

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

*Submissions on the Committee's*  
*Study on Open Government*

Submissions on behalf of The Canadian Civil Liberties Association

March 23, 2011

The Canadian Civil Liberties Association (CCLA) is grateful for the opportunity to make submissions with respect to the Standing Committee's study of Open Government. The CCLA is a national organization with the paid support of thousands of individuals drawn from all walks of life and several associated group members throughout the country. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the protection of procedural fairness. In its advocacy and public education work, the CCLA has also consistently spoken out and fought for greater transparency and accountability in public institutions. For over 40 years, the CCLA has worked to advance these goals.

The CCLA's submissions will focus on the following issues:

- 1) Open government is crucial to a vibrant and healthy democracy and facilitates and promotes fundamental freedoms, including freedom of thought, opinion, belief and expression;
- 2) Sole reliance on the existing access to information framework is insufficient to achieve open government. Proactive disclosure by government is absolutely necessary; and
- 3) The existing regime must be modified to remove or narrow the current exceptions to the general presumption in favour of disclosure, to allow for better oversight of how the access system operates in practice and to improve the ongoing problems with delays in responding to access requests.

## **1. The Importance of Open Government**

Many Canadians aren't aware of or in a position to utilize the tools available to access information about the government's inner workings, public policy choices, or even basic statistical data held by governments. Although Canada was once among the world's leaders in the area of access to information, the country has fallen behind in recent years.<sup>1</sup> All too often the presumption in favour of openness and disclosure is forgotten, the culture of secrecy persists and the reality becomes that there is a presumption that information should be withheld rather than disclosed.

The CCLA has long promoted and defended the rights of all Canadians to express themselves and to participate in the democratic governance of their country. The *Canadian Charter of Rights and Freedoms* guarantees the right to "freedom of thought, belief, opinion and expression,

---

<sup>1</sup> See Robert Hazell & Ben Worthy, "Assessing the performance of freedom of information" (2010) 27(4) *Government Information Quarterly*, p. 352-359.; Dean Beeby, "Canada ranks last in freedom of information: study" *Globe and Mail* (January 9, 2011); available online at: <http://www.theglobeandmail.com/news/politics/canada-ranks-last-in-freedom-of-information-study/article1863083/>.

including freedom of the press and other media of communication”.<sup>2</sup> However, the meaningful exercise of these rights can only be achieved within a system where government is open and transparent. As former Supreme Court Justice La Forest noted

“The overarching purpose of access to information legislation...is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.”<sup>3</sup>

Indeed, the *Access to Information Act (ATIA)* has been accorded quasi-constitutional status by a number of courts,<sup>4</sup> and a recent Supreme Court of Canada decision has explicitly recognized that, in some cases, denying access to information constitutes a violation of freedom of expression.<sup>5</sup> While successive governments have promised reform in the area with a view to greater transparency and accountability in government, meaningful reform has not occurred. The CCLA believes Canada is at a crucial moment and that a fundamental shift to openness is essential to remain a vital democracy in the 21<sup>st</sup> century.

## **2. Proactive Disclosure**

While the existing access to information regime creates a presumption in favour of disclosure subject to limited and specific exceptions, the system’s very design suggests that information “belongs” to government and can and will be “shared” with the people only when a request is made and when government deems it appropriate. The CCLA believes this fundamentally misconstrues the nature of the information that is collected, created and held by government. This information belongs to everyone. Canadians pay for it with their tax dollars and elect representatives to create, collect and manage it. It is crucial that government take proactive steps to disclose as much information as possible to the public. Such an approach will not only enhance democratic dialogue and government accountability and transparency, it is also necessary if Canada is to keep up with other modern democratic societies. Indeed, some of Canada’s provinces and municipalities have already moved ahead with open government initiatives. The federal government should be leading the charge in this area, not playing catch-up.

The CCLA is aware that many of the submissions the Committee has heard and read relate to the concept of “open data”, which some witnesses have distinguished from a broader understanding of “open government”. Some have suggested that “open data” refers to the sharing of

---

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 2(b).

<sup>3</sup> *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61 per La Forest J. dissenting, but not on this point.

<sup>4</sup> See e.g. *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] 4 F.C.R. 181 (F.C.) per Dawson J. at para. 20. The Act itself states at s. 4(1) that it operates “notwithstanding any other Act of Parliament”.

<sup>5</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23.

government data sets, which largely consist of numerical data or data that can be organized by way of a spreadsheet. The CCLA agrees that there is an urgent need for government to make the vast number of data sets it has in its possession available to the public, proactively, in machine-readable formats. It should be in formats that allow it to be reproduced and reused. As other witnesses have recognized, this data contains a wealth of information that members of the public, and private sector organizations and corporations, may find new and helpful uses for.

The CCLA's submissions, however, are not confined to "data". Rather, the need for openness and increased transparency extends to all information held by government that can be disclosed without creating a real and significant risk to a public interest.<sup>6</sup> There are countless benefits to be gained from a system of proactive disclosure, where government publishes information so that it is available for everyone. For example, proactive disclosure is likely to lead to a decrease in access to information requests and a related decrease in the pressure on government offices (and demand on resources) to respond to these requests in accordance with the timelines prescribed by legislation. Proactive disclosure is also a more democratic and equitable means of sharing information. It does not rely on an individual to make a request and then provide a response to that individual alone. Information that can be disclosed is shared with everyone, and can be used by everyone for a wide variety of purposes. The CCLA notes that information on access to information requests used to be contained in the CAIRS (Coordination of Access to Information Requests System) database, but that this database was discontinued in 2008. The CCLA echoes the calls by the Information Commissioner and this Committee to reinstate the database, at least until a robust proactive disclosure regime has been implemented for all federal government institutions. There are significant inefficiencies in the system when multiple actors ask for the same information and must all pay for it.

Proactive disclosure is necessary to improve government transparency and increase accountability. It could be done in phases, with government institutions first publishing lists of the information that is available and phasing in publication or disclosure of the information itself over time. The CCLA notes that in the United States, President Obama's administration has made a commitment to open government and that it appears that significant strides in the area have been made in a relatively short period of time.<sup>7</sup> Given the importance of providing the public with the information the government creates, collects and uses in its governing functions, further delay in this area simply cannot be excused.

---

<sup>6</sup> The CCLA also acknowledges that private interests must be protected in some circumstances – in particular, the privacy of personal information should be protected.

<sup>7</sup> See the White House's open government site at [www.whitehouse.gov/open](http://www.whitehouse.gov/open) and in particular the December 2009 progress report on the open government initiative, available at: <http://www.whitehouse.gov/sites/default/files/microsites/ogi-progress-report-american-people.pdf>.

### 3. Improving the Access to Information System

The *Access to Information Act*, once a revolutionary piece of legislation, is now sorely out of date and in need of substantial reform. Over the years, there have been many proposals to amend or modify the Act, but to date there has been little movement in the direction of true reform. The CCLA lays out a number of reforms below, which would provide significant assistance in improving the efficiency and effectiveness of the access to information regime. Many of these proposals have been made before and some have also been endorsed by this Committee. While there are continually calls to study and consult with stakeholders, the CCLA believes that there has been significant consultation and debate on these issues already. Now is the time for action.

Proposed reforms:

- The *ATIA* should include a requirement that government institutions document decisions. A proactive record-keeping requirement is necessary in order to ensure that the access to information regime is not rendered meaningless because decisions are simply not contained in records that can be accessed. Such a practice will also be beneficial to government decision-making more generally;
- The *ATIA* should include an increased mandate for the Information Commissioner. In particular, the role of the Commissioner should encompass public education and research roles. The Commissioner should also be empowered to make orders and be given an advisory mandate with respect to legislative proposals. These powers would help to increase public awareness of the access to information regime, would help improve the effectiveness of the Act and would ensure that freedom of information concerns are addressed in advance of passing legislation which may have an impact in this area;
- The *ATIA* should apply to Cabinet confidences and to information that is subject to a certificate under s. 38.13 of the *Canada Evidence Act*. Excluding these categories from the Act insulates them from review by both the Information Commissioner and the Federal Court and creates a vacuum of transparency and accountability. While information in these categories will not always be appropriate for disclosure, a discretionary exemption is sufficient to address the interests that the exclusion currently aims to protect;
- The *ATIA* should be expanded to cover records relating to the general administration of Parliament and the courts, subject to provisions to protect parliamentary and judicial privilege;
- The *ATIA* should include explicit language to recognize that the public interest in disclosure must be considered in all cases where there is discretion in the head of a government institution to disclose a record;<sup>8</sup>

---

<sup>8</sup> In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada held that where Ontario's *Freedom of Information and Protection of Privacy Act* conferred a discretion on a

- Where disclosure of a record is refused in accordance with an exemption under the Act, there should be a positive obligation on the government institution to publish the nature of the request that was made and the reasons for claiming the exemption. In addition, Parliament should undertake a review of the existing exemptions, create expiry periods for as many categories as possible, and shorten existing expiry periods; and
- The fees charged for filing an access to information request should be eliminated. While the initial fee for making an access request is typically small, the information being requested is created, collected or used by the federal government with the benefit of Canadians' tax dollars. Members of the public should not have to pay for this information twice.

#### **4. Other Reforms**

In addition to the reforms and general submissions made above, the CCLA notes that the existence of Crown copyright continues to hinder the public's ability to use government information in new and innovative ways. In its submissions to the Committee considering reform of the *Copyright Act* (Bill C-32 Committee), the CCLA proposed amending the *Copyright Act* to reflect the current administrative policy which limits the Crown copyright of enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, to ensuring accuracy and the use of disclaimer of official status. This modest step will be useful to pave the way to a more comprehensive regime of open licensing or absolute elimination of Crown Copyright.

#### **Conclusion**

The CCLA believes Canadian democracy cannot continue to grow and thrive without a strong commitment to openness, transparency and accountability. The CCLA has proposed a number of reforms that would substantially increase the openness of Canadian government and would contribute to greater public participation and collaboration in the work of government. The ability to access government information is crucial to a free and democratic society and to the exercise of freedom of thought, opinion, belief and expression. The delays and costs incurred through the operation of the current statute and its exceptions are undemocratic and do not serve a mature democracy such as Canada.

---

head of a government institution to refuse to disclose a record, this discretion had to be exercised consistently with the purposes underlying its grant. In particular, the Court held that the head of the government institution must weigh the considerations for and against disclosure, including the public interest in disclosure. While this necessary balancing exercise would similarly apply to any instance where the federal *ATIA* grants discretion to a head, the Act would be clearer if the requirement to consider the public interest were made explicit.