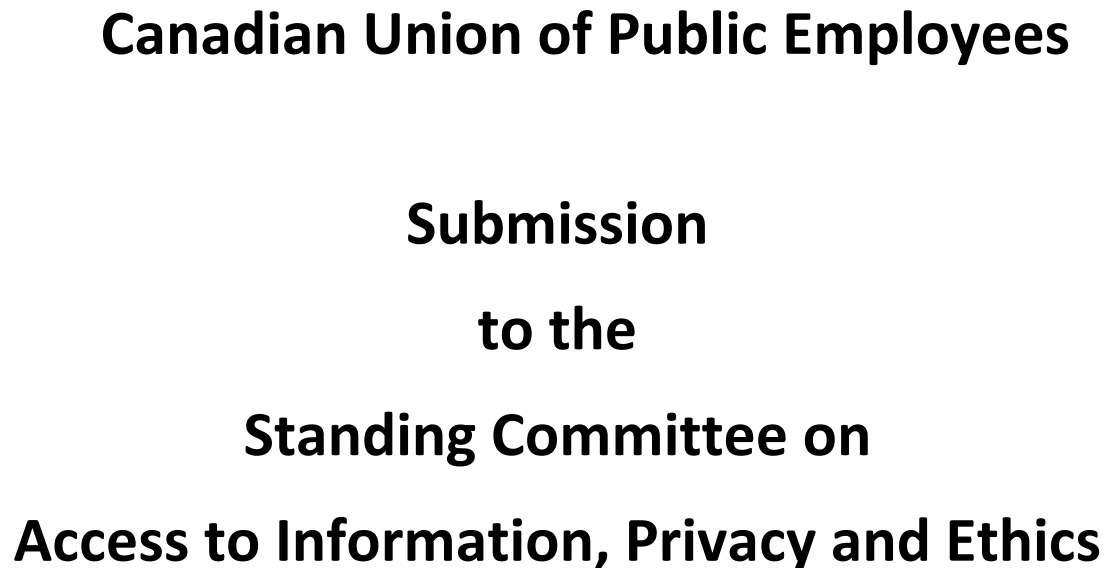

Canadian Union of Public Employees

Submission

to the

Standing Committee on

Access to Information, Privacy and Ethics

C-58: An Act to amend the Access to Information Act

and the

Privacy Act and to make consequential amendments to other Acts

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Introduction

The Canadian Union of Public Employees finds the government's proposals under C-58 to run counter to generally accepted principles of access to information. Canada is ranked 49th out of 111 countries by the Global Right to Information Rating program, which notes "Canada's lax timelines, imposition of access fees, lack of a proper public interest override, and blanket exemptions for certain political offices all contravene international standards for the right of access. Canada's antiquated approach to access to information is also the result of a lack of political will to improve the situation."[1]

C-58 does nothing to challenge this assessment. The amendments proposed would increase barriers to gaining meaningful access to information that is in the public interest. Furthermore, the proposed amendments do not include the necessary changes to the current Act that would improve its most glaring deficiencies. **CUPE recommends that C-58 be discarded, and that the government engage in a meaningful review of current legislation to re-establish Canada's global leadership in transparency and freedom of information.**

Secrecy in Public-Private Partnerships and Privatization

In particular, CUPE is concerned that the current Access to Information regime, and its proposed amendments, obfuscate the information necessary for the public to assess the desirability and viability of private sector delivery of public services and infrastructure into which the government invests public funds.

CUPE has long fought for access to the full details of privatization deals, particularly public-private partnerships that are justified using a biased and secretive evaluation process. The private sector's claims of "value for money" can't be proved, as key details are blacked out of any documents that are made public.

When CUPE and other independent evaluators do gain access, the facts repeatedly show privatization costs more. An Ontario auditor general study of 74 P3s found the projects cost $8 billion more than if they had been publicly delivered, and that there was "no empirical evidence" to justify the projects going ahead as P3s.

In recent months, CUPE and our counterparts have submitted Access to Information requests for records associated with infrastructure projects funded in part by substantial public money, but operating in partnership with a private third-party. In the cases where the requests were not denied, the scope of redactions were so expansive that it was impossible to conduct an evaluation of the project or an evaluation of the process by which the project came to be. In the case of a request to Infrastructure Canada for reports and analyses of the Réseau électrique métropolitain project in Montréal, to which the government has committed $1.3 billion of public funds, 99% of the resulting records were redacted.[2]

[1] http://www.rti-rating.org/
[2] Bergeron, Maxime. "Rentabilité du REM: Ottawa garde secrete une étude." La Presse, 6 October 2017.

In the case of the government's plan to sell off its interest in Canadian airports to the private sector (a plan known as "Project Eagle"), both the Canadian Development Investment Corporation and the Department of Finance have refused to release the financial evaluation and even the cost of the contract with Credit Suisse to undertake it.[3] In the case of the proposed privatization of Canadian ports, the Department of Finance refused to disclose the entirety of the report by Morgan Stanley evaluating the proposal.[4] This practice of "information laundering" defeats the purpose of an access to information law.

CUPE is concerned that under the current Access to Information regime, all monies channeled through the Canada Infrastructure Bank will be shrouded in secrecy. The legislation creating the Bank includes overly broad prohibitions on disclosure and adds the Bank to Schedule II of the Access to Information Act, further limiting its exposure to access requirements. The Bank's private investors and the Bank itself will be dangerously concealed from public scrutiny. This is unacceptable.

A new report from the Columbia Institute outlines the unanimity among Canadian and international Information and Privacy Commissioners on this issue. In sum, "When citizens are blocked from knowing the details of government operations it undermines both the accountability of government and democracy itself."[5] This statement applies equally to private entities delivering public services with public funds. The report recommends that "private entities delivering substantial public functions or services, or receiving substantial government funding to carry out public functions or services, should be subject to access to information legislation,"[6] and CUPE supports this recommendation.

International Guiding Principles

The right to access information held by public authorities is recognized internationally as a fundamental human right which should be given force at the national level through comprehensive legislation. This right is enshrined in Article 19 of the United Nations' Universal Declaration of Human Rights, which Canada supports. Freedom of information assumes that all information held by governments and government institutions is public, *ab initio*, and may be suppressed only if there is a legitimate reason.

Under this framework, access to information legislation must meet certain principles:

- Maximum Disclosure: The public's right to access information must take precedence over administrative and bureaucratic limitations, over government privilege, and in all but the most extreme cases, over proprietary and third-party information.
- Obligation to Publish: The government must ensure information critical to a frank assessment of its fiduciary and procedural performance is made available.

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[3] http://www.cbc.ca/news/politics/airports-pwc-credit-suisse-morneau-sale-equity-lease-c-d-howe-cdev-finance-canada-1.4210703.
[4] Access to Information request #A-2017-00228 (FIN).
[5] Canada Infrastructure Bank and the Public's Right to Know, p. 21. Columbia Institute, 2017.
[6] Ibid.

- Promotion of Open Government: The processes of government, including the deliberations of governmental bodies and the information upon with these bodies rely to come to decisions, must be made available.
- Limited Scope of Exceptions: Blanket exemptions are not appropriate; government must limit its secrecy to a narrow range of access exemptions where actual and serious harm can be demonstrated. It is not acceptable to refuse to disclose information simply because it relates to a government or third-party interest.
- Processes to Facilitate Access: The process by which the public requests information must be clear, simple to navigate, and consistent across government departments. Costs must be minimal. Timelines must be reasonable, and they must be respected.

C-58 violates these principles and represents a step backward for freedom of information in Canada. We are not alone in this view. The Center for Law and Democracy, News Media Canada, Canadian Journalists for Free Expression, the Information Commissioner of Canada, dozens of First Nations groups, scholars, and labour groups – among others – have voiced opposition. We join with them in expressing concern over the following clauses.

Proposed Amendments

Amendments to Section 6 of the Access to Information Act

In Section 6, the government proposes amendments that will restrict access to information by granting undue discretion to the "head of a government institution." For example, under the proposed amendment, the head of a government institution may decline to act on the basis of unintentional administrative error on the part of an applicant, an applicant's lack of knowledge of government systems and jargon, because of the size of the request, or because the head deems the request to be vexatious. The definitions of "large number" and "vexatious" are imprecise, subjective, or wholly non-existent.

Amendments to Section 7 of the Access to Information Act

The Access to Information page of the Liberal party's website states that a Liberal government will "make it easier for Canadians to access information by eliminating all fees, except for the initial $5 filing fee."[7] The current proposals in C-58 do not eliminate fees, but in fact broaden the possibility of additional fees being levied at the discretion of "the head of the government institution to which the request is made." The language also continues to allow a payment deposit to be required before the government will provide access to information. Fees serve as both a disincentive to make requests and an obstacle to gaining access. The government should fulfill its commitment to eliminate all fees save the nominal $5 filing fee.

[7] https://www.liberal.ca/realchange/access-to-information/, accessed 25 October 2017.

Recommended Amendments

Sections 18 and 20 of the Access to Information Act

The exceptions outlined in Sections 18 and 20, relating to "trade secrets" and "financial, commercial, scientific or technical information" of the government, government institutions, and third parties, are overly broad and do not conform to international standards of access to information. A transparent and

accountable government aims for maximum disclosure, but Sections 18 and 20 in application result in the suppression of information vital to this principle. It is not acceptable that information merely related to the aforementioned interests be withheld. Rather, there must be a clear demonstration of actual harm resulting from the disclosure. Sections 18 and 20, in practice, undermine the public interest and should be amended.

Section 21 of the Access to Information Act

This section of the Act exempts from public access the records of government deliberations, and therefore violates the principle of Open Government. Canadians must be able to assess the processes by which government and government institutions come to decisions, and the information they rely on to make these decisions.

Section 69 of the Access to Information Act

For the same reasons outlined above, the records of the Prime Minster's Office, the Privy Council, and Cabinet must be subject to the Act. International principles of Access to Information demand Maximum Disclosure and the reversal of cultures of secrecy within government. The Access to Information page of the Liberal party's website states that a Liberal government "will ensure that Access to Information applies to the Prime Minister's and Minister's Offices, as well as administrative institutions that support Parliament and the courts."[8] C-58 does not fulfill this commitment. Section 69 is far too broad an exclusion and should be amended.

The Canadian Union of Public Employees (CUPE) is Canada's largest union, representing 635,000 workers. Our members deliver frontline services in municipalities, health care, social services, schools, universities, and many other sectors across the country.

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[8] https://www.liberal.ca/realchange/access-to-information/, accessed 25 October 2017.