Reviewing Access to Information

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To Treasury Board President Jean-Yves Duclos,

I appreciate the ability to submit my thoughts to the ongoing Access to Information Act review — even if it comes some eight months late.

I am a freelance investigative journalist and, from the very beginning of my career, I have used the Access to Information system to both uncover government wrong-doing and understand governmental decision-making. In the past decade, I have easily filed more than a thousand ATI requests to various federal departments and agencies, provincial governments, municipalities, police forces, and universities. I have been called in to consult on Access to Information systems, and I have given workshops and seminars on how to best use the system. I have covered the administration of the system itself, and the various reforms — or lack thereof — over the years.

The outcome of these consultations cannot be the status quo. The Access to Information system is outdated, inefficient, wasteful, anti-transparent, and fundamentally broken in every sense. To keep the status quo would be to keep an Access to Information system in name only.

There are only two serious options: Either significantly overhaul and improve the system, to actually meet the lofty promises made when the system was started four decades ago; or shut it down.

In this letter, I'm including a list of ideas, suggestions, and strategies that, I believe, would lead to a significant improvement in the system. Others may have competing ideas — and I'd welcome a debate on the best course of action. But those competing ideas absolutely should not be an excuse to throw

hands in the air and proclaim there is no consensus. Nor should it be an excuse to continue the foot-dragging. These consultations should be an opportunity to pick from a variety of bold, significant, and aggressive changes to the system. And it should be an invitation to do it quickly.

There have been dozens of reports – from third-party groups, Parliamentary committees, and the Information Commissioner – outlining a raft of good ideas that have been seriously studied and debated already. Those should be your starting point.

There will be a healthy amount of skepticism that comes along with these consultations, and for good reason. The last time your government asked for submissions on this system, you ignored the vast, vast majority of those recommendations and pursued changes that actually made it easier to deny and reject requests without making any noticeable improvements to the system writ large.

Do not delude yourselves into thinking that this system has improved since you replaced your predecessors. It has not. Your government has presided over a substantial worsening of this system.

I can say with absolute confidence that the Access to Information system has gotten worse over the nearly six years your government has been in power. It has worsened in the nearly two years that your most recent reforms, C-58, have been in effect. It will continue to worsen unless a significant set of changes are implemented, and fast.

So, as much as it pains me to say – as someone who has relied on the system extensively in the past decade – if your government is not interested in improving this system, you should just repeal the Act and end the system outright. The continued existence of this anemic and dysfunctional system, to allow governments to point to it in order to compliment their own commitment to transparency, is an affront. At worst, the liberal use of delays, refusals, and redactions actually allows departments to more easily hide information and obfuscate, all while feigning transparency.

Below is a non-exhaustive list of very achievable reforms that could both improve the system and reduce overhead. I can’t stress enough that serious

reform could both improve transparency and reduce costs. The only reason to not pursue some of these reforms would be to oppose accountability.

I would be happy to expound on these ideas further, either by phone, email, or if called to testify at committee – something that would normally make me deeply uncomfortable as a journalist, but which I would be happy to do in order to drive these points home.

Centralize Access to Information Units

One of the most daunting parts of the Access to Information is its sprawling, labour-intensive nature. Each department and agency has its own set of ATI analysts, responsible for fielding requests. Some smaller agencies, without the budget for such staff, require employees to be the designated ATI officer on top of their regular work – meaning that every ATI request necessitates them to drop their day-to-day work and turn to the request. Many departments, faced with an influx of requests, have had to turn to outside contractors to handle the requests and manage backlogs or else second existing staff, impacting operations.

COVID-19 has put a particular point on how events can lead to a surge of requests to departments not-otherwise equipped to handle such a deluge of requests. At the same time, other departments may be seeing a significant decline in the number of requests.

Centralizing staffing, either entirely or in part, into a single office – either inside the Treasury Board, or a new arms-length agency – allows for significantly more flexibility, professionalization, and surge capacity than the status quo.

There are downsides to such centralization: One review of such an idea noted that in centralized systems: “A sense of the overall presence of FOI is reduced in the Ministry—an FOI request becomes an outside demand, something like providing documentation on budget requests or HR actions.”

As such, there ought to be an eye to creating a mostly centralized model: One where a central office manages the IT infrastructure, fields requests, takes

payment, and manages requests from start-to-delivery, but where there is still at least some ATI staffing at the department level. This further has to happen with a broader strengthening of the ATI system to ensure that access doesn't backslide.

Moving to a centralized system could allow Canada to run its ATI system more efficiently with significantly fewer staff, across the whole of government. It also relieves departments of the need to run, and maintain, outdated records management software.

Improve Technology

It is absolutely unacceptable that any part of the Government of Canada still relies on CD-ROMs, let alone by faxes and cheques. But, even in 2021, departments still demand that the $5 ATI fee be paid by cheque. Requests are sent by paper, because departments are incapable of sending moderately-large PDFs electronically. Baseless concerns about "security" ward departments away from releasing records via e-mail. Canada has two competing ATI request portals, yet numerous departments and agencies still require that requests be sent by mail.

No matter what decision is made about centralizing staffing, it is absolutely crucial that the Treasury Board take over responsibility for ATI technology. Various U.S. agencies have managed to build perfectly functional online portals where requests can be submitted, paid for, tracked, and where records can ultimately be released.

There is absolutely no excuse for why the Government of Canada cannot manage a single, functional, records management platform where Canadians can create an account and track all of their requests.

What's more, a secure cloud-based system would allow various offices to submit records easily and efficiently, and they could be further sent out to third-parties for necessary review.

It is unacceptable that the Government of Canada releases records in non-readable PDFs. The year is 2021: It is possible to effectively and safely

redact records in a machine-readable PDF format where the text is still searchable. It should be possible to release records in their original format, such as .ppt, .docx, and so on.

Canada's commitment to keeping its ATI system firmly stuck in 2005 is costly and inefficient. Time, money, and headaches could be saved by upgrading these systems.

Crucially, this system does need to be designed *de novo*. Off-the-shelf technologies can solve these problems.

Significantly Limit Exemptions

When the Act was unveiled in the 1980s, there were already significant concerns that the exemptions offered governments a nearly-limitless ability to withhold information without significant oversight. In the last five years, these exemptions have been a hindrance to a functional system.

While the wording of these exemptions has not significantly changed since 1985 (if at all) I have noticed a serious and drastic change as to how certain sections are being applied. They are now being used to withhold information that is not sensitive and ought to be public.

Section 15 has been particularly used and abused: Requests to Global Affairs Canada drag on for months or, more often, years. When they finally arrive, it is common for every single page to be pockmarked by 15(1) exemptions. Even sections detailing human rights abuses or open-source intelligence are redacted as merely their mention is considered "injurious to the conduct of international affairs."

Requests to agencies like CSIS and Public Safety rely heavily on 15(1)(d)(ii) to withhold basic information about threats facing the country — even if those threats are a half-century old.

Section 16 offers an extremely broad blanket exemption for departments to withhold information about their own investigations. What's more, it offers massive latitude to send "Glomar responses" — that the service or agency can

neither confirm nor deny the existence of the records in question. While I fully accept that the ATI system should not be used to obtain files relating to ongoing investigations, and should not interfere with sensitive operations, it is also crucial that there be limitations to this section.

Section 21 needs to be significantly curtailed. While I fully appreciate that civil servants should be able to offer advice without having to worry about their emails becoming public, the balance has swung too far towards secrecy. “Advice or recommendations developed by or for a government institution or a minister of the Crown” can be used to redact nearly every sentence and word written inside the government of Canada — and, increasingly, it is being used exactly to that end.

These sections, in particular, need to be rewritten from scratch, with an eye to only capturing the most sensitive information that ought not be disclosed, instead of leaving it to the discretion of the individual ATI analysts, political staffer, or civil servant.

Expand the Scope

When Bill C-58 was released, your government insisted that the Act was being expanded to ministers’ offices, as promised in your 2015 election campaign. This was a lie, and it was insulting to Canadians’ intelligence.

I cannot, today, file a request to any ministers’ offices, including the Prime Minister’s Office. It’s time that changes.

There is no good reason for this limitation. Exemptions for cabinet confidence are baked into the Act — as they, generally speaking, should be. If reforms are made, but ministers’ offices continue to be walled off, the reform package will be a farce.

It was Prime Minister Justin Trudeau, before his election to the prime minister’s office, who said: “If I’m writing things in my emails that I don’t want people to read, I shouldn’t be writing them.”

It is also crucial that the Act modernize to capture new types of records. Civil servants are using instant messaging applications, and other technologies, to skirt ATI requests. This is an open secret, yet virtually nothing is being done to address this. Despite requesting exactly these kinds of records, I have never once received an instant message, an SMS message, or any kind of hand-written note. This allows for a huge, obvious, way to skirt the Act — and it is regularly being used to that end.

Enact Strict Timelines

The idea of an ATI request process that takes just 30 days, beginning-to-end, is admirable but it is no longer realistic. But because it has remained the statutory timeline for so long, it has lost all meaning. Departments regularly request extensions at the end of those 30 days, but suggest timelines that are completely invented: 60, 90, 270, 600 days. It is rare that they even meet their own, self-imposed, timelines.

Either the ATI system has deadlines, or it doesn't. But allowing departments and agencies to merely decide their own unenforceable and vague timelines after they smash through the statutory deadline is unacceptable. Increasingly, access delayed is access denied.

In my own experience, normal or average timelines under the previous government ranged from two to six months. Today, it is unrealistic to expect that requests will be answered within eight months — delays regularly stretch into years.

Create a Public Interest Override

One eloquent strategy to fight delays and over-broad exemptions is to create an application for a public-interest override. When requesters file applications in the United States, they are asked two things: Should the request be expedited, and are the records in the public interest?

In effect, such a mechanism could separate urgent and timely requests from fishing expeditions. It could allow some broader exemptions (like ss. 15 and 16) to remain, but with a carve-out for records that ought to be made public.

It is crucial that this sort of tool be overseen, or at least reviewable, by the Information Commissioner. Letting the holders of these records decide what is, and what isn't, in the public interest would just entrench many of the current problems.

Empower Requesters

The only saving grace of Bill C-58 was the order-making powers afforded to the Information Commissioner. The past year has shown that even those desperately-needed powers are woefully insufficient to deal with the scope of the dysfunction.

A lack of budget and staff severely hobble the Commissioner's ability to field complaints. Even when clear wrongdoing is found, such as recent investigations into the Department of National Defence and the Royal Canadian Mounted Police, there are no real consequences. Departments and agencies can ignore the commissioner's findings, and return to the status quo. Other departments guilty of the same issues can comfortably ignore those reports, knowing that it could take years for an investigation into their systemic issues to be concluded. It is worth it for departments to fight to withhold information, lose, and face the commissioner's order-making powers than to simply release the information when asked.

As it stands, I have absolutely no faith that complaints about timelines, exemptions, or refusals will lead to any kind of expeditious resolution. The only success I receive from filing complaints is in spurring departments to prioritize my much-delayed requests.

It's my view that the scofflaw nature of the system can only be fixed by allowing requesters to appeal their denied or frustrated requests directly to the Federal Court. It is my view that departments will only begin adhering to the principles of the Act if there are real consequences to breaching the Act.

As it stands, the Information Commissioner is, despite their serious and well-intentioned effort, ill-equipped to do that.

Expand Alternative Disclosure

There are a massive number of ATI requests that do not need to be handled through the ATI system. In particular, requests to Citizenship and Immigration are disproportionately being made by immigration and refugee lawyers looking for information about their clients: This was never the intent of the ATI system. There needs to be a better way to handle that flow of information.

Your government was right to identify other, often-requested, records that could be more effectively released by proactive disclosure. But understand that proactive disclosure can never replace the Access to Information system. Continued efforts to create an 'open by default' standard must be done with a continued expansion and improvement of the ATI system.

What's more, the proactive disclosure improvements made in 2019 have been meagre, and haven't alleviated the need to file ATI requests. For example: As of today, the most recent title of a briefing note prepared for the Minister of Finance — published in the Open Government portal — is more than a month old.

If proactive disclosure is to be useful, it needs to be timely. Quarterly doesn't cut it.

Create a Responsibility to Document, Catalog, and Maintain

There are two duelling problems at the heart of our access system: It is next to impossible to know what records exist; and it is unfortunately easy to delete records.

Once upon a time, GC Infobase was a repository of all the records, or types of records, held by departments and agencies. For years, however, it was out of date and functionally useless. Today, it is next to impossible to figure out what records actually exist on government systems — even finding organizational charts can be difficult. (Though this has improved slightly in

recent years.) Because the types of records, and even the terminology around those records, varies so drastically between departments, requesters must rely on general and broad terms that can complicate requests. A better catalogue or dictionary of those terms and records could allow for narrower requests and less back-and-forth with ATI coordinators.

The lack of visibility also makes it easy to destroy records without anyone being any the wiser. The anachronistic notion of ‘transitory records’ lets departments move critical information to platforms where records can be easily deleted and hidden from future ATI requests.

Conclusion

This invitation for reform should be exciting. This is an opportunity to improve efficiencies, and to return Canada to being a world-leader in access to information.

Unfortunately, I have not seen that level of excitement from your government.

But some day, your government will leave office. As it stands, you will be remembered as the government which presided over one of the greatest reductions in Canadians’ right to know. Your successor may appreciate it, but Canadians will not.

The system is very nearly at the point of no return – it may be there already.

Do not let our Access to Information system die.

Do not kick this can down the road again.

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