CARL ABRC
CANADIAN ASSOCIATION OF RESEARCH LIBRARIES • ASSOCIATION DES BIBLIOTHÈQUES DE RECHERCHE DU CANADA

Access To Information – Broadening the Openness of Government

Introduction

The Canadian Association of Research Libraries (CARL) would like to thank the Government of Canada for inviting input to its Access to Information Review, and fully agrees with its stated goal that "Access to information should reflect today's digital world and Canadians' expectations for accessible, timely and trustworthy information."1

CARL upholds that government transparency is in the public interest and that it is the public's right to know about the activities, spending, and decision-making of its government. CARL has made two previous submissions related to access to information (ATI) reform.[2]

Recommendations

CARL would like to recommend the following. Each recommendation is discussed in the subsequent section of this document:

1. Expand the right of access beyond the current scope (Canadian citizens or permanent residents) only if sufficient funding is provided to government departments to be able to support increased demand.

2. Reduce exclusions and limit exemptions by narrowing the scope, implementing harm tests, and setting time limits to make records open.

3. Implement a regime of scheduled declassification and release to open for documents subject to exemptions, including those currently exempted in perpetuity.

4. Expand proactive disclosure by: broadening the types of documents required to be published, considering ways of further encouraging individual departments to initiate open record-keeping practices, and removing the requirement that all public records must be available in English and in French.

5. Consider an open registry and record repository that would help users understand what information is available from departments in an open and

[1] Access to Information Review Public Engagement https://atiareview.ca/
[2] Access to Information Act – Revitalizing access to information consultation, June 2016 https://www.carl-abrc.ca/wp-content/uploads/docs/ATI_Revitalization_Submission_June2016.pdf and CARL Statement on Bill C-58: An Act to Amend the Access to Information Act and the Privacy Act, July 2017 https://www.carl-abrc.ca/wp-content/uploads/2016/03/CARL-Statement-on-Bill-C-58-Access-final_en.pdf

consistent manner, and allow opened records to be accessed by others seeking the same information.

6. Confirm the public domain status of records released under ATI, or apply an open Creative Commons licence, so that users understand their copyright status.

7. Address the current barriers faced by users who are print disabled by providing documents that are not solely static .pdf documents but that are readable by screen readers or Braille displays.

8. Amend the *Access to Information Act*, *Privacy Act*, and *Library and Archives Canada Act* to adopt the OCAP principles which would remove barriers for Indigenous communities to retrieve data and records specific to their communities.

9. Provide significant and ongoing funding for Library and Archives Canada for processing access to information requests pertaining to historical records from over 207 government departments, including the program of block review and print records digitization.

10. Increase the authority and oversight responsibilities of the Information Commissioner.

Discussion

Adequately Support Right of Access
CARL fully supports the right of access by Canadians that is outlined in the s 4(1) of the Act.

However, when the 2017 revisions removed limits to the size of requests being made, departments fell under increased pressure to meet the deadlines established under the Act. Many individual government departments are now challenged in meeting current deadlines, but this is exponentially compounded for Library and Archives Canada (LAC). (See "Better Resource Library and Archives Canada (LAC) as a Special Case", below for further information.)

Canada lags globally[3] in providing rights to access information outside of Canada and this needs to be addressed. Only with additional funding would CARL support extending this right beyond Canadians as expanding the eligibility for requests beyond Canadian citizens would only compound the problem of delays in meeting the current demand, and would increase the potential for vexatious requests.

The Government must increase funding to support current activities but also to support the proposed expansion to right of access.

[3] Fallen Behind: Canada's Access to Information Act in the World Context p. 347, https://fipa.bc.ca/wp-content/uploads/2020/05/2020_FallenBehind.pdf

In addition to increased funding, there are other measures the government can take to better meet citizens' right of ATI, as presented in the following section.

Reduce Exclusions and Limit Exemptions

The main purposes of exclusions and exemptions is to protect information that may be harmful to individuals, national security and military concerns, solicitor/client privilege, and cabinet confidences. We agree that it is important to maintain appropriate, time-limited exemptions for these reasons; but we also believe that no record should be unduly or permanently precluded from public access.

Privy Council and Ministerial records, rather than being considered excluded, should fall under the Act, and then be treated as embargoed, with their release managed (as with all records) under a schedule for automatic future declassification/release (e.g., after 20 years, as exists currently for Privy Council).[4] A lengthier term may be needed on a small subset of ministerial records owing to privacy considerations.

Exemptions have specific intent and limited scope: to protect inter-governmental relations, Canada's economic interests, trade secrets, public safety, national security, or personal privacy. But the exemptions are subject to uneven and overly liberal interpretation by government institutions. CARL posits that government information could be more comprehensively released than is currently the case, without jeopardy to essential protections. For example, do reports of internal consultations need to be exempted for 20 years (per 21(1)b) or internal audits for fifteen years (per 22.1 (1)), even given the exceptions noted (22.1 (2))?

CARL also proposes that no government records – including those that are exempted for any reason (privacy, security, or solicitor-client privilege for example) – should be closed in perpetuity. A time limit such as 100 years for even the very most sensitive records should be considered.

There is currently insufficient oversight for the way in which exemptions are managed, leaving too much latitude and subjectivity for the department processing the request. This typically results in great swaths of information being redacted or withheld as departments apply "class exemptions" to cover all records related to a particular subject matter. Exemptions should be narrow in focus and records that relate to a topic should be subject to a 'harms' test rather than withheld under a sweeping exemption.

Furthermore, there must be independent oversight of the process. This is discussed in further detail in the section "Increase Authority and Better Resource the Information Commissioner".

Any amendments made to this Act and any relating Acts in support of these changes should ensure that authoritative bodies that currently have override capabilities (e.g., Office of the Information Commissioner, Librarian and Archivist of Canada, etc.) to any section (e.g., Section 23) of the Act, remains intact.

[4] ATIA Section 69(3)(a) https://laws-lois.justice.gc.ca/eng/acts/a-1/page-13.html#h-1003

Creating an ontology, as described in the “Expand Proactive Disclosure” section, would provide the methodology to manage the process and timeframes for records release.

Create a Regime of Scheduled Declassification and Release

On the basis of record type and level of sensitivity, department records could become open at a set time from the date of creation. This should reflect the natural, predicted point at which there is no longer risk of harm from their release.

But departments will need to be either mandated or incentivized to regularly declassify or downgrade the classification of sensitive documents --whether security classification (Secret, Top Secret, etc.) or privacy protection (Protected A, B, C, etc.).

Library and Archives Canada recently underwent an investigation by the Office of the Information Commission (OIC) for a complaint that LAC was “deemed refusal pursuant to subsection 10(3)”[5] in failing to meet the extended deadline requested to complete the access to information request.

The OIC determined that LAC was unable to satisfy the request because of a very lengthy process involving the Canadian Security Intelligence Services (CSIS) to obtain a classification on the records given, which in the end, were deemed Top Secret. LAC does not have the proper digital infrastructure in place to process this level of classification.

This example illustrates a problem that could be easily solved if documents’ classification status could be changed to open by default, where possible, at the time of the transfer of the records’ custody to LAC. If declassification to open is not possible, at minimum, a downgrade from Top Secret to Secret upon transfer could be automatic.

Declassification and Access to Information regimes need to be closely tied. At the present time, a situation could arise where documents that have been declassified are nevertheless withheld from an ATI request based on a broad exemption.

Expand Proactive Disclosure

The Open Government initiative[6] is to be lauded, but it is only a first step toward a more comprehensive, cross-departmental system of proactive disclosure of selected contemporary information.

Broaden Types of Documents Disclosed

Under the current regime, with the exception of travel, hospitality, contract information, etc., government departments publish information on a voluntary basis without any ongoing, regular, and systematic activity. In order to fully support the open by default initiative, and to support proactive disclosure of other government records, the government should consider more types of documents for which

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[5] Information Commissioner of Canada’s Decision, Library and Archives Canada, 2021. https://www.oic-ci.gc.ca/en/decisions/final-reports/library-and-archives-canada-re-2021-oic-14

[6] Proactive Disclosure, Government of Canada, https://open.canada.ca/en/proactive-disclosure

proactive disclosure would apply and consider ways of further encouraging individual departments to initiate open record-keeping practices.

Remove Restriction that Documents Must Be Released in Both Official Languages

Given the Government of Canada's official languages regime, departments are reluctant to regularly disclose records publicly because records are only available in one official language. However, a decision by the Yukon Supreme Court[7] on the issue of providing evidence in both official languages found that there was no requirement that materials provided under the ATIA be made available in both official languages.

Create an Ontology of Government Information

Creating an ontology of government information (i.e., a categorization of document types based on their key characteristics and providing recommended treatment), while challenging, would provide departments with a consistent approach to regularly releasing more types of documents on an ongoing basis in an automated way that could reduce ATI requests and the amount of time and effort to review information prior to release. It would create a way for departments to be accountable for the information released and to expand beyond the minimal, high level information currently being shared.

Review Alignment of Proactive Disclosure Regimes with ATI

Whether the requirement of proactive disclosure (or the 'duty to publish', as it is called in the UK) should be addressed under ATIA or in separate legislation, and who would be responsible for monitoring compliance, are both open questions. There are some good arguments that ATI and proactive disclosure should be separate regimes, insofar as proactive disclosure effectively publishes records, removing them from the scope of the Act.[8]

Create an Open Registry and Records Repository

In addition to the regular release of records, government departments should consider means to keep the records released under completed requests openly available. Currently, access to such records is difficult, as the records are often partial (only summaries of the information contained), without context, and without descriptive metadata. This leads to others having to re-request the information, in turn adding unnecessary work for departments and unnecessary delays for members of the public.

There also needs to be a better way to search for this information so that users understand what information is available from departments, as well as a way to search across all departments.

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[7] "...citizens can obtain information under the Access to Information Act, S.C., ch. A-1, but this information does not have to be made available in both official languages simply because it is made available to the public; once again, the documents in question are generally prepared for internal use and are not mainly intended for the public." *R v Rodrigue* (1994), 91 CCC (3d) 455 (YK SC), pp. 16-17, https://canlii.ca/t/1p1hd

[8] Weiler, Mark. "Let's not confuse Open Government with Access to Information" https://policyoptions.irpp.org/2016/04/27/lets-not-confuse-open-government-with-access-to-information/

Creating a system to regularly publish completed requests, including the metadata for the records released – or, where possible, the records themselves – even if there were a short delay[9], would alleviate processing backlogs. This will require better, more standardized record-keeping practices and systems (i.e., GCDocs or other) across the whole of government, based on a firm and funded commitment to efficiency and transparency.

Confirm Public Domain Status of Records Released under ATI
Crown copyright applies to both published and unpublished government works; and published content is, logically, excluded from the ATIA. That leaves the copyright status of released records—and therefore the uses that can be made of the records—ambiguous for users.

In previous years, libraries have asked about the copyright status of the documents released through ATI requests to government departments. The responses received seemed to indicate that these works are considered to be in the public domain and that libraries would not need permission to make them available online. This position also seems to be reflected in the Federal government's Access to Information Manual[10], but a clear statement by the government clarifying the copyright status of records released under ATI would be of benefit to Canadian citizens.

Assigning released records to the public domain and indicating so with a Creative Commons waiver (CC-0) or, as appropriate, assigning a Creative Commons or licence[11] would help to alleviate copyright-related confusion that prevent preservation, reproduction, and redistribution of important government information and would relieve demands on ATIP officers since records could be more widely shared.

Universal Design and Alternate Formats
Under Section 12(3) of the Act, an individual who has a "sensory disability and requests that access be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format:

> (a) forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or
>
> (b) within a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the

[9] Investigation Report F11-02, Investigation Into the Simultaneous Disclosure Practice of BC Ferries, Office of the Information Commissioner of British Columbia, May 2011. https://www.oipc.bc.ca/investigation-reports/1243
[10] Access to Information Manual, Government of Canada, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html
[11] As with other jurisdictions, the Creative Commons Attribution licence (CC BY) as a default licence should be suitable in the majority of cases, with exceptions as needed for the Creative Commons Attribution Noncommercial licence (CC BY NC) and the appropriate application of Indigenous knowledge protocols.

person's right of access under this Part and considers it reasonable to cause that record or part thereof to be converted."

This section allows discrimination against users who are print-disabled by creating a barrier to information that does not exist for users who are not print-disabled. This is in direct contravention of the Canadian Charter of Rights and Freedom and to text in the *Towards Canada's 2030 Agenda National Strategy*[12] report, in which the government pledges that no one will be left behind:

> "As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first."

The Act should be modified not only to remove the subjectiveness of making alternate formats available, but to aim, whenever possible, that records released under ATI proactively meet international accessibility standards, which would further remove barriers that contribute to an inequitable society in Canada.

Reconciliation

Originating with the Alberta First Nations Information Governance Centre, many Indigenous communities are adopting the guiding principles of *Ownership, Control, Access and Possession (OCAP®)*[13] whose purpose is to promote and protect First Nations' data and the management thereof.

The four guiding principles are:

> *"Ownership* refers to the relationships of a First Nation community to its cultural knowledge, data, and information. Ownership asserts that a community, as a group, owns information collectively in the same way that an individual owns their personal information. This is distinct from concepts of stewardship.
>
> *Control* asserts that First Nation people, their communities, and representative bodies must control how information about them is collected, used, and disclosed. This extends to all aspects of information management, from collection to use, disclosure, and ultimately, destruction of data.
>
> *Access* determines that First Nations must have access to information and data about themselves and their community regardless of where it is held. It is within the rights of First Nation communities and organizations to manage and make decisions regarding who can access their information.

[12] 2030 Agenda and Sustainable Development Goals, ESDC, July 2019 https://www.canada.ca/en/employment-social-development/programs/agenda-2030/national-strategy.html#h2.03

[13] The First Nations Principles of OCAP® https://fnigc.ca/ocap-training/

> *Possession* reflects the state of stewardship of data. Possession is the mechanism to assert and protect ownership and control; possession puts data within First Nation jurisdiction and therefore, within First Nation control."

A community's ability to manage their data in this manner is undermined by current privacy, access to information, and library and archives legislation. As a result, many communities are unable to obtain information and data that would support the many aspects of reconciliation such as medical/social support, financial resources, and residential school registries.

Amendments should be brought to these legislative Acts to adopt the OCAP principles and remove barriers for Indigenous communities to retrieve Indigenous data and records.

Better Resource Library and Archives Canada (LAC) as a Special Case
The *Library and Archives Canada Act*[14] stipulates that the institution is "to be the permanent repository of publications of the Government of Canada and of government and ministerial records that are of historical or archival value". As such, LAC holds archival records for 107 active and over 100 defunct government departments, and access to these historical departmental records forms 99% of ATI requests to the institution. LAC ranks fifth in the number of requests received by any department at 2,131 reported for 2019-2020. This accounts for approximately 5% of their operating budget (7% if one considers the cost associated with digitizing the records) – much higher than any other department.

There are many factors under the current *Access to Information Act* and the *Library and Archives Canada Act* (*LAC Act*) that create barriers to being able to meet the requirements to fulfil requests. In an increasingly digital world, LAC is falling behind. Its funding levels are founded on the analogue (e.g. print-based) past; it has not been provided with the proper support to achieve its mandate effectively in a digital environment.

To be efficient and responsive, LAC needs to take a risk-based, default-to-open, approach for access to its holdings, but there are hindrances. First, records received from other departments often come in paper format, leaving LAC responsible to digitize the records in order to make them available to the public. LAC is not funded for this, nor does it receive reimbursement from the department whose records it digitizes. Support for both digital and analogue operations must grow and be properly supported.

Second, while LAC has this responsibility of records retention, the *LAC Act* does not compel government departments to transfer to LAC in a timely manner those records they deem to have archival value, which can cause significant gaps in the archival records available to the public.

Third, while a department with good information management and good metadata management could (and, in fact, *should*, according to the Directive on Open Government (clause 6.5)) send their records to LAC with restrictions removed (or reduced to a

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[14] *Library and Archives Canada Act*, Section 7(c) https://laws-lois.justice.gc.ca/eng/acts/l-7.7/page-1.html#h-345240

minimum, at least), in practice, most records – de facto – are still transferred closed-by-default. This creates additional delays in satisfying requests while LAC reviews every requested document and sometimes consults with the departments to release information. Adopting an open by default approach, as well as processes described in the Declassification section, would reduce this additional work.

LAC has developed an innovative proactive records review process, called 'block review', that opens large blocks of older, closed records deemed, through a sampling process, to be low risk. After ten years of work, in 2020, LAC hit the 50 million pages-reviewed mark. Wider application of this process would reduce the reliance on laborious and costly case-by-case reviews, with their attendant delays and frustrations for ATI requestors. The block review program merits increased funding from the Government of Canada, as the institution needs significant resources to manage its existing collection of restricted, paper-based records going forward.

Increase Authority and Better Resource the Information Commissioner

Although there were new measures taken in the 2016 review of the ATIA to expand the powers of the Information Commissioner and increase transparency in the work of their Office, amendments could be made to further improve order-making powers. The British Columbia model, for example, provides details on duties to comply with orders and the enforcement of orders for compliance by the commissioner, provides specific remedies, and grants additional protections for the commissioner.[15]

Furthermore, including a section in the Act that allows the commissioner to appoint a mediator would further support the work of the Commissioner and add strength to the current investigation process.

For the Office of the Information Commissioner (OIC) to function as a true arms-length appellate body, the Office should also be protected from litigious actions against the Commissioner for decisions and orders made.

In addition to this important expansion of duties of the Commissioner, CARL suggests that the government expand the parameters of the public interest override beyond Third Party Information and requests for translations to apply to the entire Act and give the Information Commissioner oversight over its application.

For government departments to effectively comply with expanded oversight and authority by the OIC, there would also need to be additional investment in departmental ATI budgets.

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[15] *Freedom Of Information And Protection Of Privacy Act*, [RSBC 1996] Chapter 165 https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96165_05#section58