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FROM LAGGARD TO LEADER

**a submission on reforming Canada's freedom of information law and practices
to the House of Commons Standing Committee on Access to Information,
Privacy and Ethics**

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SUMMARY

As a result of a political culture and structure that favours secrecy over openness, Canada is not and has never been a global leader in freedom of information – a value parties of all political stripes claim to embrace in Opposition but abandon if they form government. That means Canadians are consistently misinformed or under-informed about the decisions and actions of public officials and institutions in this country, compromising accountability and the integrity of our democracy.

The government has an opportunity to redress Canada’s tradition of secrecy by reforming not just the Access to Information Act, but the practices, policies and laws that frustrate what should be one of our fundamental rights: the right to know. Specifically, the Canadian Association of Journalists recommends the following five priority actions:

1. Reduce, limit or eliminate the exemptions and exclusions in the Access to Information Act, which public institutions use to censor records before they are released to the public;
2. Require public officials to document their decision-making, as well as establish and enforce penalties for those who don’t;
3. Require public institutions to regularly, promptly and proactively release broad categories of records in a machine-readable format;
4. Permit and encourage federal employees to freely communicate with the media and the public, without the involvement of political or media relations officials; and
5. Provide the Information Commissioner of Canada with order-making power.

BACKGROUND

The history of the Access to Information Act began in 1965 when New Democratic Party MP Barry Mather introduced the country’s first administrative disclosure bill and Carleton University political science professor Donald C. Rowat presented a paper entitled “How Much Administrative Secrecy?” at the Canadian Political Science Association’s annual meeting in Vancouver.

At the time, powerful, international societal forces – including the consumer, environmental, participatory democracy and investigative journalism movements of the 1960s and 1970s – were beginning to demand more and more information from

the state. In Canada, these demands were heightened by the increased availability of government records in the United States, where freedom of information legislation had been signed into law in 1966 and strengthened eight years later.

As a result, academics, activists, journalists, lawyers and parliamentarians, advocated for the introduction of similar legislation in our country. Pierre Trudeau's government, which was in power for much of this period, wasn't completely unsympathetic to providing more information to the public. In doing so, it saw a solution to the problem of public ignorance and mistrust, the later of which increased following the Watergate scandal in the United States.

But these demands were resisted by a political culture and system that has traditionally favoured secrecy over openness. In a 1974 study, D.F. Wall, the secretary of the Privy Council Office's security panel, recommended against a freedom of information law because the "concepts of collective responsibility or Cabinet solidarity" necessitate a "degree of 'built-in' confidentiality in government decision-making."¹

Three years later, a 1977 green paper on public access to government documents also stated the "public interest requires that a government receive advice which is confidential, in order to protect the neutrality of the civil service, and to ensure that its counsel is frank, not fearful, full not partial, disinterested not partisan. Without the confidence of that kind of expert service, the quality of decisions would be lowered."²

When it was introduced in 1980, the Access to Information Act conformed to the contours of these twin concerns over cabinet and civil service confidentiality rather than challenging them. As a result, in an op-ed published in the *Toronto Star*, Rowat predicted the "sweeping mandatory exemptions for cabinet and related documents, and the broad permissive ones for deliberations, advice or plans...will result in the withholding of many policy documents that ought to be made available for full public discussion of proposed measures, and so that Parliament and the public will know the basis on which the government has made its decisions."³

Rowat concluded that the access law was "far from having all of the characteristics of a strong bill needed to make the government fully accountable."⁴ Indeed, within just two months of the law coming into force, it had become a punch line. In a column, the *Toronto Star's* Bruce Ward quipped that the Access to Information Act 's

¹ D.F. Wall, *The Provision of Government Information* (Ottawa: Privy Council Office, 1974).

² Department of the Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa: Department of the Secretary of State, 1977).

³ Donald C. Rowat, "Freedom of information bill 'too restrictive,'" *The Toronto Star*, November 22, 1981. C5.

⁴ *Ibid.*

loopholes were so wide that the Goodyear Blimp could float through them “without touching on either side.”⁵ However, for the electorate, it was also a tragedy.

In a 1984 study testing the spirit of that law, public interest researcher and consumer advocate Ken Rubin wrote he “learned that simply because the Access Information Act now exists, the Canadian government is not willing to share a great deal of its information collected at taxpayers’ expense. In fact, since most of my cases were started before proclamation, I have been able to detect that, with the implementation of rigid fee and administrative barriers, less information, not more may now be released.”⁶

CONCLUSION

This history challenges the narrative that Canada has gone from being a global leader in freedom of information to a laggard. In many ways, the Access to Information Act legally fortified the secrecy that is an inherent part of Canada’s political system and culture. Over the past 30 years, those fortifications have been buttressed by practices that allow public officials and institutions to thwart even the limited transparency that legislation provides.

For example, in an unpublished 1983 manuscript, former Progressive Conservative Party MP Gerald Baldwin – whose Order of Canada citation described him as “the father and grandfather of the Access to Information Act” – wrote, “It will be a very sorry day when those obliged to make important decisions are so fearful of having their motives and their assumptions challenged, that they will make such decisions on facts given orally.”⁷

However, according to the country’s information commissioners, that sorry day is already upon us. In a recent joint statement, the commissioners wrote, “The trend towards no records responses to access requests appears to result from new communications technologies that complicate the retention and management of records and an emerging oral culture of decision-making where the activities of public entities go undocumented.”⁸ Indeed, in a 2015 tweet, Scott Reid, who was formerly Prime Minister Paul Martin’s communications director, acknowledged, “Everyone at every level of government, in every party uses private email,” reflecting a natural desire to “discuss stuff bluntly.”⁹

⁵ Bruce Ward, “Calgary professor will return to his university position,” *The Toronto Star*, August 28, 1983, A6.

⁶ Ken Rubin, *Testing the Spirit of Canada’s Access to Information Legislation* (Ottawa, 1984).

⁷ Gerald Baldwin, “Why Should We Tell You?” (unpublished manuscript, August, 1983).

⁸ Information and Privacy Commissioners of Canada, *Statement of the Information and Privacy Commissioners of Canada on the Duty to Document* (Information and Privacy Commissioners of Canada, 2016).

⁹ Scott Reid, Twitter post, March 4, 2015, 7:57 a.m., https://twitter.com/_scottreid.

At the same time, the government has constricted other means of accessing such information. In a 1979 letter to deputy ministers, then-prime minister Joe Clark wrote that, when dealing with the media, “federal officials should be prepared to discuss frankly information within their areas of responsibility that describes or explains programs and policies that have been announced or implemented by the Government. Public servants should not go beyond this discussion of factual information.”¹⁰

Back then, those guidelines did not “go beyond what has been the accepted practice in recent years, and in some ways appear aimed at restricting information on future Government plans.”¹¹ Yet, if Clark’s directive were issued today, it would be seen as relaxing restrictive media relations practices that, according to a 2013 paper prepared by the University of Victoria’s environmental law clinic, have required even the most routine requests for information to be “filtered through the bureaucratic procedure of communications departments.”¹²

When taken together, such measures don’t just thwart the public’s right to know. They also threaten our democracy. As such, the Canadian Association of Journalists recommends the government take five priority actions that address this threat.

RECOMMENDATIONS

1. Reduce, limit or eliminate the exemptions and exclusions in the Access to Information Act, which public institutions use to censor records before they are released to the public

The United States’ Freedom of Information Act has 17 loopholes. By comparison, Canada’s Access to Information has 75 such exemptions and exclusions that increase opacity and administrative costs. As such, the Canadian Association of Journalists recommends the government shrink or close those loopholes.

Of particular concern to the CAJ are the exemptions and exclusions that create an expansive zone of secrecy surrounding the government’s decision-making processes. Section 21 of the Access to Information Act permits the government to refuse access to any advice or recommendations developed for public officials, as well as accounts of their consultations or deliberations, for a 20-year period. In addition, section 69 prohibits access to cabinet records. That includes records used to brief ministers

¹⁰ Robert Sheppard, “Freedom bill passes test in Commons,” *The Globe and Mail*, November 30, 1979. 9.

¹¹ *Ibid.*

¹² Clayton Greenwood, *Muzzling Civil Servants: A Threat to Democracy* (Victoria: University of Victoria Environmental Law Clinic, 2013).

about matters brought before cabinet. Together, these sections mean Canadians often only know what the government lets them know about the reasoning behind the decisions and actions it takes.

The Canadian Association of Journalists recommends replacing those loopholes with a single discretionary exemption for policy advice or accounts of policy deliberations by public officials. This exemption would only apply to records that have been in existence for less than five years or which relate to a decision or action that has not yet been made, whichever happens sooner. In addition, to apply this exemption, the disclosure of those records would have to substantially inhibit the free and frank provision of advice or exchange of views in government.

The Canadian Association of Journalists further recommends that minister's offices – and, by extension, the records they hold – be brought within the scope of the Access to Information Act.

2. Require public officials to document their decision-making, as well as establish and enforce penalties for those who don't

An access to information law is useless if there is no information to access. As such, the Canadian Association of Journalists recommends public officials be required to document their decision-making and retain those records. This recommendation is consistent with proposals that have already advanced by the country's information commissioners, as well political parties, advocacy groups and other public officials. The Canadian Association of Journalists further recommends a failure to document be considered an offence under the Access to Information Act.

3. Require public institutions to regularly, promptly and proactively release broad categories of records in a machine-readable format

Canadians should not have to constantly go on so-called “fishing expeditions” to find out what their government is doing, filing access to information requests for records that may or may not exist. Instead, the Canadian Association of Journalists recommends the Access to Information Act require the government to regularly, promptly and proactively release broad categories of records in a machine-readable format. Examples of such categories could include briefing notes, ministerial calendars, communications materials, audits, studies, etc.

4. Permit and encourage federal employees to freely communicate with the media and the public, without the involvement of political or media relations officials

In November, Minister of Innovation, Science and Economic Development Navdeep Bains stated, “Our government values science and will treat scientists with respect. That is why government scientists and experts will be able to speak freely about

their work to the media and the public.”¹³ The Canadian Association of Journalists applauds this announcement. Moreover, we see no reason why this policy should not be clearly applied to all public officials. Yet, governments across the country implicitly or explicitly prohibit their employees from speaking to the media without permission, requiring questions to be fielded by communications officials who often have no expertise other than a background in spinning the answers to suit political needs. Public servants should serve the public interest.

5. Provide the Information Commissioner of Canada with order-making power

The Canadian Association of Journalists is in agreement with those who have recommended the commissioner be given order-making power. While the association believes it is more important to close and shrink the loopholes in the Access to Information Act, we also feel it is important the commissioner be given greater authority to ensure government does not abuse the law’s exemptions.

¹³ Minister of Innovation, Science and Economic Development, Navdeep Bains, *Statement from the Minister of Innovation, Science and Economic Development on Communicating Science*, 2015.

APPENDIX 1: TIMELINE

February 7, 1965	Democratic Senator Edward Long introduces S. 1160, an Act to clarify and protect the right of the public to information, in the United States Senate. President Lyndon B. Johnson eventually signs the bill, which becomes the United States' Freedom of Information Act.
April 8, 1965	NDP MP Barry Mather introduces Bill C-39, an Act to better assure the public's rights to freedom of access to public documents and information about government administration, in the House of Commons.
June 12, 1965	Carleton University professor Donald Rowat presents a paper entitled "How Much Administrative Secrecy?" at the annual meeting of the Canadian Political Science Association in Vancouver. In it, he writes that Canadians should "prepare to abandon the principle of secrecy" and adopt "the principle of free access to government documents."
July 4, 1966	President Johnson signs Bill S. 1160, writing that the legislation "springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."
August 30, 1968	Liberal Prime Minister Pierre Trudeau announces the appointment of the Task Force on Government Information to "make recommendations to improve the co-ordination of federal activities in information; to ensure effectiveness in the diffusion of official information; and thus, to lead to the public's gaining a better understanding of the operations than it has now."
May 1, 1969	Speaking in the House of Common, Trudeau announces, "All records over 30 years old will be transferred to the Archives and made available to the public." But Trudeau says certain records will be exempted from public access – "particularly those who release might adversely affect Canada's external relations, violate the right of privacy of individuals or adversely affect national security."
August 29, 1969	The Task Force on Government Information submits its report, To Know and Be Known, to Trudeau. In that report, the task force writes, "Canada has lagged behind other countries - and particularly Britain, the United States and Sweden - in opening administrative practices to the public." The report recommends, "The right of Canadians to full, objective and timely information and the obligation of the State to provide such information about its programmes and policies be publicly declared and stand as the foundation for the development of new government policies in this field. This right and obligation might be comprehended within a new constitution in the context of freedom of information."
June 17, 1971	Progressive Conservative MP Gerald Baldwin introduces Bill C-250, An Act respecting the right of the public to information concerning the public business. Speaking in the House of Commons, Baldwin – whose Order of Canada citation describes him as the "father and grandfather" of the Access to Information Act – says his bill "seeks to inhibit attempts by government to hide incompetence and arrogance behind a wall of secrecy. The bill provides, very simply, that Canadians who are refused access to the records of public business may apply for a court order and, if that court order is not complied with, that there may be a penalty of up to five years in jail."
March 15, 1973	President of the Privy Council Allan MacEachen makes public Cabinet

	Directive No. 45, the guidelines government uses to determine what documents can't be made available to MPs who table a Notice of Motion for the Production of Papers. Defending those guidelines in the House of Commons, MacEachen says, "It is always a delicate matter of judgment to balance the desire to make information available with the effective administration of the government, security of the state and other consideration."
April, 1974	In a study for the Privy Council Office, D.F. Wall, the secretary of its security panel, writes, "The complaint most often made and most intensely expressed concerning the provision of government information was that the practice of the Canadian government (although enshrined neither in principle nor policy) was to release only that information which was considered advantageous or harmless, and automatically to withhold the rest." Nevertheless, he recommends against freedom of information legislation.
November 21, 1974	H.R. 12471 becomes law, significantly strengthening the United States' Freedom of Information Act. The bill is enacted over Gerald Ford's presidential veto.
December 19, 1974	By all-party agreement, the House of Commons decides the Standing Joint Committee on Regulations and Other Statutory Instruments should, according to the Canadian Press, "conduct an inquiry into Government secrecy and how well present information practices conform with the democratic principle of the public's right to know." The inquiry includes an examination of Baldwin's Right to Information Act.
June 29, 1977	The Department of the Secretary of State releases a green paper to "assess the impact of legislation on access to government documents." The paper argues, "There is a public interest in preserving an area in the decision-making process which is not subject to the glare of full disclosure."
October 24, 1979	President of the Privy Council Walter Baker introduces Bill C-15, the Progressive Conservative's Freedom of Information Act. But that legislation isn't been passed by the time Clark's minority government was defeated on December 13, 1979.
July, 17, 1980	Secretary of State Francis Fox introduces Bill C-43, the Trudeau government's Access to Information Act, just before Parliament is scheduled to rise for the summer.
May 20, 1982	Fox announces a government proposal to amend the Access to Information Act to have cabinet confidences withheld from judicial review.
June 28, 1982	The House of Commons passes the Access to Information Act.
July 1, 1983	The Access to Information Act comes into force.