CUPE

Canadian Union of Public Employees

Submission to The Treasury Board of Canada Secretariat - Access to Information Review

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Introduction

The Canadian Union of Public Employees (CUPE) is Canada's largest union, with 700,000 members across the country. CUPE represents workers in health care, emergency services, education, early learning and childcare, municipalities, social services, libraries, utilities, transportation, airlines and more. CUPE advocates for workers who deliver the public services people depend on. We also advocate for better public services that would improve our communities and the lives of *all* Canadians.

Access to information is essential to our core purposes of advancing working conditions and advocating for strong and universally accessible public services. We use the access to information system for collective bargaining purposes; to help our members provide the highest level of service by ensuring they are safe and healthy at work, and that they get fair pay and benefits for the services they provide. We also use the system to conduct public interest research. Access to government information informs our campaigns for better public services, helps us track how public funds are being spent and allows us to hold governments accountable.

CUPE endorses the submission of the Canadian Labour Congress to this consultation.

We have additional comments and recommendations which follow below. Along with our submission, CUPE representatives have actively participated in each "ATI Review Workshop."

We note that the questions posed in this consultation are very broad. CUPE strongly encourages the President of the Treasury Board to solicit public input on specific proposals before tabling the final report to Parliament.

LEGISLATIVE FRAMEWORK

The *Access to Information Act* is constructed on the principle that "government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."[1] Unfortunately, several provisions of the Act are inconsistent with, and even violate, the fundamental principles articulated under the Purpose of the Act.

Issues of Scope

It remains a serious problem that the Offices of the Prime Minister and Ministers are not subject to the Act. Stakeholders and access to information users have not forgotten the Liberal Party of Canada's 2015 election promise to "ensure that Access to Information applies to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts."[2]

[1] *Access to Information Act*, RSC 1985, c. A-1, s. 2(2)(a).
[2] "A New Plan for a Strong Middle Class." Liberal Party of Canada, 2015. https://s3.documentcloud.org/documents/2448348/new-plan-for-a-strong-middle-class.pdf

The promise to extend the Act to these Offices was articulated as a directive to the President of the Treasury Board and Minister of Justice in their November 2015 mandate letters.[3] This commitment to Canadians remains unfulfilled. Instead, in Bill C-58 *An Act to amend the Access to Information Act and the Privacy Act (2019)*, the government instituted proactive publication requirements for sanitized materials such as mandate letters and briefing packages for new ministers. Records relating to the administration and decision-making of the Offices of the Prime Minister and Ministers cannot be requested. The Offices of the Prime Minister and Ministers are still not subject to the right of access under the *Access to Information Act*.

- **Recommendation: Extend the scope of the Act to include the Prime Minister's Office and Ministers' Offices under Part I: Access to Government Records.**

CUPE knows firsthand that successive Conservative and Liberal governments have increasingly transferred public services, functions and responsibilities from the government or another public body to the private sector. A key consequence of privatization is a loss of transparency and accountability, due in large part to the immense difficulty of accessing information. Private entities that perform public functions or receive significant public funding are also not subject to the Act. Current Information Commissioner Maynard and former Information Commissioner Legault have made repeated recommendations to the government to subject agencies to whom the government has outsourced the delivery of programs that provide government services or that carry out activities of a governmental nature to the *Access to Information Act*.[4] The public has a right to know essential information about privatization. Any private entity seeking to do business with government and have access to any public funding should expect to be subject to the right of access under the *Access to Information Act.* As Commissioner Legault has said, "Broad coverage enables citizens to assess the quality, adequacy and effectiveness of services provided to the public and scrutinize the use of public funds. This increase in transparency, in turn, increases accountability to the public. This particular issue has become especially pressing as governments, not just in Canada, but around the world continue to downsize and divest services traditionally performed by the public service to the private sector. This criteria ensures that entities that act for the benefit of the public interest are subject to appropriate transparency and accountability mechanisms."[5]

- **Recommendation: Extend the scope of the Act to include private entities that deliver substantial public programs, services or functions, or receive substantial public funding to carry out public programs, services or functions.**

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[3] "ARCHIVED - President of the Treasury Board of CANADA Mandate Letter." Prime Minister of Canada Justin Trudeau. Office of the Prime Minister, November 12, 2015. https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-president-treasury-board-canada-mandate-letter.
"Archived - Minister of Justice and Attorney General of Canada Mandate Letter." Prime Minister of Canada Justin Trudeau. Office of the Prime Minister, November 12, 2015. https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter.

[4] "Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act." Information Commissioner for Canada, March 2015.
"Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime." Information Commissioner for Canada, January 12, 2021. https://www.oic-ci.gc.ca/en/resources/reports-publications/observations-and-recommendations-information-commissioner-review.

[5] "Striking the Right Balance: Recommendations to Modernize the Access to Information Act: Submission to ETHI on Recommendation 1.1: Criteria for Coverage," Information Commissioner for Canada, February 25, 2016

The *Access to Information Act* contains no requirement that other laws be consistent with its provisions, or else be invalidated to the extent of the inconsistency with the Act. In the absence of such provision, other laws can extend the *Access to Information Act*. In fact, there is an entire Schedule of such laws in the Act. Section 24(1) of the *Access to Information Act* prohibits disclosure of any record that contains information that is restricted by 65 other laws that are listed in Schedule II of the *Access to Information Act*. When the Act was adopted in 1983, there were 33 laws listed in Schedule II.

One such egregious example is s. 28(1) of the *Canada Infrastructure Bank Act,* which forbids the Bank from disclosing information "in relation to the proponents of, or private sector investors or institutional investors in, infrastructure projects." A person who releases such information "is guilty of an offence and liable on summary conviction to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both."[6] The Canada Infrastructure Bank is entrusted with $35 billion of public money but is shrouded in secrecy in such a way that limits the public's right to scrutinize decision-making on infrastructure investment. The Bank is already covered by the *Access to Information Act*, and its exemptions for documents based on commercial confidentiality, economic interest of government or policy advice. These additional exemptions in the *Canada Infrastructure Bank Act* further inhibit Canadians from evaluating decisions made by a public entity that is ostensibly working for the public interest.

- **Recommendation: Remove the *Canada Infrastructure Bank Act* from Schedule II of the *Access to Information Act*.**

Abuse of Exemptions and Exclusions

In CUPE's experience, exemptions available under s. 20 such as trade secrets of a third party; financial, commercial, scientific, or technical information that is confidential information supplied to a government institution by a third party; and information that could prejudice the competitive position of a third party have been interpreted far too broadly and prevent critical information from being disclosed. As one particularly egregious example, CUPE submitted a request for information regarding the government's decision to invest in the REM light rail project and 95 per cent of the records disclosed were blacked out.[7]

These exemptions do not conform to the international standard of maximum disclosure, nor do they conform to the first principle of the Act that exceptions to the right of access should be limited and specific. It is not acceptable that information merely related to third-party interests be withheld. Rather, there must be a clear demonstration of actual and serious harm resulting from the disclosure, and that harm must be greater than the public interest in having access to the information.

It is a serious problem that key documents such as "value for money," risk analyses and business cases prepared by consultants and private companies in their pitch for a public-private partnership or contract opportunity with government are almost always redacted or withheld from the public.

[6] *Canada Infrastructure Bank Act*, SC 2017, c. 20, s. 403, s. 31.
[7] "Case for Liberals' $1.2 Billion Support of Privatized REM Kept Secret." Canadian Union of Public Employees, December 7, 2017. https://cupe.ca/case-liberals-12-billion-support-privatized-rem-kept-secret.

Government decision-makers rely on these documents to make significant financial decisions, yet they are withheld from public scrutiny. This is especially concerning given that multiple provincial Auditors General have found the cost of P3 projects to be significantly more than public procurement.[8] Among the most important information to the public is information about government spending. It is critical for the health of our democracy that government spending is transparent, and the public has confidence.

- **Recommendation: Amend s. 20 to be exclusively an injury-based exemption.**

The fact that there is no review mechanism available for s. 69 cabinet confidentiality exclusions is a blatant violation of the first principle of the Act, which states, "decisions on the disclosure of government information should be reviewed independently of government." Neither the Information Commissioner nor the federal court is empowered to review decisions to withhold records under s. 69 to determine whether claims of cabinet confidence are justified. Section 69 has long been the most frequently cited exclusion. In 2019-2020, s. 69 was invoked by institutions 3,658 times, while all other exclusions combined were invoked 554 times.[9]

- **Recommendation: Empower the Information Commissioner to independently review institution decisions to deny access requests by citing exclusion for cabinet confidentiality.**

No Accountability for Extensions, Consultations

Section 9 of the Act allows for extensions of a "reasonable period of time" for responding to requests where there is a high volume of records and meeting the 30-day time limit would unreasonably interfere with government operations, consultations are required, or notifying third parties is required. The Act does not prescribe any time limit for these extensions.

This provides for a considerable amount of discretion for the assigned ATI officer to determine the extension period. In practice, there is little consistency in setting timelines for extensions. A prescribed timeline for extensions is important for setting expectations to both the requestor and the third party and can better inform resource allocation towards fulfilling access to information requests. Lengthy extension periods result in information that is no longer relevant to the requestor and can undermine meaningful civic engagement.

- **Recommendation: Prescribe a limit of up to 30-calendar days for all extensions. An extension beyond 30 days must require the approval of the Information Commissioner.**

[8] Reynolds, Keith. "Canada Infrastructure Bank and the Public's Right to Know." Columbia Institute, September 2017. https://www.columbiainstitute.ca/sites/default/files/resources/Columbia%20Infrastructure%20Bank%20English%20for%20signoff%20Sept%2011%202017.pdf.

[9] Secretariat, Treasury Board of Canada. "Government of Canada." Canada.ca. / Gouvernement du Canada, December 30, 2020. https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2019-2020.html#toc1.

When an extension is required in order to seek consent or provide notice of intention to disclose third-party information, specific timelines apply to that consultation (e.g. a third party is supposed to respond within 20 calendar days of receiving the government institution's notification of the request). However, there are no consequences for a third party failing to meet consultation timelines. A non-response from the third party can hold up the entire request process. Requestors can be left in limbo between choosing to engage in the lengthy appeal process or waiting for the third party to co-operate with the institution.

For example, earlier this year CUPE submitted a request to the Public Health Agency of Canada for a copy of contracts between the Agency and a third party. The Agency subsequently invoked a 60-day extension to contact the third party to provide them an opportunity to argue for the records to be withheld. The third party neglected to respond to the Agency during this time. The Agency is now two months past the 60-day deadline but will not release the records to CUPE, stating that they will continue to attempt to reach the third party.

- **Recommendation: Implement a legislative requirement that if the third party does not respond to the consultation process within the prescribed timeframe, the information will be disclosed.**

PROCESS AND SYSTEMS

Under resourced System

The *Access to Information Act* requires institutions to respond to information requests within 30 calendar days. In 2019-2020, almost one-third of requests processed were not closed within legislated timelines – a figure that has been increasing since 2015-2016. This does not mean that the 30-calendar day legislated timeline should be increased. The timeline is consistent with most provinces and territories in Canada, and many international jurisdictions. Rather, the ATI regime must be properly funded and staffed in order to meet legislative requirements of the Act. Responding to access to information requests is a core function and service of government and must be resourced as such.

- **Recommendation: Increase funding to ATI programming and hire more ATIP officers. These positions should be permanent public service jobs, not temporary help workers or contractors.**

Archaic Technology

As recently as July, CUPE received a release package from the Privy Council Office on a CD-ROM. This is unacceptable and adds a further barrier to accessing information. As the government is aware, CD-ROM hardware has been largely phased out of computer technology.

Moreover, when records are released to requestors in PDF format, they are almost never text-searchable, but rather electronic documents that are printed and scanned. The clarity of text is often diminished, and the frustration of the search function is an unnecessary barrier for the requestor.

In CUPE's experience, some institutions deliver release documents via Canada Post's ePost (a platform that is being retired), but this is the exception. Government should implement a standardized release format across all institutions subject to the Act.

- **Recommendation: Require all records to be released in a machine-readable, searchable format.**

Summary of Recommendations

- Extend the scope of the Act to include the Prime Minister's Office and Ministers' Offices under Part I: Access to Government Records.
- Extend the scope of the Act to include private entities that deliver substantial public programs, services or functions, or receive substantial public funding to carry out public programs, services or functions.
- Remove the *Canada Infrastructure Bank Act* from Schedule II of the *Access to Information Act*.
- Amend s. 20 to be exclusively an injury-based exemption.
- Empower the Information Commissioner to independently review institutions' decisions to deny access requests by citing exclusion for cabinet confidentiality.
- Prescribe a limit of up to 30-calendar days for all extensions. An extension beyond 30 days must require the approval of the Information Commissioner.
- Implement a legislative requirement that if the third party does not respond to the consultation process within the prescribed timeframe, the information will be disclosed.
- Increase funding to ATI programming and hire more ATIP officers. These positions should be permanent public service jobs, not temporary help workers or contractors.
- Require all records to be released in a machine-readable, searchable format.

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