Members of the Canadian Committee on World Press Freedom (CCWPF) welcome this opportunity to provide input into the study of Bill C-58 by the Senate Legal and Constitutional Affairs committee. Our volunteer committee advocates on issues and press freedom, and includes representatives of newspapers, news broadcasters, digital media outlets and other supporters.

The Access to Information Act (ATIA) is a tool regularly used by journalists to hold the federal government to account, with almost 9,000 requests identified as filed by news media in 2016-2017, or one of every 10 received across all institutions.

Yet journalism groups, non-governmental organizations, access advocates and others have complained in recent years that this tool – forged in 1983, during the pre-digital era – has become ineffective and is overdue for a major overhaul.

The law remains essentially unchanged from its passage more than a generation ago, and Canada has slipped badly in world rankings over the years. The poor state of Canada’s law is especially concerning in an era when various hostile actors, some of them elected representatives, are determined to distort and undermine information for the purposes of acquiring and maintaining power. Freedom-of-information legislation can act as an important check on the deliberate falsehoods that can infect public discourse.

Delays in responding to Access to Information Act requests are particularly troublesome for journalists, who have responsibility to inform the public about current government actions, including policy-making, the crafting of legislation, responsiveness, and the effectiveness of public spending. News media requests frequently undergo special scrutiny and vetting, exacerbating already significant delay problems. Our experience is that news media requests typically take three months and more for a response, and there are numerous media examples of records received a year or more after they were requested.

The Act also has numerous loopholes that allow the withholding of government information, including the notorious Section 21 – referring to “advice” – which has been used to withhold polling data, factual and background information, fiscal charts, and many other such records. Section 69, which excludes cabinet documents from release under the Act, has been stretched to cover many records that in fact are never presented to cabinet.

The Liberal party promised specific ATIA reforms in the 2015 federal election campaign. The commitment to eliminate fees (apart from the $5 application fee, which remains) was partially met May 6, 2016, but as a government directive rather than embedded in regulations.

Other promised reforms were introduced June 19, 2017, in the form of Bill C-58, though the proposed legislation significantly watered down those 2015 promises and introduced new measures that critics, such as the Information Commissioner of Canada, have labelled as regressive.

The 2015 platform commitment to “ensure that Access to Information applies to the Prime Minister’s and Ministers’ Offices,” for example, was reduced in Bill C-58 to a legislative requirement merely to pro-
actively publish a limited set of ministerial documents, almost all of which are already accessible under the current Act.

Bill C-58 in this way subverted the purpose of the Access to Information Act, which was predicated on giving citizens and others the right to access government-controlled records of their own choosing, rather than records governments choose to pro-actively release.

Our committee would like to emphasize we do not regard pro-active publication of a small subset of ministerial records as even remotely fulfilling the commitment set out in the government’s 2015 election platform to bring records in ministers’ offices under the ATIA.

Rather, the government must be held accountable on its clear election promise: **Bill C-58 needs to be amended to include ministerial office records in Section 1, that is, as accessible through a citizen’s request under the Act.** The government is welcome to proactively and voluntarily publish whatever records it deems fit, on its own timetable, but cannot claim that process as a substitute for the citizens’ access rights it supported during the 2015 election campaign.

Bill C-58 imposes a new requirement on requestors (in Section 6), that is, the responsibility for precisely identifying the records sought. Requestors’ failure to do so would give a government institution the authority to refuse to respond.

Indigenous groups and others outside government have objected to Section 6, saying it is often impossible to precisely identify records, including their dates of creation. They also noted the requirement conflicts with the Act’s “duty to assist” provision, which compels institutions to assist requestors in the identification of the records being sought.

The Treasury Board president, Scott Brison, invited your committee during his appearance Oct. 3, 2018, to introduce an amendment eliminating this requirement. (It is not clear why he left this fix to your committee rather than to the House of Commons committee, where the issue was raised repeatedly by Indigenous groups and others.) **We trust your committee will seize on this retreat by the minister and eliminate this odious section, which would severely restrict the ability of journalists and others to file even basic requests for government information.**

Bill C-58 also confers order-making power on the Information Commissioner of Canada, as was promised in the 2015 election platform, though the bill delays the coming-into-force of this section for one year after Royal Assent.

Mr. Brison told your committee on Oct. 3 that he accepts the argument of the commissioner that order-making power should come into force immediately on Royal Assent, to avoid administrative complexities in investigations. **The Minister invited the committee to introduce an amendment to that effect; the CCWPF supports such an amendment.**

The Information Commissioner of Canada and the Privacy Commissioner of Canada have also jointly asked for changes to Bill C-58’s provisions regarding notice to the Privacy Commissioner during certain types of investigations. Mr. Brison has apparently indicated to both commissioners that he accepts this
recommendation, which would also resolve administrative complexities, and would welcome an amendment to this effect from your committee. The CCWPF also supports such an amendment.

The CCWPF remains concerned about another flaw in Bill C-58.

As the Information Commissioner of Canada testified before your committee on Oct. 17, 2018, the order-making power that would be conferred on that office by the proposed legislation is deficient in that each order will not be certified as an order of the Federal Court.

Thus, a federal institution that receives such an order could choose to ignore it, rather challenge it in court, requiring the Information Commissioner of Canada to seek a **mandamus** order from Federal Court compelling the institution to comply. This additional step would take six to seven months to complete, according to the commissioner, an unnecessary and costly delay.

**Our committee believes Bill C-58 should be amended to provide automatic certification for these orders, orders that represent the only potential gain in access rights contained in all of Bill C-58.**

As noted previously, journalists are keenly sensitive to delays in the release of information requested under the Access to Information Act, largely because public discourse and debate on current issues requires timely information. Bill C-58, in our view, will exacerbate the already excessive delays under the Act.

The proposed legislation allows the head of an institution to decline to act on a request made under the Act if “the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.” **Our committee believes the need for such a restriction has never been adequately demonstrated, and until there is empirical evidence that so-called “vexatious” requests somehow harm the access regime, it should be eliminated from Bill C-58.**

To make matters worse, the proposed legislation offers a troublesome “solution” to resolve the objections of users who fear federal institutions will too readily invoke the “vexatious” clause.

The currently amended bill requires the Information Commissioner of Canada to authorize such refusals, a vetting process that could add hundreds of cases to that office’s already onerous workload and backlog. Our committee questions whether a “vexatious” clause is worth the additional resources required to implement the measure. At the very least, the government needs to produce a proper cost-benefit analysis of a system that will route every one of these cases to the Information Commissioner’s already overworked office.

Bill C-58’s pro-active publication regime is also likely to exacerbate delays in the system.

Some 240 institutions would be newly burdened with vetting and publishing a range of administrative records, regardless of whether these records are in demand by the public. The vetting and publishing responsibility will fall to each institution’s access-to-information unit – units that are already unable to respond in a timely way to existing ATIA requests, raising the very real prospect of even longer delays.
Here again, the proposed measure requires a cost-benefit analysis before implementation is considered.

Indeed, reform of the Act needs to address chronic delays in access. ATIP units need to be properly resourced, for example, to match the workloads. Other solutions include making the annual compensation of senior officials, up to and including deputy ministers, contingent on hitting targets for timely responses to ATIA requests; a requirement to notify the office of the Information Commissioner of Canada each time an institution violates a deadline; and requiring a refund of any fees, including application fees, each time an institution fails to meet its deadlines.

Finally, Bill C-58 mandates a “review” of the legislation within one year of Royal Assent. However, that review (and subsequent five-year reviews) is to be conducted by the minister responsible, not by Parliament. Such a procedure departs from the standard five-year Parliamentary review required for much other legislation. The proposed legislation should be amended to ensure that Parliament, not the government, controls the review process.

Any reform of the Access to Information Act needs to closely review the numerous broad exemptions that remain untouched by Bill C-58, such as Section 21 and Section 69. These exemptions, which result in numerous responses to requestors in which all the but the document title are blacked out, need to be addressed now – not in some promised future review.

Bill C-58 was a badly flawed piece of legislation when introduced more than a year ago, and an extraordinary number of fixes have had to be applied in the interim. The CCWPF believes the repair process remains incomplete, and that Bill C-58 effectively dodges the central impediments to transparency embedded in the Access to Information Act.