

INTEGRITY IN PUBLIC LIFE: ACCESS TO GOVERNMENT INFORMATION

A Paper by the Department of Justice, Canada

INTRODUCTION: ACCESS TO INFORMATION LEGISLATION IS ONE OF MANY TOOLS TO ENSURE INTEGRITY IN PUBLIC LIFE

1. There are many different tools to develop integrity in public life. Our basic premise for ensuring there is integrity in public life is to find ways to make government accountable to the people it serves. This paper stresses the importance of access to government information legislation for ensuring integrity in public life. There are approximately a dozen countries in the world that have successful access legislation. Beginning in 1977, every federal, provincial and territorial government in Canada (except Prince Edward Island) has adopted a freedom of information law. There were approximately 100,000 access requests to the federal government in the first decade of the federal *Access to Information Act* and approximately 10,000 requests per year. It is clear that Canadians support their freedom of information rights and the accountability and public integrity it promotes.

2. Although we believe that access to information legislation is important, we recognize that that access to information is only one of a number of building blocks that should be used to ensure integrity in public life.

3. Any discussion of integrity in public life should begin with the twin pillars of our commonwealth heritage: a commitment to the rule of law and to the accountability of the Executive to the people. The rule of law ensures integrity by making it clear that every one in the country, from the most powerful to the weakest, is subject to the same laws. The rule of law also ensures that senior leaders cannot rule by decree. To support the rule of law we have developed a strong, independent judiciary, one that has the power and indeed the duty, to strike down laws which do not accord with our Constitution, which includes our *Charter of Rights and Freedoms*.

4. The second pillar of integrity in public life is the accountability of the Executive to the people of the country. In our commonwealth heritage this is

seen in our strong Parliamentary tradition, where the Executive Branch of government is accountable to the elected representatives. In Canada, this means that the Executive is formed from among those persons elected by the public, and the other elected representatives of the people have the right to ask questions of the Executive, introduce their own legislative proposals and call votes of non-confidence against the government of the day. This accountability of the Executive to the people is supported by fair elections and universal suffrage. Thus, the rule of law, a strong judiciary, an Executive accountable to Parliament and free elections, are the cornerstones for ensuring integrity in public life. However, these are not enough.

5. Basic human rights play an important role in ensuring integrity in public life, and most especially, freedom of speech and of the press. The media play a very important role in helping ensure that there is integrity in public life by exposing examples where such integrity does not exist. However, freedom of the press, the rule of law and free elections all depend to a large extent on the literacy of the population.

6. Although "literacy" is not stated as a right in our *Charter of Rights and Freedoms*, we recognize that without literacy, citizens have a very limited ability to hold governing officials accountable. It is probably fair to say that illiteracy is a problem for all countries, including Canada. Although we are fortunate to have very high rates of literacy, we know there are significant numbers of Canadians who have a very limited ability to read and write. Our Department of Heritage has a National Literacy Secretariat whose role is to try to address this problem. It is difficult to imagine how any country can achieve genuine accountability of the Executive unless it devotes its energies to the literacy of its people.

7. In Canada, we are very fortunate. We take for granted literacy, the rule of law, an independent judiciary, the accountability of the Executive to the people, fair elections and freedom of the press. With this base, we have been able to explore other methods to further enhance integrity in public life (including, for example, conflict of interest guidelines for elected officials and public servants). One of those other methods was the enactment of freedom of information laws. The first such law in Canada was passed by the province of Nova Scotia in 1977. Today, almost every provincial and territorial government in Canada has freedom of

information legislation. The federal government's access law, known as the *Access to Information Act*, was enacted in 1982 (the same year our *Charter of Rights and Freedoms* came into force).

8. Many other countries around the world have also adopted freedom of information legislation. To the south of Canada, we have the example of the United States, where the federal government and most state governments have freedom of information laws, which include "Open Meeting" laws and are sometimes known as "Government in the Sunshine" laws. Among our Commonwealth cousins, Australia and New Zealand have freedom of information laws, and we understand that South Africa is developing its own freedom of information law.

ACCESS TO INFORMATION LAWS: BASIC PRINCIPLES

9. Access laws have a variety of differences between them, both within Canada and around the world, but the basic principle is the same for all of them: providing a guaranteed, statutory right of access to government records. Here are the other basics of most freedom of information regimes.

I. What records are subject to the Act?

10. The Act should explain which records are subject to the law. Generally, this is done in two ways. First, by defining "records", and second, by explaining which institutions are subject to the law. Some Acts list the institutions which are subject to the Act. If an institution is not on the list, it is not subject to the Act. Other Acts define "public body": if an institution is a "public body", it is subject to the Act. Most Acts give a very broad definition to the word "records". Generally, a "record" is any document, video, audio recording or electronic file, and any copy of such a record. Thus, it does not matter if the original is located somewhere else.

11. Canada's federal *Access to Information Act* says that the Act applies to records "under the control of" any government institution listed in the Schedule to the Act. Courts have interpreted the phrase "under the control of" very broadly. Thus, any record in the physical possession of a government institution, no matter how that record was obtained, no matter what promise of confidentiality was made to obtain the record, is subject to the Act. In addition, where a government enters into a contract or funding agreement with a third party, and the agreement specifies that the government has a right to receive or review records produced under that agreement, then those records

are also subject to the Act, even if the government has never had physical possession of them.

II. What records does the government hold?

12. The Act should require the government to tell its citizens what records it holds. The federal government in Canada does so through a publication called *InfoSource*, which names all of the government institutions subject to the federal Act, describes the programs and activities of those institutions and describes their various information holdings.

III. Who will respond to a request?

13. The Act should request government institutions to provide a mechanism for responding to access to information requests. Each federal institution has an office that is responsible for providing access to information. This office receives requests for information, seeks out that information from the various places within the institution, and provides a reading room where requesters can review the records, or makes copies to send to the requester. Under most freedom of information laws, it is the requester who chooses whether to receive copies or to read the documents, not the institution.

IV. What time limits and fee limits are there?

14. The Act should limit how long an institution can take to respond to a request for information and how much it can charge for that information. If institutions can delay their responses indefinitely, or can charge high fees for access to information, then either of these mechanisms could defeat the entire purpose of the freedom of information regime. Under Canada's federal law, institutions must respond to a request within 30 days but can extend that limit for a reasonable period of time if there are special circumstances, such as an unusually large number of records to deal with. Under our federal Act, fees are limited and the government recovers almost none of the costs of providing access to information.

15. Some people argue that requesters should pay more for the access they receive, but this depends very much on one's perception of the role of the Act. If access to information is seen as an important tool to promote accountability of government to its citizens, then it may be appropriate to compare the cost of providing access to government information to the cost of conducting elections or operating the courts. No one would suggest that elections be paid

for on a user-pay basis, or that the cost of operating the courts be paid by the people who come before the courts. To have an open, democratic society, certain institutions are required and are in the general interest of all citizens, not just those citizens who vote, who use the courts or who make access to information requests.

V. Are there limits to what kinds of information must be disclosed?

16. The Act should allow some kinds of information not to be disclosed, especially if disclosure could cause harm. These limits are known as "exemptions" and will be discussed in greater detail later in this paper.

VI. What happens if there is exempt and non-exempt information in a record?

17. The Act should require the government to sever exempt information and disclose the remaining records, and to state the exemption it used to withhold some information. Generally this is done by blanking out exempt information when photocopies are made.

VII. What happens if there is a disagreement about how the law should apply?

18. One of the principles of the rule of law generally is that there should be an independent review of the decisions made under the law. This can be done in a number of ways. In Canada, we use a combination of Commissions and the courts. In our federal scheme, the Information Commissioner is an investigator, mediator and can make recommendations and reports to Parliament, but has no decision-making power. The Commissioner can apply to court if he or she disagrees with the way an institution handled a particular request, and so can the requester.

19. In a number of our other jurisdictions, such as Ontario, Quebec and British Columbia, the Commissions perform investigation, mediation and quasi-judicial functions. In their quasi-judicial function, they can order institutions how to respond to specific requests. Appeals to court from these Commissions can only consider whether the Commission exceeded its jurisdiction, not whether it was correct or incorrect in a particular case.

EXEMPTIONS: BALANCING ACCESS WITH OTHER OBJECTIVES

20. Governments are allowed to refuse to disclose some records if they fall within the exemptions set out in the laws. The exemptions represent those areas where law-makers believe that the public interest may be better served by non-disclosure than by disclosure. Thus, it is important to understand that freedom of information laws do not behave like bulls in a china shop. They are subject to limits. The challenge for law-makers and courts is to provide as much access as possible without jeopardizing other important social objectives and personal rights.

21. Most access laws set out similar exemptions. Here are the exemptions in Canada's *Access to Information Act*:

Third party concerns

- * personal information (there is a federal *Privacy Act*; the other jurisdictions in Canada combine data protection law with their freedom of information law)
- * confidential commercial information
- * safety of individuals

Government concerns

- * international and federal-provincial affairs
- * national defence
- * information obtained in confidence from other governments
- * Cabinet confidences (if less than 20 years old, they are "excluded" from the Act)
- * other exemptions in other Acts specifically recognized by the Access to Information Act (the general rule is that the Access to Information Act applies notwithstanding the provisions of any other Act)
- * advice and recommendations to the Government (20 year limit)
- * economic interests of Canada
- * law enforcement
- * auditing and testing procedures
- * solicitor-client privilege
- * information already available to the public (on the principle that the purpose of the Act is to ensure access to information; if that access has been achieved outside the Act, there is no need to go through the expense of providing access under the Act)

22. Many of the above exemptions can only be claimed if there is a reasonable expectation that disclosure would cause harm. This is true for international and federal-provincial affairs and national defence (but note that information obtained in confidence from another government can be exempted without an expectation of harm). It is also the case for law enforcement information (but note that our federal law permits 10 designated investigative bodies to withhold information they obtain in the course of an investigation, even without an expectation of harm).

23. There must be a reasonable expectation of harm to use the "safety of individuals" and "economic interests of Canada" exemptions (but note that it is not necessary to show harm to withhold government trade secrets or commercial information with a substantial value). Although confidential commercial information supplied by a third party can be withheld without demonstrating that disclosure would cause harm, the Act also provides for non-disclosure of information which could harm the competitive or contractual negotiating position of a third party. Finally, there must be a reasonable expectation of harm before an institution can refuse to disclose government audit and testing procedures.

24. There are observers who claim that the law does not provide as much access as it should, that the exemptions are worded too broadly, that they give the government too much discretion to refuse to disclose records, and that the law has not kept up with the realities of electronic information. These are important, legitimate concerns. The federal Information Commissioner recently issued a set of recommendations to amend the federal Act, we now have more than a decade of experience with the federal Act and a variety of more modern provincial laws from which to draw comparisons.

25. We can see places where some provincial laws provide more access than the federal law, particularly by providing a "public interest" override, where institutions will not be able to withhold documents under some exemptions if there is an overriding public interest in disclosure. Provincial laws can extend to more of their public bodies than the federal law, in part because they apply to municipal governments as well as to provincial government agencies and even to self-governing professions, and in part because the definition of "public body" is broadly defined. In some cases, provincial laws have narrower exemptions, for example, by requiring that there be

a reasonable expectation of harm resulting from disclosure in situations where the federal law does not impose a harm test. In some provinces, the Information Commissioner has the power to order departments to disclose information, thus avoiding the cost of going first to the Commissioner and then to the courts before getting an Order, which is the case under the federal Act. Officials within the federal Department of Justice are currently reviewing the federal *Access to Information Act* with a view to suggesting possible amendments.

EXAMPLES OF ACCESS CONTRIBUTING TO ACCOUNTABILITY

26. No taxation without representation is a bedrock principle from our Parliamentary heritage. It has evolved into a variety of rules, the most basic being that there will be no taxation unless it is approved by Parliament. In Canada, other rules have developed to ensure accountability for public expenditures. These include a detailed accounting of how each institution *plans* to spend money in the next year (the Main Estimates and the Budget); a detailed accounting of how each institution *actually spent* money in the past year (the Public Accounts); and a variety of financial controls and accounting requirements, under the *Financial Administration Act*, other Acts and government policies. Also, there is the Office of the Auditor General who has broad power to audit government institutions and report to Parliament (and the public).

27. In addition to the above financial accountability rules, the *Access to Information Act* (in combination with the definition of "personal information" in the *Privacy Act*) enhances accountability for expenditure of public moneys. The following financial information is accessible under the Act: expense accounts of public servants and Ministers; details of discretionary financial benefits provided by government to individuals; the names of recipients of government gifts; the salary *ranges* of the positions of all public servants; and contracts signed with individuals (by definition this is not "personal information" for the purposes of the *Access to Information Act*. However, note that a different section of the Act provides that government institutions must not disclose confidential commercial information supplied by a third party. There is case law suggesting that negotiated contract terms are not information "supplied by" a third party.)

28. The Act also provides accountability for public health and safety, the environment and other

public policy concerns. The Act has proved useful in ensuring there is public access to information relating to an ill-fated peace-keeping mission in Somalia in the early 1990s; controversial contracts relating to privatizing a major airport and purchasing airplanes; the activities at a coal mine where there was a tragic accident, amid allegations of poor safety regulations and political considerations; and information relating to the environmental impacts relating to a proposed water-diversion project for an aluminum smelter.

29. There are numerous examples where requesters or the Information Commissioner were able to convince institutions to disclose records they might not have disclosed if the Act were not in place, and where requesters or the Commissioner were able to convince courts that a government institution's application of the law was incorrect. One of the most famous of these involved a court action against the Prime Minister of Canada which ultimately forced disclosure of public opinion research the government had been undertaking and caused the government to adopt a new, more open policy to releasing public interest research results.

30. As painful as it may be for governments to be confronted with facts and to be held accountable, there can be no doubt that allowing such access promotes good government and integrity in public life.

ACCESS LAWS: SUPPORTED BY A VARIETY OF OTHER LAWS, POLICIES AND NOW, BY NEW TECHNOLOGIES

31. Although the focus of this paper has been on access to information statutes, such laws are supported by a variety of other laws and policies. For Canada, one of the most important is the *National Archives of Canada Act*. The *National Archives Act* provides that no one within government can destroy government records without the consent of the National Archivist (who does consent to the destruction of most government records, but ensures that the more important records are kept for historical purposes). Thus, it is not possible to avoid the *Access to Information Act* by destroying records in an unauthorized fashion.

32. Also, rules of natural justice and rules of court ensure that parties who are involved in litigation with the government or whose rights may be affected by administrative tribunals have access to the information they need to properly present their arguments and to collect relevant evidence.

The Government of Canada has policies on the management of government information holdings, on the application of the *Access to Information Act*, and on the duty to inform the public of its activities. All of these are important tools to ensure that the public has access to information, without having to rely on the formal process under the *Access to Information Act*.

33. One of the most recent tools available to help provide citizens with access to information is the Internet. In the past year, the federal government became the first jurisdiction in Canada to make its consolidated laws available to the public free on the Internet. Before summer, we expect that the regulations will also be available on the Internet. The Northwest Territories have followed, the Yukon Territory has begun posting its annual statutes, and a few statutes from other provinces are also available free on the Internet. In addition, we are selling the laws (and regulations) on CD ROM and other publishers are welcome to use our data to sell the law themselves (one publisher is currently selling the federal laws on CD ROM for as little as \$25). Australia has its federal laws freely available on the Internet as does the federal government of the United States and many state governments. In the United States, most appeal courts have their judicial decisions available on the Internet, as does the Supreme Court of Canada and the High Court of Australia.

34. The federal government has embarked on a voyage of using new technologies as an important tool for providing greater access to information to its citizens. All of the federal and provincial governments in Canada have home pages on the Internet, and provide a varying degree of information at those sites. Although the Internet is only available to those persons with access to computers, modems and Internet service provider accounts, access can be obtained increasingly in the workplace and public libraries. With the development of wireless technologies, there is good reason to believe that countries that do not have extensive telephone wire infrastructures may nonetheless be able to join the Internet. In addition, recent reports indicate that computers now outsell televisions. Thus, countries where there are few computers but many televisions may find this trend will reverse relatively soon. The Internet will prove to be a good way to provide citizens with information about their governments, and therefore to promote accountability and integrity in their governments.

**CONCLUSION: CITIZEN ACCESS TO INFORMATION
PROMOTES INTEGRITY IN PUBLIC LIFE**

35. Generally speaking, Canada's access to information legislation is working well in providing access to government information that might not otherwise have been disclosed. The legislation was adopted because it was seen as an important way to ensure government institutions and political leaders are accountable to the people they serve. We believe that accountability is the key to promoting integrity in public life. It is certain that Canada's access to information laws can be improved and that our institutions could be more open without harming important government interests or third party rights.

36. It has also been argued, with some justification, that when governments adopt access to information legislation, they run the risk of actually reducing access to information. This happens because governments can force requesters to use the slow, expensive, somewhat formal processes under the Act, because they can charge fees which could deter some requesters and because they can delay their responses despite a 30 day limit in the Act itself. Governments have sometimes been accused of hiding behind the discretion that access laws provide them, such that they are "managing exemptions" rather than truly living up to the spirit of the access laws. It is important to keep these criticisms in mind. Often, government must be pushed and prodded by citizens to being more open. Now that virtually every jurisdiction in Canada has enacted an access to information law, it is highly unlikely these laws will ever be repealed. It is likely that over time they will come to be seen as essential to democracy as the rule of law, an independent judiciary and fair elections. Access laws, in conjunction with the development of the information highway', will likely continue a trend towards more open government that focuses on routine disclosure of information to the public without reference to the formal access laws. (In addition, there is reason to believe that government disclosure of information benefits the economy, as commercial firms take raw government

information, add value to it, and sell the new value-added product, thus creating new, private sector jobs.)

37. We recognize that access to information legislation is no panacea. Without the fundamentals - the rule of law, fair elections, free speech and literacy - access to information legislation can do relatively little to promote integrity in public life. But even if the legislation is only symbolic in nature, it is an important symbol of openness and integrity. As the other basic tools of accountability and integrity develop in a country, access to information legislation will develop as well, serving the citizens and the long term interests of any country brave enough to adopt such a law.

April 1996

* The federal Department of Justice is
http://canada.justice.gc.ca/index_en.html.

To see the federal *Access to Information Act*, once at the Justice site, go to "Laws", then "Consolidated Statutes" then *Access to Information Act*.