

CANADIAN
CIVIL LIBERTIES
ASSOCIATION



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LIBERTES CIVILES

**Submission to the Government of Canada's Review of the
Access to Information System**

August 13, 2021

Canadian Civil Liberties Association

90 Eglinton Ave. E., Suite 900

Toronto, ON M4P 2Y3

Phone: 416-363-0321

www.ccla.org

I. Introduction

The Canadian Civil Liberties Association (“CCLA”) is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental constitutional freedoms. Working to achieve government transparency and accountability lies at the core of our mandate.

The CCLA believes that a strong access to information regime is crucial to a vibrant democracy. Information about how our government functions assists the populace in making informed choices at the ballot box, participating meaningfully in policy discussions, and is a way to ensure that those in government are held accountable for their decisions. Our Supreme Court has affirmed that Canadians’ right to information is derived from freedom of expression protected under the *Canadian Charter of Rights and Freedoms*.¹ This right is engaged when meaningful expression on the functioning of government cannot be undertaken without access to information.

Like many civil society groups, the CCLA has repeatedly called for significant amendments to the *Access to Information Act* and, more broadly, for changes to how our access scheme works in practice. The current government review is, to a large extent, unnecessary. The reforms needed to improve our system have been known for years and are the subject of extensive recommendations made by many, including the Information Commissioner of Canada and the House of Commons Standing Committee on Access to Information, Privacy and Ethics.² The time for a timid or incremental approach has long passed. Immediate, meaningful, and ambitious reform of our access regime is imperative.

While there is a long list of reforms that can and should be made to our system, the CCLA has focused in this brief on four main issues:

- 1) The need for a statutory duty to document;
- 2) The need to expand the scope of the Act (i.e., by expanding the list of institutions to whom it applies);
- 3) The need to simplify and narrow the scope of exemptions and create a public interest override; and
- 4) The need to address the unreasonable delays associated with the access regime.

The CCLA makes the following 15 recommendations, each of which are explained in further detail below:

Recommendation 1: The Government should adopt legislation requiring public servants, government officials and other entities subject to the *ATIA* to document and retain records relating to their deliberations, actions, and decisions and adopt appropriate oversight and enforcement mechanisms

¹ *Ontario (Public Safety and Security) v Criminal Lawyers’ Association*, 2010 SCC 23 at paras 36-40.

² House of Commons, *Review of the Access to Information Act: Report of the Standing Committee on Access to Information, Privacy and Ethics* (June 2016) (Chair: Blaine Calkins) [House of Commons Report].

Recommendation 2: The Government should adopt legislation that prescribes record management systems be designed to facilitate the right of access

Recommendation 3: Delete Schedule I and define “government institution” using a criteria-based definition

Recommendation 4: All exclusions in the Act should be replaced with exemptions

Recommendation 5: Amend the Act to include a public interest override which applies notwithstanding any other provision in the Act

Recommendation 6: Amend Section 21 to define the term “advice” and reduce the time limit from 20-years to 10-years

Recommendation 7: Amend Section 69 to include a definition of Cabinet records which excludes purely statistical, technical, and scientific material, as well as background information for decisions once a matter has been decided, and mandate the principle of severability for Cabinet records

Recommendation 8: The Government should mandate that the Information Commissioner review the exemptions listed under Schedule II and report any recommendations for narrowing the list to the House of Commons Standing Committee on Access to Information, Privacy and Ethics for consideration.

Recommendation 9: Repeal Section 14 as a redundant measure to simplify the Act

Recommendation 10: Amend Section 13 to define the term “institution” and introduce a 15-year time limit for the exemption

Recommendation 11: Define “publicly available” information and amend Section 19 to include criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy

Recommendation 13: The Government should mandate the appropriate resourcing of the Office of the Information Commissioner and amend the Act to permit the head of an institution to approve extensions not exceeding 30 days, and thereafter all extensions of the time limit to respond to an access request shall be subject to the approval of the Information Commissioner

Recommendation 14: Amend the Act to require the authorization of the Minister to apply exemptions when time limits have been breached

Recommendation 15: Repeal Section 26 of the Act or reduce the timeframe for publication from 90 days to 30 days

II. A duty to document

Recommendation 1: The Government should adopt legislation requiring public servants, government officials and other entities subject to the *ATIA* to document and retain records relating to their deliberations, actions, and decisions and adopt appropriate oversight and enforcement mechanisms

A meaningful right of access to information is dependent on the existence of adequate documentation of government actions and decisions and the retention of these records.³ The Office of the Information Commissioner's ("OIC") investigations indicate that actions and decisions are not always documented properly, and therefore requesters are sometimes told there are no records concerning a specific government action or decision.⁴

According to the OIC, the absence of records can be attributed to two main factors. First, the use of new communication technologies has added a layer of complexity to information management.⁵ The use of multiple systems has created duplicate records, and copies and versions of the same record may be stored on multiple platforms, making retrieval more difficult.⁶ Second, a lack of stringency in the documenting of actions and decisions by institutions has exacerbated this issue.⁷

Canada should adopt legislation, or amend the *ATIA*, to create a statutory duty for public servants, government officials and other entities subject to the *ATIA* to document and retain records relating to their deliberations, actions, and decisions.⁸ For example, in New Zealand, the *Public Records Act 2005* requires every public office and local authority to "create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor."⁹

To be effective, this statutory duty must be accompanied by independent oversight and enforcement measures.¹⁰ The Information Commissioner's jurisdiction should be expanded to include overseeing the record keeping practices of institutions subject to the *ATIA*, including auditing powers. As for ensuring compliance, the Government should enact a new offence for intentionally failing to create and retain adequate records in contravention of the Act.

³ Statement of the Information and Privacy Commissioners of Canada on the Duty to Document (30 November 2020), online: Office of the Information Commissioner <oic-ci.gc.ca/en/statement-information-and-privacy-commissioners-canada-duty-document> [Joint Statement].

⁴ Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime* (Gatineau: Office of the Information Commissioner, January 2021) at 7 [OIC Report].

⁵ *Ibid.*

⁶ *Ibid* at 8.

⁷ *Ibid* at 7.

⁸ Joint Statement, *supra* note 3.

⁹ *Public Records Act 2005* (NZ), 2005/40, s 17(1).

¹⁰ Joint Statement, *supra* note 3.

Recommendation 2: The Government should adopt legislation that prescribes record management systems be designed to facilitate the right of access

In Canada, government records are primarily indexed for the government’s convenience, rather than in a manner facilitating the right of access to information.¹¹ Requesters often know what kind of information they are searching for, but not necessarily where the information is to be found or the structure of the records to be searched.¹²

While the *ATIA* requires the Minister to publish, at least once a year, a description of all classes of records under the control of each government institution in sufficient detail to facilitate access requests, there is no requirement that government record systems be structured with a view to facilitate this right.¹³ The only provincial freedom of information law that prescribes records be classified and indexed to facilitate this right is that of Quebec.¹⁴

Following the example of Quebec, Canada should amend the *ATIA* to require that “[a] public body must classify its documents in such a manner as to allow their retrieval.”¹⁵

III. Expanding the scope of the Act

Recommendation 3: Delete Schedule I and define “government institution” using a criteria-based definition

Currently, the *ATIA* applies to approximately 250 government institutions.¹⁶ The Act does not, however, extend to all entities that spend taxpayers’ money or perform public functions.¹⁷ The House of Commons, the Senate, the administrative bodies supporting the courts, airport authorities, NAV CANADA, and Canadian Blood Services are a few examples of entities not subject to the Act.¹⁸

A purposive expansion of the *ATIA*—the purpose being of course a robust democratic infrastructure with respect to information— would require the Act to apply to any entity that is controlled in whole or in part by the government, receives public funding, or performs a public

¹¹ Stanley L Tromp, *It’s Time for Change! 206 Recommendations for Reforms to Canada’s Access to Information Act* (Toronto: Centre for Free Expression at Ryerson University, August 2021) at 39.

¹² House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 42-1, No 72 (23 October 2017) at 1535 (Cara Zwibel).

¹³ *Access to Information Act*, RSC 1985, c A-1, s 5(1)(b) [*ATIA*].

¹⁴ Tromp, *supra* note 11 at 39 (see Recommendation 113).

¹⁵ *An Act respecting access to document held by public bodies and the protection of personal information*, CQLR c A-2.1, s 16.

¹⁶ Treasury Board of Canada, “Information About Programs and Information Holdings” (last modified 23 October 2020), online: *Access to information and privacy* <canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/information-about-programs-information-holdings/sources-federal-government-employee-information.html#A>.

¹⁷ Canada, *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act* (Gatineau: Office of the Information Commissioner, March 2015) at 8 [Striking Balance].

¹⁸ *Ibid.*

function.¹⁹ Undoubtedly, this should include corporate entities that are nominally designated as “private.” The rationale behind this purposive expansion has to do with the rapid increase in public-private partnerships, and the consequent outsourcing of many tasks traditionally performed by the government to private institutions. Without subjecting such institutions to the *ATIA*, the requisite degree of transparency for a healthy democracy is not achieved—and accountability becomes increasingly evasive.

The limited scope of the *ATIA* stems from the narrow meaning ascribed to the term “government institution” in the Act. Under the *ATIA*, “government institution” includes only those institutions listed in Schedule I, as well as “any parent Crown corporation, and any wholly-owned subsidiary of such a corporation.”²⁰ The Government may add to this list by Order in Council.²¹

In furtherance of a purposive expansion, the Government should delete Schedule I and replace it with a criteria-based definition of “government institution,” adopting the criteria recommended by the House of Commons Standing Committee on Access to Information, Privacy and Ethics (2016), namely:

- institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);
- institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
- institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada’s civil air navigation service provider);
- institutions established by statute (such as airport authorities); and
- all institutions covered by the *Financial Administration Act*.²²

This change would have the effect of bringing the Prime Minister’s Office and other Ministers’ Offices within the Act’s scope.

Alternatively, the Government could amend the Act to adopt a criteria-based definition while retaining Schedule I as a non-exhaustive list, without restricting the generality of the former. This is the approach taken by the United Kingdom, which uses both definitions and listings to circumscribe the scope of its freedom of information law.²³

Recommendation 4: All exclusions in the Act should be replaced with exemptions

¹⁹ World Press Freedom, (*ATIA*) (16 June 2021), online: <worldpressfreedomcanada.ca/submission-from-world-press-freedom-canada-wpfc-to-treasury-boards-review-of-the-access-to-information-act-atia/>.

²⁰ *ATIA*, *supra* note 13, s 3 (“government institution”).

²¹ *Ibid*, s 101.

²² House of Commons Report, *supra* note 2 at 5.

²³ *Freedom of Information Act 2000* (UK), 2000, s 3.

The *ATIA* excludes certain types of materials from its purview entirely, including Cabinet confidences and information subject to a certificate prohibiting disclosure under the *Canada Evidence Act* for the purpose of protecting national security or defence.²⁴ Significantly, the Cabinet confidences exclusion means the Act generally does not apply to minister’s offices, including the Prime Minister’s office.²⁵

As the Supreme Court of Canada has indicated, “[c]abinet confidentiality is,” in principle, “essential to good government.”²⁶ Unlike exemptions, however, exclusions are not subject to the review mechanisms provided for in the Act.²⁷ Without the ability to verify whether grounds for refusing access have been properly claimed, the *ATIA* provides a ripe ground for the government to abuse categories for exclusion, including Cabinet confidence.

To be sure, some minor changes have been made to address the issue of excluding Cabinet deliberations. With the enactment of Bill C-58 in 2019, ministerial offices, including that of the Prime Minister, are now required to proactively publish mandate letters, all briefing material for new ministers, and information on the use of public funds (such as travel expenses and contracts over \$10,000).²⁸ The *ATIA*’s breadth, however, stops at this point. Cabinet documents and the bulk of records in minister’s offices—“which represent the core of decision-making and policy formation”—continue to fall outside the scope of the Act.²⁹

By replacing all exclusions in the Act with exemptions, and by adopting the proposed amendments to the definition of “government institution” outlined in Recommendation 3, the Information Commissioner would have jurisdiction to investigate complaints and issue orders for materials previously subject to exclusion, including Cabinet records, thereby providing the requisite degree of independent oversight currently missing for such records.

IV. Simplifying exemptions and creating a public interest override

Recommendation 5: Amend the Act to include a public interest override which applies notwithstanding any other provision in the Act

Currently, the *ATIA* does not include a public interest override, whereby disclosure is made notwithstanding any other provision of the Act whenever the benefits to the public of accessing the information sought outweigh any harm caused.³⁰ In *Criminal Lawyers’ Association v Ontario (Public Safety and Security)*, the Supreme Court of Canada read a form public interest override into the discretionary exemptions (i.e., those qualified by “may” rather than “shall”).³¹ This form of implied override does not, however, apply to either mandatory exemptions or exclusions.

²⁴ *ATIA*, *supra* note 13, ss 69, 69.1. See also ss 68, 68.1, 68.2.

²⁵ Cara Zwibel, *supra* note 12 at 1530.

²⁶ *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 15.

²⁷ OIC Report, *supra* note 4 at 18.

²⁸ *Ibid* at 14.

²⁹ World Press Freedom, *supra* note 19.

³⁰ Centre for Law and Democracy, *Canada: Note on Bill C-58 Amending the Access to Information Act* (Halifax: June 2017) at 6.

³¹ *Criminal Lawyers’ Association*, *supra* note 1 at para 48.

The Act should therefore be amended to include a codified public interest override, which operates notwithstanding any other provision of the *ATIA*.³² The freedom of information laws of British Columbia, Alberta, Prince Edward Island, and Nova Scotia each contain such an override.³³ An override clause would ensure that the public interest in openness and transparency is the paramount concern under the Act.

Recommendation 6: Amend Section 21 to define the term “advice” and reduce the time limit from 20-years to 10-years

Section 21 should be amended to define the term “advice” and should include a non-exhaustive list of the types of decision-making information it covers, as well as a list of records not considered advice.³⁴ The lack of precision in defining “advice” has created a catch-all category for policy-related materials, subject only to the limited exclusions in subsection 21(2). According to the OIC,

A large portion of the information contained in the records covered by section 21 can be made public without jeopardizing the policy-development or decision-making processes of ministers and institutions. However, investigations show that institutions rely on section 21 without due consideration of the purpose of the exemption and whether the public interest is served by refusing access.³⁵

The Government should follow the example set by Ontario’s *FOIPP*, which includes a subsection listing twelve types of materials and information not to be construed as “advice” for the purpose of claiming an exemption for advice to government, including factual materials, feasibility studies, and cost estimates.³⁶

Furthermore, the Government should reduce the time limit for Section 21 exemptions from 20-years to 10-years, in keeping with the recommendation of the Information Commissioner.³⁷ A ten year limit is also supported by the report of the Access to Information Review Task Force: “In our view, reducing the protective period from 20 to 10 years is unlikely to compromise the frankness or candour of advice being provided to the government, the convention of ministerial responsibility, or the authority of Ministers.”³⁸

³² Centre for Law and Democracy, *supra* note 30 at 6.

³³ *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25 [BC FOIPP]; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 32 [AB FOIPP]; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s 30 [PEI FOIPP]; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s 31 [NS FOIPP].

³⁴ Tromp, *supra* note 11 at 12 (see Recommendation 29).

³⁵ OIC Report, *supra* note 4 at 21.

³⁶ *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 13(2) [ON FOIPP].

³⁷ OIC Report, *supra* note 4 at 22.

³⁸ Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: June 2002) at 49 [Making it Work].

Recommendation 7: Amend Section 69 to include a definition of Cabinet records which excludes purely statistical, technical, and scientific material, as well as background information for decisions once a matter has been decided, and mandate the principle of severability for Cabinet records

In addition to re-formulating Section 69 as an exemption rather than an exclusion (see Recommendation 4), this section should be amended to include a definition of Cabinet confidences that focusses on information that reveals the substance of deliberations, decisions, and submissions between or among ministers.³⁹

The definition should be supplemented with a list of documents and materials not to be construed as Cabinet confidences, such as documents containing “purely statistical, technical, or scientific material unless the disclosure of the document would involve the disclosure of any deliberation of Cabinet.”⁴⁰

To this end, the Government should follow the example of Nova Scotia’s *FOIPP*, which excludes “background information in a record the purpose of which is to present explanations or analysis...in making a decision” from the definition of Cabinet confidences, provided the decision has been made public, been implemented, or five years or more have passed since the decision was considered.⁴¹

Furthermore, as the Centre for Free Expression at Ryerson University proposes, the definition of Cabinet confidences should also exclude materials not actually deliberated on by Cabinet:

Such a new clause is regrettably necessary to stop a deleterious practice often observed in cabinet rooms in Commonwealth nations, whereby Cabinet members simply take documents into Cabinet and then out again and claim an exemption or exclusion - behavior which is now a perfectly legal way to circumvent disclosure obligations in most Canadian jurisdictions.⁴²

Lastly, the Act should be amended to mandate the principle of severability with respect to Cabinet records, thereby ensuring as much information as possible is disclosed when requested.⁴³ The amendment should also mandate the implementation of the Treasury Board Secretariat’s recommendations for Cabinet documents: “That a prescribed format be developed for Cabinet documents that would allow for easy severance of background explanations and analyses from information revealing Cabinet deliberations such as options for consideration and recommendations.”⁴⁴

³⁹ Tromp, *supra* note 11 at 21 (see Recommendation 56).

⁴⁰ *Ibid* at 22 (see Recommendation 59).

⁴¹ NS *FOIPP*, *supra* note 33, s 13(2)(c).

⁴² Tromp, *supra* note 11 at 21-2.

⁴³ *Ibid* at 23 (see Recommendation 60).

⁴⁴ Making it Work, *supra* note 38 at 46.

Recommendation 8: The Government should mandate that the Information Commissioner review the exemptions listed under Schedule II and report any recommendations for narrowing the list to the House of Commons Standing Committee on Access to Information, Privacy and Ethics for consideration.

Currently, there are far too many exemptions under the *ATIA*. As the submission of the WPFC Canada makes clear, there are currently 102 kinds of information in Schedule II of the Act—“from transport and energy to trade and defence.”⁴⁵ Yet, these are precisely the kinds of information, among many others, that Canadians require access to in order to evaluate and take action on government policies. Undoubtedly, these exemptions create pockets of darkness in a law that is meant to shine a light and promote transparency. The nature and volume of exemptions, seriously undermines any efforts to expand the scope of the Act.

The Government should mandate that the Information Commissioner conduct a review of Schedule II with a view to narrowing the list. In doing so, the overall legislative scheme can be simplified, and with fewer types of records subject to a Schedule II paramountcy clause.⁴⁶ The Commissioner’s recommendations should then be provided to the House of Commons Standing Committee on Access to Information, Privacy and Ethics for consideration.

Recommendation 9: Repeal Section 14 as a redundant measure to simplify the Act

Section 14 (Federal-provincial affairs) is redundant, considering the scope of Sections 13 (Information obtained in confidence) and 21 (Advice).⁴⁷ Together, these provisions capture the scope of Section 14 in its entirety. Therefore, to simplify the Act, Section 14 should be repealed.⁴⁸

Currently, the scope of Section 14, a discretionary exemption, is limited to records containing information, which, if disclosed, “could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs.”⁴⁹ This includes federal-provincial consultations and deliberations,⁵⁰ as well as strategies or tactics to be adopted by the federal government relating to federal-provincial affairs.⁵¹

Insofar as federal-provincial consultations and deliberations are concerned, the mandatory exemption prescribed by Section 13(1)(c) for information obtained in confidence from a province already captures these records.⁵² In fact, the latter exemption is arguably broader than the former, as it does not contain the added qualification that disclosure must be injurious for the exemption to apply.

As for strategies and tactics developed for federal-provincial affairs, Section 21 provides a discretionary exemption for twenty years for advice or recommendations developed by or for a

⁴⁵ World Press Freedom, *supra* note 19.

⁴⁶ Tromp, *supra* note 11 at 19.

⁴⁷ *ATIA*, *supra* note 13, ss 13, 14, 21.

⁴⁸ Tromp, *supra* note 11 at 11 (see Recommendation 26).

⁴⁹ *ATIA*, *supra* note 13, s 14.

⁵⁰ *Ibid*, s 14(a).

⁵¹ *Ibid*, s 14(b).

⁵² *Ibid*, s 13(1)(c).

government, as well as positions or plans developed for the purpose of negotiations carried on by or on behalf of the federal government.⁵³

Recommendation 10: Amend Section 13 to define the term “institution” and introduce a 15-year time limit for the exemption

Section 13 should be amended to include a definition for the term “institution.” While the term “government institution” is defined in Section 3 for the purpose of circumscribing the scope of the *ATIA* as a whole, the term “institution” is not defined for the purpose of Section 13. This section therefore leaves some uncertainty as to which institutions of foreign, provincial, or municipal governments qualify for the exemption thereunder. For example, the Act is unclear whether records containing information obtained in confidence from a provincial Crown corporation qualify.

Additionally, Section 13 should be amended to introduce a 15-year time limit for the exemption, unless the disclosure of the information would prejudice law enforcement investigations. The freedom of information laws of six provinces and all three territories includes a 15-year time limit for exemptions pertaining to information obtained in confidence from another government or institution thereof.⁵⁴ In British Columbia, Newfoundland and Labrador, the Northwest Territories, and Nunavut, the 15-year time limit does not apply to law enforcement information.

Recommendation 11: Define “publicly available” information and amend Section 19 to include criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy

Section 19 (Personal information) is the most widely used exemption in the Act and was invoked in 42% of access requests in 2018-2019.⁵⁵ This exemption is defined broadly and includes all records containing personal information, unless the individual to whom it relates consents, the information is publicly available, or the disclosure is in accordance with Section 8 of the *Privacy Act*.⁵⁶

The Office of the Privacy Commissioner has called for strengthening the current exemptions in the Act to provide further protections against disclosure of “personal” and “publicly available information.”⁵⁷ Given that “so much of our everyday activities [occur] in the digital sphere, it may

⁵³ *Ibid*, ss 21(1)(a, c).

⁵⁴ *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2, s 34(3) [NL AIPP]; *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, s 16(3) [NWT AIPP]; *Access to Information and Protection of Privacy Act*, RSY 2002, c 1, ss 68(2)(a), 76(2) [YK AIPP]; *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20, s 16(3) [NU AIPP]; BC FOIPP, *supra* note 33, s 16(3); AB FOIPP, *supra* note 33, s 21(4); PEI FOIPP, *supra* note 33, s 19(4); NS FOIPP, *supra* note 33, s 12(3);

⁵⁵ OIC Report, *supra* note 4 at 15.

⁵⁶ The *ATIA* defines “personal information” as having the same meaning as section 3 of the *Privacy Act*. See also *Privacy Act*, RSC 1985, c A-1, s 8.

⁵⁷ Canada, *Submission of the Office of the Privacy Commissioner of Canada to the President of the Treasury Board: Review of the Access to Information Act (ATIA)* (Ottawa: February 2021), online: <priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_tbs_210217/>.

not be so apparent when personal information online is ‘publicly available.’”⁵⁸ By way of example, it is debated whether personal information posted online is “publicly available”—thus raising questions as to whether individual privacy interests are retained in such instances, in turn raising ambiguities as to whether the exemption applies in such cases.⁵⁹

In consultation with the Privacy Commissioner of Canada, the Government should amend Section 19 to provide definitional certainty within the Act itself for determining whether personal information is deemed to be “publicly available”

To appropriately protect privacy while constraining the scope of the exemption, CCLA would suggest an approach similar to that in Ontario’s *FOIPP*, which provides a set of non-exhaustive criteria to consider in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, along with a list of categories of information so sensitive as to constitute a presumptively unjustified invasion of personal privacy.⁶⁰

V. Addressing delay

Recommendation 12: Set a time limit for responding to consultations

According to the OIC, access requests are taking longer to process, and the percentage of requests processed within time limits continues to drop.⁶¹ Institutions are required to respond to access requests within 30 days of receipt.⁶² This time limit, however, is subject to “reasonable” extensions approved by the head of the government institution responding to the request, if the request involves many records, consultations are necessary, or notice to a third party is given.⁶³ There is currently no time limit for institutions to respond to consultations.

The OIC’s investigations show that the issue of delay “is particularly critical when institutions consult other institutions in order to respond to an access request.”⁶⁴ In the absence of time limits for government institutions to respond to consultations, the consultation stage has become a bottleneck in the process, leading to more extensions of the 30-day limit. A time limit for consultations, with any extension thereof beyond 30 days subject to the approval of the Information Commissioner, would help reduce this bottleneck.⁶⁵

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ ON FOIPP, *supra* note 36, s 21(2,3).

⁶¹ OIC Report, *supra* note 4 at 11.

⁶² ATIA, *supra* note 13, s 7.

⁶³ *Ibid.*, s 9(1).

⁶⁴ OIC Report, *supra* note 4 at 12.

⁶⁵ *Ibid.* at 10 (see Recommendation 1).

Recommendation 13: The Government should mandate the appropriate resourcing of the Office of the Information Commissioner and amend the Act to permit the head of an institution to approve extensions not exceeding 30 days, and thereafter all extensions of the time limit to respond to an access request shall be subject to the approval of the Information Commissioner

The *ATIA* requires the head of a government institution, when approving an extension for more than thirty days, to give notice to the Information Commissioner.⁶⁶ The Commissioner does not, however, have the power to approve or refuse such extensions (though the extension may be the subject of a complaint to the Commissioner).

By contrast, in British Columbia, the head of a government institution may extend the time for responding to a request for up to 30 days if the applicant has not provided sufficient detail, many records are requested or must be searched, more time is needed to consult with a third party or another government institution, or if the applicant has consented;⁶⁷ and thereafter, further extensions can only be made with the permission of the Commissioner.⁶⁸

In 2019, the Standing Senate Committee on Legal and Constitutional Affairs recommended that Bill C-58 include an amendment to subsection 9(2) of the *ATIA* to include a similar clause, namely: “An extension of a time limit...may not be for more than 30 days except with the prior written consent of the Information Commissioner.”⁶⁹ This amendment was rejected by the House of Commons,⁷⁰ on the basis that it had “not been the subject of consultation or thorough study in the context of the targeted review that led to Bill C-58.”⁷¹

The Government should include a proposal to require the authorization of the Information Commissioner for extensions beyond 30 days in its review of the *ATIA*. To do so, the Government must also ensure the Information Commissioner has sufficient resources and funding to attend to the added responsibility of reviewing the large number of anticipated requests.

Recommendation 14: Amend the Act to require the authorization of the Minister to apply exemptions when time limits have been breached

The Government should amend the Act to include a provision to the effect that, notwithstanding any other provision in the Act, the authorization of the Minister is required to apply exemptions whenever a time limit has been breached.⁷² As the Centre for Law and Democracy notes, “[t]he maxim ‘justice delayed is justice denied’ applies to access to information.”⁷³ Requiring ministerial

⁶⁶ *ATIA*, *supra* note 13, s 9(2).

⁶⁷ BC FOIPP, *supra* note 33, s 10(1).

⁶⁸ *Ibid*, s 10(2).

⁶⁹ Senate, *Thirtieth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-58)* (April 2019) (Chair: Serge Joyal) at para 3.

⁷⁰ *House of Commons Journals*, 42-1, No 436 (18 June 2019) at 5680-5683.

⁷¹ *House of Commons Debates*, 42-1, No 433 (13 June 2019) at 1525 (Hon Greg Fergus).

⁷² Centre for Law and Democracy, *Canada: Recommendations for Reforming Canada’s Access to Information Act* (Halifax: June 2016) at 9-10.

⁷³ *Ibid* at 9.

authorization to apply exemptions when time limits have been breached would introduce a layer of accountability for government institutions in default of time limits.

Recommendation 15: Repeal Section 26 of the Act or reduce the timeframe for publication from 90 days to 30 days

In 2015, the OIC recommended repealing Section 26.⁷⁴ This section provides an exemption “if the head of the institution believes on reasonable grounds that the material... will be published... within 90 days after the request is made or within any further period of time that may be necessary for printing or translating the material for the purpose of printing it.”⁷⁵

The exemption is unnecessary, however, since an extension of the time limit can be sought instead, provided there are reasonable grounds to believe the materials will soon be published. Indeed, the expected publication exemption “has been misused as a game to buy extra time. An institution may receive a request for a record, deny the request on the basis of Sec. 26 and, when that period expires, simply change its mind about publication and newly apply exemptions to the record.”⁷⁶

Alternatively, if the Government does not accept this recommendation, CCLA supports the Centre for Free Expression at Ryerson University’s proposal to amend Section 26 to “change the period from 90 days to 30 days after the request is received, and stipulate that if the record is not published within those 30 days, it must be released forthwith in its entirety with no portions being exempted.”⁷⁷

⁷⁴ Striking Balance, *supra* note 17 at 34 (see Recommendation 3.7).

⁷⁵ ATIA, *supra* note 13, s 26.

⁷⁶ Tromp, *supra* note 11 at 48 (see Recommendation 150).

⁷⁷ *Ibid* at 48 (see Recommendation 151).