actions and decisions for fear of adverse exposure. Digital technology has also enhanced opportunities to make public records vanish, such as emails, text messages, meeting notes, etc., records that are often essential for holding public officials accountable. Section 67.1 (1) provides for sentences and fines for destroying, falsifying or concealing records, but has a high threshold for conviction, that is, criminal intent must be proved. No charges have ever been laid under this section.

Solution: The Act must be amended to compel government officials and employees to routinely document their actions and decisions, on pain of fines for failure to do so, regardless of whether the relevant records are the subject of an Access to Information Act request. Further, Section 67.1 (1) must be amended to include a class of offences referring to any mere act of destruction, falsification or concealment of records without necessary regard to intent, punishable by fines.

Schedule II – The notorious opt-out list

Problem: Section 24(1) of the Access to Information Act creates a long list of opt-outs. That is, institutions are required to withhold requested information if the release is prohibited by a particular statute on the list. Information commissioners have raised red flags about the Section 24(1) list since 1986, with John Grace calling it a “back door” derogation from access rights. There were 33 statutes listed in the Act in 1983, citing 40 kinds of information impervious to access requests. Today, the list has almost doubled, to 65 statutes referring to 102 kinds of information prohibited from release. Section 24(1) prohibitions too often appear in new legislation, without having undergone proper scrutiny by Parliament. This form of creeping censorship has expanded for almost four decades, until its substantial accumulation today.

Solution: Existing exemptions in the Act are sufficient to safeguard the information protected by Section 24(1). The section and list must be eliminated.

Machine-readable (digital) records

Problem: ATIA-based reporting on public issues is often thwarted by an institution's failure to provide digital records, including databases, in their original machine-readable, searchable formats. Too often, the digital records provided are mere optical scans that cannot be readily interrogated by computer. In May 2016, the Treasury Board president recognized this persistent problem by issuing a weak directive to all institutions that said "when privacy, confidentiality and security considerations would not be compromised and it would not be unreasonable or impractical to do so, provide records in the format requests by the requestor, including machine-readable and reusable formats." The problem has persisted over the last five years, despite the directive, with numerous journalists battling institutions for digital records in machine-readable formats.

Solution: Embed language in the Act itself that compels institutions to provide requestors with fully machine-readable formats when requested.

The outsourcing loophole

Problem: Governments often outsource the delivery of programs and services to private-sector businesses and non-governmental agencies. Such transfers of public funds and operations have the corollary effect of drawing a veil over records that document the activity, because the outsourced work is then considered beyond the ambit of the Access to Information Act. Journalists who would normally use the Act to hold institutions accountable for the provision of public services can no longer access relevant records now held by a business or agency. Much of this outsourced work impacts the health and safety of Canadians, and the environment.

Solution: Amend the Act to broaden its scope to cover any entity that delivers government goods, services and programs through outsourcing, or that delivers a government-authorized public mandate.

Retention of ATIA releases

Problem: Previously released access-to-information files can be an important source of information for journalists and others. These documents, which can be accessed informally, can also help reduce the need to file Access to Information Act requests, alleviating the administrative burden on federal institutions. The federal online database listing metadata for previously released ATIA package was begun in 2012, yet older listings have been deleted so that the database contain only the most recent two years' of listings. The policy is counterproductive, undermining the usefulness of this tool.

Solution: Permanently restore the database listings to at least 2012, and begin a process to post online the records themselves, rather than just the metadata.

The government claims that “openness, transparency and accountability are guiding principles,” yet the centerpiece legislation intended to deliver those results – the Access to Information Act – has been allowed to deteriorate through decades of neglect. The Bill C-58 amendments of June 2019 did little to fix flaws in the access regime, and indeed exacerbated some of those flaws. Former information commissioner Suzanne Legault called the bill a “regression of existing rights.”

Canada’s access-to-information regime was thus at its weakest point in the last four decades just as COVID-19 hit – a health emergency that requires greater transparency, not less. One year ago, the current information commissioner, Caroline Maynard, warned the access regime was in such dire straits it “may soon be beyond repair.”

I do not view the law and its administration as beyond repair. The demands above chart a reasonable path back to transparency, openness and accountability. What is at risk is confidence that public officials and politicians in Canada will set aside their reflexive, self-serving secrecy and do the right thing for the country.

Dean Beeby
OTTAWA