

**DELIVERED VIA EMAIL**

Senate Standing Committee on Legal and Constitutional Affairs  
The Senate of Canada  
Ottawa, Ontario  
Canada, K1A 0A4

December 5, 2018

Attn: Keli Hogan

**Re: Recommended Amendments to Bill C-58 and the *Access to Information Act***

---

The Canadian Environmental Law Association (CELA) and Ecojustice are pleased to provide this joint submission to the Senate's Standing Committee on Legal and Constitutional Affairs in the hopes of making meaningful amendments to the federal *Access to Information Act* ("ATIA" or the "Act").

The *Act* is essential to our work as public interest environmental law organizations, however a number of problems with the *Act* have undermined its utility. Bill C-58, as passed by the House of Commons on December 6, 2017, does not do enough to remedy the serious problems that undermine the current access to information regime.

**A. Background on Canadian Environmental Law Association and Ecojustice**

CELA is a non-profit, public interest organization founded in 1970. It is also a specialty environmental law clinic funded by Legal Aid Ontario. CELA is dedicated to providing legal services to low income individuals and disadvantaged communities, in order to advance the cause of strong environmental protection through advocacy, education, and law reform.

Ecojustice is a national charitable organization that goes to court and uses the power of the law to defend nature, combat climate change, and fight for a healthy environment for all. Since 1990, Ecojustice has provided free legal services to clients, litigating precedent-setting cases and strengthening environmental laws that protect and restore the environment through litigation and law reform activities, including outreach campaigns, workshops, investigations and reports.

In our organizations' experience as public interest environmental law organizations, access to government information is often critical for public safety, environmental protection, and legal reform. Access to government-held information also enhances our advocacy efforts in a wide variety of situations, ranging from submitting timely and informed comments on proposed development projects, to participating effectively in environmental assessment hearings, to enhancing strategic litigation efforts.

## B. Review of the Proposed Amendments

In 2013, CELA and Ecojustice submitted to the Information Commissioner of Canada joint recommendations for reforming and strengthening the *Act* (included as an Appendix to this submission). While those recommendations remain relevant today, Bill C-58 fails to incorporate many of them. We submit that the Senate should amend Bill C-58 to:

1. Reform the exemptions and exclusions by imposing reasonable public interest limitations on the uses of both the policy advice exemption and the Cabinet confidences exclusion;
2. Limit procedural delays;
3. Include a clear public interest fee waiver test;
4. Establish a positive duty on government to document its decision-making processes;
5. Provide for a timeline for completing an investigation; and
6. Amend the *ATIA* to require proactive disclosure of environmental enforcement information.

## I. REFORM OF EXEMPTIONS AND EXCLUSIONS

In 2013, we recommended reforms to exemptions and exclusions for certain classes of information, including the policy advice exemption and the Cabinet confidences exclusion. We recommended that the current twenty-year time frame during which the policy advice exemption applies be reduced to five years to better balance transparency and accountability with the need for deliberative secrecy. Alternatively, we recommended that the *Act* be amended to include a public interest override, or exception to the exemption, similar to that found in section 23 of the Ontario *Freedom of Information and Protection of Privacy Act*. Such an override would properly balance between deliberative secrecy and transparency and accountability. We recommended repealing the Cabinet confidences exclusion and replacing it with a discretionary exemption that would be subject to oversight by the Information Commissioner and the Federal Courts.

Although the House of Commons Standing Committee on Access to Information, Privacy and Ethics (“Standing Committee”) recommended in 2016 that the *Act* include a public interest override for exemptions, which would specifically consider the environmental, health or public safety implications of the information, the House of Commons did not incorporate this recommendation in Bill C-58.<sup>1</sup> We are disappointed that the House of Commons has failed to seize this opportunity to restore balance to these provisions of the *Act* in a way that gives effect to the *Act*’s transparency and accountability objectives.

For the reasons we set out in our 2013 submissions, we recommend that the Senate amend Bill C-58 to limit the lifespan of the policy advice exemption under section 21 to the shorter of five years or the calling of an election, to introduce a public interest override for exemptions and to repeal the Cabinet confidences exclusion and replace it with a discretionary exemption.

---

<sup>1</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Review of the Access to Information Act* (June 2016) (Chair: Blaine Calkins) at 27.

**Recommendation 1: Bill C-58 should limit the lifespan of the policy advice exemption under section 21 to the shorter of five years or the calling of an election.**

**Recommendation 2: The *Act* should include a public interest override for exemptions under the *Act*. The cabinet confidence exclusions should be replaced by a discretionary exemption which is subject to the public interest override.**

## **II. STRICT TIMELINES**

In many cases where citizens seek access to information held by the government, access delayed is access denied. This is particularly so where that information is requested to support time-sensitive legal efforts to protect Canada's environment and the health of Canadians. In our experience, government institutions often frustrate access by claiming extraordinarily lengthy time extensions in responding to access requests.

This was a problem in 2013, when we recommended that an automatic fee waiver provision be triggered if an institution fails to disclose requested information within the *Act*'s timelines.

It remains a problem today. The *Act*'s timelines remain largely unenforceable and institutions lack any real incentive to respond to information requests in a timely manner. Therefore, we reiterate our recommendation that Bill C-58 include an automatic fee waiver provision, but also recommend that there be a simplified appeal process to the Office of the Information Commissioner to order disclosure if the time limits under the *Act* are not met. Costs should be awarded against the government for the appeal process if it cannot provide a reasonable explanation for the delay.

In our experience, delays are also occasioned under the *Act* when third parties do not respond to requests for input within the *Act*'s deadlines and are given unauthorized extensions to respond. We therefore recommend that a third party be required to submit a formal request for an extension of time pursuant to subsection 27(4) of the *Act*, or the third party should be deemed to have waived the right to oppose disclosure.

**Recommendation 3: The issue of delay in disclosure should be addressed by the *Act*. Bill C-58 should include an automatic fee waiver if the timelines in the *Act* are not met. A simplified appeal process to the Office of the Information Commissioner for a failure to make a decision within the *Act*'s deadlines should be established. Costs should be awarded against the government for the appeal process if they cannot provide a reasonable explanation for the delay.**

## **III. PUBLIC INTEREST FEE WAIVER**

In 2013, we recommended that the *Act* include an automatic fee waiver for requests made by the executive director of a registered charitable organization. Such a provision would provide certainty that the public interest in disclosure is not frustrated by a requester's inability to pay a

photocopying or searching fee – certainty that is not provided by the *Act*'s current discretionary fee waiver power.

We understand that Canada has adopted a policy that it will not charge any fees associated with access requests beyond the nominal application fee.<sup>2</sup>

While encouraging, this does not go far enough. At a minimum, that policy should be formalized in the *Act* itself, such that it will require a legislative amendment to “undo.” This will provide the certainty we recommend above. In the alternative, we recommend a provision be added to Bill C-58 triggering an automatic fee waiver when a request is made by a registered charity's executive director, in addition to the current fee waiver policy adopted by Canada.

**Recommendation 4: The government's policy to only require a nominal application fee should be included in the *Act*.**

#### **IV. DUTY TO DOCUMENT DECISION-MAKING PROCESSES**

The duty to document is an important element of government transparency and the public's right to know, as we explained in our 2013 submission.

The House of Commons Standing Committee on Access to Information, Privacy and Ethics recognized this when it recommended that Bill C-58 include such a duty.<sup>3</sup> However, Bill C-58 does not incorporate that duty.

The House's decision not to include this duty is a missed opportunity to ensure that the public's rights to access information are not frustrated by “a practice of avoiding making records to avoid application of the *Act* and insulate officials from public accountability.”<sup>4</sup>

**Recommendation 5: The *Act* should include a duty to document decisions.**

#### **V. TIMELY ACCESS TO JUDICIAL REVIEW**

We are supportive of Bill C-58's proposal to empower the Information Commission to compel disclosure of a record following a complaint investigation. This is an important change that brings the *Act* into line with access to information laws in other Canadian jurisdictions, like Ontario.

However, we remain concerned that the *Act* imposes no deadlines on the Information Commissioner for conducting an investigation of a complaint. The absence of deadlines continues to diminish individuals' ability to access information in a timely manner: again, access delayed is access denied.

---

<sup>2</sup> *Interim Directive on the Administration of the Access to Information Act*, Modified May 5, 2016, s 7.5

<sup>3</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Review of the Access to Information Act* (June 2016) (Chair: Blaine Calkins) at 17-18.

<sup>4</sup> Office of the Information Commissioner of Canada, *Open Government Act: Notes, Sources and References* (January 2008) at 7.

The situation differs in Ontario, for example. In Ontario, a requester can directly appeal an access decision to the Information and Privacy Commissioner. While there are still no timelines for the conduct of that appeal, the outcome is a decision from an expert tribunal that binds the institution.

As we noted in 2013, providing a time limit in the *Act* for the completion of an investigation of a complaint would provide a person with clear time lines before they have access to the remedy of judicial review under the *Act*. We support the Commissioner's 2005 suggestion of a 120 day timeline in which the Information Commissioner must complete an investigation under the *Act*.

We are concerned that the Federal Court of Canada will be tasked with conducting a *de novo* review of the access decision. The Office of the Information Commissioner's investigation may be rendered redundant by this requirement.

We also request that the *Act* be amended to include a bar on costs being awarded at the Federal Court of Canada if a third party decides to appeal an Information Commissioner decision and the requester appears as a party in Court.

**Recommendation 6: The *Act* should include a time limit of 120 days for the Office of the Information Commissioner to complete an investigation under the *Act*.**

**Recommendation 7: The *Act* should not task the Federal Court of Canada with undertaking a *de novo* hearing, but rather require judicial review of the decision of the Office of the Information Commissioner.**

**Recommendation 8: The *Act* should include a bar on costs being awarded against a requestor if a third party appeals a decision to the Federal Court of Canada and the requestor wishes to appear as a party in the Court proceeding.**

## VI. PROACTIVE DISCLOSURE

We support the recommendation of the 2016 Standing Committee that government institutions proactively disclose all records that are clearly of public interest.<sup>5</sup> In 2013, we recommended that environmental enforcement information be proactively disclosed. We are disappointed that none of the proactive disclosure requirements Bill C-58 proposes specifically apply to information about environmental enforcement or hazards, and we recommend that the Bill be amended to correct that omission.

Section 2 of the *Act* recognizes that government information should, as a rule, be available to the public and that restrictions on access should be the exception to the rule. The federal Information Commissioner has characterized proactive disclosure as a "fundamental aspect of freedom of

---

<sup>5</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Review of the Access to Information Act* (June 2016) (Chair: Blaine Calkins) at 43-47.

information and open government”<sup>6</sup>, while suggesting that information should be made publicly available without requiring access to information requests.<sup>7</sup> We wholeheartedly agree, especially because of the significant delays that are common in the access to information process.

The Supreme Court of Canada has likewise recognized that “the overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.”<sup>8</sup> Enhancing the accountability of decision-makers and providing opportunities for public review is particularly important when the information relates to environmental hazards that could affect the health and lives of Canadians.

A community that stands to be affected by pollution or other environmental hazards has a “right to self-protection through access to information about chemicals, substances or conditions that may pose a risk to health or the environment.”<sup>9</sup> In other words, the community has a right to know that information. To effectively exercise that right to know, the public must have access to information relating to the enforcement of a variety of federal environmental laws. Despite the proposed amendments by C-58, the newer and more expansive proactive disclosure criteria do not apply to environmental enforcement information, therefore significant amounts of information likely will not be caught by the existing and proposed requirements.

**Recommendation 9: The *Act* should include a proactive disclosure requirement for environmental enforcement information.**

### C. Conclusion

We make the following recommendations to amend Bill C-58:

**Recommendation 1: Bill C-58 should limit the lifespan of the policy advice exemption under section 21 to the shorter of five years or the calling of an election.**

**Recommendation 2: The *Act* should include a public interest override for exemptions under the *Act*. The cabinet confidence exclusions should be replaced by a discretionary exemption which is subject to the public interest override.**

**Recommendation 3: The issue of delay in disclosure should be addressed by the *Act*. Bill C-58 should include an automatic fee waiver if the timelines in the *Act* are not met. A simplified appeal process to the Office of the Information Commissioner for a failure to make a decision within the *Act*'s deadlines should be established. Costs should be awarded**

---

<sup>6</sup> Interim Information Commissioner of Canada (2010), *Annual Report 2009-2010, Achieving Results. Building for Success*, (Ottawa: Minister of Public Works and Government Services) at c 6 (“Getting the Message about Transparency and Open Government”).

<sup>7</sup> *Ibid* at 28.

<sup>8</sup> *Dagg v Canada*, (1997) 2 SCR 403.

<sup>9</sup> William Amos et al, *Getting Tough on Environmental Crime? Holding the Government of Canada to Account on Environmental Enforcement* (Vancouver: Ecojustice, 2011) at 17 [“*Enforcement Report*”].

**against the government for the appeal process if they cannot provide a reasonable explanation for the delay.**

**Recommendation 4: The government's policy to only require a nominal application fee should be included in the *Act*.**

**Recommendation 5: The *Act* should include a duty to document decisions.**

**Recommendation 6: The *Act* should include a time limit of 120 days for the Office of the Information Commissioner to complete an investigation under the *Act*.**

**Recommendation 7: The *Act* should not task the Federal Court of Canada with undertaking a *de novo* hearing, but rather require judicial review of the decision of the Office of the Information Commissioner.**

**Recommendation 8: The *Act* should include a bar on costs being awarded against a requestor if a third party appeals a decision to the Federal Court of Canada and the requestor wishes to appear as a party in the Court proceeding.**

**Recommendation 9: The *Act* should include a proactive disclosure requirement for environmental enforcement information.**

Should you have any questions about the above comments, please contact Jacqueline Wilson at (416) 960-2284 ext. 7213 and at [jacqueline@cela.ca](mailto:jacqueline@cela.ca), or Ian Miron at 416-368-7533 ext. 540 and at [imiron@ecojustice.ca](mailto:imiron@ecojustice.ca).

Yours Truly,



Ian Miron  
Barrister and Solicitor  
Ecojustice



Jacqueline Wilson  
Counsel  
Canadian Environmental Law Association

Suzanne Legault, Information Commissioner  
Office of the Information Commissioner of Canada  
c/o Open Dialogue  
112 Kent Street, 7<sup>th</sup> Floor  
Ottawa, ON K1A 1H3

January 22<sup>nd</sup>, 2013

*Via e-mail*

Dear Madame Commissioner,

**Re: Input and Advice on the Federal *Access to Information Act***

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization founded in 1970 as well as an environmental law clinic – within Legal Aid Ontario. CELA is dedicated to providing legal services to low income people and disadvantaged communities, and advancing the cause of strong environmental protection through advocacy, education and law reform.

Ecojustice, formerly Sierra Legal Defence Fund, is a national charitable organization dedicated to defending Canadians' right to a healthy environment. Since 1990, Ecojustice has provided free legal services to clients, litigating precedent-setting cases and strengthening environmental laws that protect and restore the environment through litigation and law reform activities, including outreach campaigns, workshops, investigations and reports.

Both CELA and Ecojustice are pleased to provide this joint submission to the Privacy Commissioner of Canada's Open Dialogue in the hopes of reforming our federal *Access to Information Act* (ATIA or the Act), in order for Canada to once again be a leader in access to information legislation.

**Canadian Environmental Law Association**

T 416 960-2284 • F 416 960-9392 • 130 Spadina Avenue, Suite 301 Toronto, Ontario M5V 2L4 • [cela.ca](http://cela.ca)

**Ecojustice**

[www.ecojustice.ca](http://www.ecojustice.ca) • [info@ecojustice.ca](mailto:info@ecojustice.ca) • 1.800.926.7744

## CELA and Ecojustice Canada's relationship with the ATIA

As public interest environmental law organizations mandated to undertake certain environmental law reform activities and legal representation in the public interest, we find that access to government information is often critical to our ability to advocate effectively for needed change and for protection of environmental rights.

Law reform efforts aimed at establishing environmental 'Right to Know' legislation have been a major focus for CELA at every level of Canadian government. Our efforts have so far proved relatively successful: for example the National Pollutant Release Inventory under the *Canadian Environmental Protection Act*, the Ontario *Toxics Reduction Act*, and the Toronto Right to Know By-Law. These efforts are based on our belief that the public's right to know is critical to effective public participation in a democracy.

Ecojustice views the *Access to Information Act* as an important tool that allows us to advocate our clients' interests more effectively. Access to government-held information enhances our advocacy efforts in a wide variety of situations, ranging from submitting timely and informed comments on proposed development projects, to participating effectively in environmental assessment hearings, to enhancing strategic litigation efforts.

While CELA and Ecojustice believe the *Access to Information Act* is essential to our work as public interest environmental law organizations, a number of problems with the Act hamper our work. To address our concerns, and with a view to enhancing federal government openness, transparency and accountability, we submit the following comments and recommendations.

Our primary concerns with the federal *Access to Information Act* are its:

- breadth of exemptions and, in particular, the opportunity for misuse of the policy advice exemption;
- breadth of exclusions and lack of independent oversight of their use and, in particular, risk of misuse of the Cabinet confidences exclusion;

- permissive language which allows the government to fail to properly document and provide proactive access to documents, and which also fails to require proactive disclosure of environmental enforcement information;
- lack of reasonably enforceable time limits for disclosure;
- limits to access judicial review for failures to disclose documents; and
- unclear language giving discretion to waive fees in the public interest.

Our recommendations to address these concerns are to:

- 1. Add a clear government duty to assist and be fully accountable to disclose public information.**
- 2. Reform the exemptions and exclusions, in particular by imposing reasonable public interest limitations on the uses of both the policy advice exemption and the Cabinet confidences exclusion.**
- 3. Limit the availability of procedural delays in the ATIA process.**
- 4. Include a clear a public interest fee waiver test.**
- 5. Establish a positive duty on government to document its decision-making processes.**
- 6. Clarify the availability of judicial review under the ATIA.**
- 7. Amend the ATIA to require proactive disclosure of environmental enforcement information.**

## **I. DUTY TO ASSIST AND FULL ACCOUNTABILITY**

The Act is intended to ensure the core democratic principles of government transparency and accountability by legally enshrining both the government's duty to assist the public in obtaining information that guides government decision-making and the government's duty to be fully accountable to the public. However, as has been made clear by the ongoing efforts to reform the Act since the late 80s, the Act falls short of achieving these over-arching objectives. As such, we recommend that these duties be more clearly laid out and reinforced in the Act

To clarify the government's duty to assist in the Act, we recommend adopting the proposed reform of the 2005 Information Commissioner, John Reid, to include the words 'fully accountable' in the Purposes section of the Act. The Commissioner rationalized the addition of this term as follows:

The addition of the term, is inspired by the Nova Scotia *Freedom of Information and Protection of Privacy Act*, a formulation of words judicially considered by the Nova Scotia Court of Appeal (leave denied to the Supreme Court of Canada) in *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132. Speaking for the court Saunders, J.A. noted that the Nova Scotia legislation is unique, in Canada, in using the expression "fully accountable", and stated:

"I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public a greater right of access to information than might otherwise be contemplated in the other provinces and territories in Canada." (para. 57)

Furthermore, the Commissioner recommended in 2005, as did the 2002 Information Review Task Force, that the Act be amended to include the duty to "assist persons requesting access, and to respond to each request openly, accurately and completely and without unreasonable delay." The duty to assist is contained in many provincial access to information statutes.

The duty to assist should be reinforced by a requirement in the Act for the Commissioner to include in his or her annual report the name of any government institution that fails without valid excuse to meet this duty. Again, such a provision was recommended in the Commissioner's 2005 proposed model Act.

## **II. REFORM OF EXEMPTIONS AND EXCLUSIONS**

The Act currently exempts a number of classes of information from its disclosure requirements. Further classes of information are excluded entirely from the operation of the Act. Although these exemptions and exclusions may sometimes be justified to shield government decision-making from the undue pressure of special interests or the media, our experience is that many of the exemptions and exclusions are arguably misused to unlawfully withhold information from the public. As public interest environmental law organizations, we are in the business of ensuring

that government decisions are made with proper regard for the environment. Although many of the exemptions could be narrowed (e.g., by making mandatory exemptions discretionary, subject to a harm-based test) to achieve greater compliance with the ATIA's purpose of making access the general rule, we will limit our comments in this submission to two areas of particular concern. In our experience, we find that exemption for policy advice contained in section 21 and the exclusion for Cabinet confidences in section 69 have often been misused.

i) Section 21 policy advice exemption

The policy advice exemption in the ATIA is “oriented to non-disclosure”<sup>1</sup>, in part because of its expansive definition of ‘policy advice’ and correspondingly broad judicial interpretation of the exemption.<sup>2</sup>

The broad wording of the exemption, coupled with the dearth of exceptions to the exemption and the absence of a public interest override, similar to that found in subsection 20(6), encourages the overinclusive use of the policy advice exemption. The exemption has been improperly used to hamper Ecojustice's work. For example, Ecojustice applied for judicial review in a matter relating to the National Pollutant Release Inventory. Prior to the commencement of legal proceedings, Ecojustice submitted a related ATIA request to Environment Canada. After substantial delay, Environment Canada released a number of documents pursuant to the request, but relied extensively on the policy advice exemption to withhold information that ought to have been disclosed. In response to Ecojustice's complaint, the Information Commissioner agreed that the exemption was used improperly, but that decision was made more than a year after the related litigation had concluded.

The rationale for the policy advice exemption is to maintain the structural accountability, and the “frankness and candour” of government decision-making.<sup>3</sup> Although we recognize the importance of these objectives, they must be balanced against the Act's overriding purposes of ensuring transparency and accountability. Currently, the section 21 exemption can apply to any

---

<sup>1</sup> See Robert Botterell, “Access to Information: A Comparative Analysis of the Policy Advice Exemption” (1992) 5 CJALP 179 at 201.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid at 184.

kind of information with only two exceptions.<sup>4</sup> Our experiences with the use of this exemption indicate that, as currently interpreted and applied, the section 21 exemption fails to achieve this balance by disproportionately favouring deliberative secrecy over transparency and accountability.

To right the balance, we recommend that subsection 21(1) be amended to reduce the 20 year lifespan of the exemption to the shorter of five years or the calling of an election. It is every citizen's right to have access to complete and accurate information about a government's policy decisions before voting, as the ballot box is the most fundamental means for holding a government accountable. Given that the rationale for the exemption is to shield government decision-making from outside pressures, once the decision is made the reason for the exemption to continue to apply is lost.

Proper balance between deliberative secrecy and transparency and accountability could also be achieved by the inclusion of a 'public interest override,' or exception to the exemption, similar to the public interest override for certain exemptions found in section 23 of the Ontario *Freedom of Information and Protection of Privacy Act* (FIPPA):

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.<sup>5</sup>

Incorporating a public-interest override in the Act similar to that found in s. 23 of Ontario's FIPPA specifying that it applies only to information relating to public health and safety and environmental protection would deter overinclusive misuse of the exemption. The rationale for protecting deliberative secrecy is less persuasive where the information pertains to public health or safety or protection of the environment, which directly relate to one's right to life. The fundamental importance of this kind of information leads us to recommend that disclosure of this information pursuant to the public interest should be mandatory, rather than discretionary. We find it difficult to conceive of a situation where disclosure of such fundamentally important

---

<sup>4</sup> *Access to Information Act*, RSC 1985, c A-1, s 21(2).

<sup>5</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, s 23.

information could cause harm to structural accountability sufficient to outweigh the health and safety concerns of individuals; therefore, we would suggest that a harm-based test (i.e., disclosure cannot occur if harm caused by disclosure outweighs the benefits of disclosure), similar to that found in subsection 20(6), is redundant. If a harm-based test is adopted, we recommend that it be used to limit disclosure only where disclosure will cause extraordinary harm.

ii) Section 69 Cabinet confidences exclusion

Documents subject to Cabinet confidence are excluded from the application of the ATIA by section 69 of the Act, subject to three exceptions.<sup>6</sup> Accordingly, neither the Information Commissioner<sup>7</sup> nor the Federal Court<sup>8</sup> can compel the government to produce such documents for the purpose of determining whether they have been unlawfully withheld. This complete lack of independent oversight has resulted in the overinclusive misuse of this exclusion.

As discussed above, CELA and Ecojustice are mandated to ensure that government decisions are made with appropriate regard for environmental considerations. Overinclusive misuse of the Cabinet confidences exclusion, due to a lack of independent oversight, makes it nearly impossible to do so. We recognize that deliberative secrecy considerations discussed above with respect to policy advice also apply to Cabinet confidences; in addition, we recognize the reluctance of the courts to overstep the constitutional boundaries between the executive and judicial branches of government. Nevertheless, our experiences with the section 69 exclusion suggest that the Act is in need of reform to restore the balance between deliberative secrecy and Cabinet privileges on the one hand, and transparency and accountability on the other.

In the interests of restoring balance to the ATIA, we recommend repealing the statutory exclusion for Cabinet confidences and replacing it with a discretionary exemption. Such an amendment would restore a measure of independent oversight to Cabinet confidences by allowing the Information Commissioner and the Federal Court to ensure that Cabinet confidences are not misused to unlawfully withhold information. Section 69 currently applies to

---

<sup>6</sup> Ibid, s 69(3).

<sup>7</sup> Ibid, s 36(2).

<sup>8</sup> Ibid, s 46.

a very broad range of documents, and this expansive application could be maintained in an exemption to ensure adequate protection of Cabinet confidences.

We recommend that the Cabinet confidences exemption be limited by a harm-based public interest override test, similar to that found in subsection 20(6) of the ATIA and to that found in section 23 of Ontario's FIPPA. We further recommend that the public interest override be carefully drafted to align with the common law doctrine of Cabinet immunity as outlined in the leading Supreme Court case of *Babcock v Canada (Attorney General)*:

...over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey, supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey, supra*.<sup>9</sup>

In a subsequent decision, the British Columbia Supreme Court reiterated that:

A claim of public interest immunity requires the court to inspect the documents over which the claim is made and balance the competing public interests of maintaining the confidentiality of the information in the documents with disclosure of the information. Factors to consider in the balancing process were identified in *Carey* and summarized in *Leeds v. Alberta (Minister of Environment)* [citations omitted]. They include:

- (i) the nature of the policy concerned;
- (ii) the particular contents of the documents;
- (iii) the level of the decision-making process;
- (iv) the time when a document or information is to be revealed;
- (v) the importance of producing the documents in the administration of justice, with particular consideration to:

---

<sup>9</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 19.

- the importance of the case,
- the need or desirability of producing the documents to ensure that it can be adequately and fairly represented,
- the ability to ensure that only the particular facts relating to the case are revealed.

(vi) any allegation of improper conduct by the executive branch towards a citizen.

Recognizing the special nature of Cabinet confidences, and the separation between the executive and the judiciary, we realize that a requirement of extraordinary harm may be inappropriate for a Cabinet confidence exemption override.

### **III. STRICT TIMELINES**

As recommended by the Commissioner in 2005, we recommend the inclusion of a fee waiver provision that applies if the government fails to disclose requested information within the time limitation set out in the Act. As the Commissioner explained in 2005,

[t]he rationale is that requesters should not have to pay any fees when a government institution fails to meet a deadline provided by the Act. The Task Force recommended that the timeliness of the response to the requester be considered as a factor in making the decision to waive access fees. This amendment would provide an incentive for the government institution to respond to requests in a timely fashion.

Ecojustice's ability to advocate on behalf of our clients in a timely and effective manner has been hampered by substantial government delays in responding to ATIA requests. In our experience, departments frequently extend disclosure timelines by over one year, including one recent extension of over 700 days. The current lack of enforceability of ATIA timelines provides no incentive for departments to respond to information requests in a timely manner.

### **IV. PUBLIC INTEREST FEE WAIVER**

The public interest should dictate that access to information not be overridden by a photocopying and or searching fee. This should be plainly outlined in the Act by including a clear public

interest fee waiver test, rather than the vague discretionary power to waive fees currently provided in section 11(6) of the Act:

The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

We encourage the adoption of a test similar to that drafted by the Commissioner in 2005,

11.(7) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section and shall, in deciding whether or not to waive or refund a fee or other amount, take into account the following factors:

- (a) whether the requested record has previously been disclosed under this Act;
- (b) whether the requested record contains information relating to public health, public safety, consumer protection or protection of the environment;
- (c) whether the requested record contains information relating to eligibility for a service, program or benefit; and
- (d) whether the disclosure of the information would be in the public interest.

We propose an automatic waiver if the request is made by the executive director of a registered charitable organization. This would permit some screening to occur at the charity's organizational level.

## **V. DUTY TO DOCUMENT DECISION-MAKING PROCESSES**

The duty to document is an important element of government transparency and the public's right to know. The need for reform to the Act to create a clear enforceable government duty to document was identified as a recurring proposal for reform to the Act in the Library of Parliament Background Paper, revised in 2012, 'The Access to Information Act and Proposals for Reform.'<sup>10</sup> The need for a clearer duty to document was further outlined by Stanley Tromp in

---

<sup>10</sup> See also : Decisions lack proper paper trail, watchdogs complain, by Jeff Sallot, Globe and Mail, 22 May 2006

[http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/canada/decisions\\_lack\\_proper\\_paper\\_trail\\_article\\_canada.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/canada/decisions_lack_proper_paper_trail_article_canada.pdf)

his 2008 text ‘Fallen Behind: Canada’s Access to Information Act in the World Context.’<sup>11</sup>

As the Honourable John Reid explained in his proposed amendment to the Act in his 2005 Reform Notes,

[t]he right of access to information is not meaningful if records are not routinely created by public officials. [...] too often, there is a practice of avoiding making records in order to avoid application of the Act and insulate officials from public accountability.

The proposed inclusion of such a duty was also raised before the Standing Committee on Access to Information, Privacy and Ethics in 2009; however, the Committee’s 11<sup>th</sup> Report withheld any recommendation on this issue.

Although it has been argued that the appropriate location for this government duty to create records is the *Library and Archives of Canada Act*, the inclusion of such a provision in the Act would provide clarity and greater meaning to the rights and duties created under the Act. At the very least, the Act should reference the duty to document created in the *Library and Archives of Canada Act*.

## **VI. JUDICIAL REVIEW PROVISIONS UNDER THE ATIA**

Currently, section 41 of the Act enables any person who has been “refused access to a record” requested under the Act to apply to the Court for a review of the matter within forty-five days after the results of an Information Commissioner investigation of the complaint are reported to the complainant, or such other time provided by the Court.

Providing greater certainty to the question of who has access to judicial review under the Act can be accomplished by clarifying the definition of “refused access to a record”, beyond the definition of “deemed refusal” provided in subsection 10(3) of the Act, as proposed by John Reid in 2005,

---

<sup>11</sup> At p. 187, available at: <http://www3.telus.net/index100/report>.

- 41.(4) For the purposes of subsection (1), the words “refused access to a record” include being denied access to a record, or a part thereof, by
- (a) an unreasonable refusal to provide a record, or a part thereof, in the official language requested by the person;
  - (b) an unreasonable refusal to provide a record, or a part thereof, in an alternative format;
  - (c) a requirement that the person pay an amount under section 11 that is unreasonable; or
  - (d) an unreasonable extension of the time limits under section 9.

Furthermore, providing a time limit in the Act for the completion of an investigation of a complaint would provide a person with clear time lines before they have access to the remedy of a judicial review under the Act. We support the Commissioner’s 2005 suggestion of a 120 day target in which the Information Commissioner must complete an investigation under the Act.

## VII. PROACTIVE DISCLOSURE

We also adopt the recommendation in Murray Rankin’s 2008 paper, ‘The Access to Information Act 25 Years Later: toward a new generation of access rights in Canada’, for proactive disclosure. Proactive web-based disclosure was also raised by “almost all of the witnesses who came before” the 2009 Standing Committee on Access to Information, Privacy and Ethics in 2009 in regard to needed reforms to the Act. The Committee outlined in its 11<sup>th</sup> Report that such models were already in place in the United Kingdom and Mexico, and that

[w]hile there might still be requests made for certain documents, the vast majority would be self-searchable by the general public on-line in a form to which the exemptions have already been applied. The intent behind the proposal is to facilitate ease of access, free up resources, and reduce the cost of the system. (p.21)

### i) Proactive disclosure of environmental enforcement information

Section 2 of the ATIA recognizes that government information should, as a rule, be available to the public and any restrictions on access should be the exception to the rule. The federal government has acknowledged this rule and has established a limited proactive disclosure policy for some government financial information.<sup>12</sup> The federal Information Commissioner has characterized proactive disclosure as a “fundamental aspect of freedom of information and open

---

<sup>12</sup> Treasury Board of Canada Secretariat, “Proactive Disclosure” online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/pd-dp/index-eng.asp>> (last accessed December 4, 2012).

government”<sup>13</sup>, while suggesting that information should be made publicly available without requiring access to information requests.<sup>14</sup>

Proactive disclosure is even more important when the information relates to environmental hazards that could affect the health and lives of Canadians. A community that stands to be affected by pollution or other environmental hazards has a “right to self-protection through access to information about chemicals, substances or conditions that may pose a risk to health or the environment.”<sup>15</sup> In other words, the community has a right to know that information.

To effectively exercise that right to know, the public must have access to information relating to the enforcement of a variety of federal environmental laws (‘environmental enforcement information’). To be clear, we are referring in this recommendation only to information resulting from completed investigations; we have no intention of jeopardizing ongoing regulatory investigations. Despite the widespread acknowledgment of the importance of proactive disclosure, the federal government discloses environmental enforcement information that is at best incomplete.<sup>16</sup> This makes it difficult for public interest environmental law organizations, acting on behalf of citizens, to hold the federal government accountable for meeting its responsibilities to enforce environmental laws.

Although some environmental enforcement information is disclosed by the government, that disclosure is fragmented, often not easily accessible to the public, and incomplete.<sup>17</sup> These problems could, however, be remedied by the establishment of a central web-based registry for enforcement information, similar to the *Enforcement and Compliance History Online* (ECHO) database operated by the United States Environmental Protection Agency.<sup>18</sup> The ECHO database allows any member of the public to search for information about 800,000 regulated facilities,

---

<sup>13</sup> Interim Information Commissioner of Canada (2010), *Annual Report 2009-2010, Achieving Results. Building for Success*, (Ottawa: Minister of Public Works and Government Services) at c 6 (“Getting the Message about Transparency and Open Government”).

<sup>14</sup> *Ibid* at 28.

<sup>15</sup> William Amos et al, *Getting Tough on Environmental Crime? Holding the Government of Canada to Account on Environmental Enforcement* (Vancouver: Ecojustice, 2011) at 17 [“*Enforcement Report*”].

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 22-24.

<sup>18</sup> US Environmental Protection Agency, “Enforcement & Compliance History Online (ECHO)”, online: US Environmental Protection Agency <<http://www.epa-echo.gov/echo/>> (last accessed December 4, 2012).

“including a record of facilities’ compliance with environmental regulations and the dates, the types of violations and their seriousness, the nature of any enforcement action taken against a facility by the state or Environmental Protection Agency and whether any penalties have been issued.”<sup>19</sup>

Such a database would promote government transparency and accountability, and would allow public interest environmental law organizations such as CELA and Ecojustice to obtain necessary information while avoiding the difficulties created by the ATIA discussed above. The database would also allow the government to credibly promote ‘good news’ environmental stories where they occur.

Significantly, the adoption of such a database would be a cost neutral measure. Some existing databases, such as the National Pollutant Release Inventory, could be subsumed in this more comprehensive database; as a result, the costs for operating that component of the database already exist. The costs of including additional comprehensive information would be offset by reduced access to information response (including search time and copying) costs: as proactive disclosure of environmental enforcement information increases, access to information requests for such information will decrease.<sup>20</sup> Furthermore, the government could make use of section 26 of the ATIA, which would allow it to summarily reject access to information requests for such information on the basis that the information would be published within 90 days of the request.

Although no mandatory proactive disclosure provisions currently exist in the ATIA, access to information laws in other Canadian jurisdictions do contain such provisions. Section 11 of Ontario’s FIPPA, although narrower in scope than we would recommend, is an example of a proactive duty to disclose information about environmental hazards. Moreover, the language of the ATIA would support the inclusion of such a provision. As discussed above, section 2 of the Act espouses the principle that government information should, as a rule, be available to the public, and restrictions on access should be exceptions to the rule. This purpose supports the inclusion of mandatory proactive disclosure provisions in the ATIA.

---

<sup>19</sup> *Enforcement Report*, supra note 15 at 27.

<sup>20</sup> *Ibid* at 29.

The critically important nature of information pertaining to environmental hazards is recognized in subsection 20(6), which provides that certain confidential third party information can be disclosed by the government, notwithstanding the general exemption for such information, where the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment, and the public interest outweighs competing interests of the third party.

Therefore, inclusion of a requirement for proactive disclosure of environmental enforcement information aligns with the purposes of the ATIA; such a provision would also further government policies of openness and accountability. Such a provision would most appropriately be housed in a law of general application, such as the ATIA, because environmental enforcement information is collected by many different government institutions. Alternatively, new legislation could be enacted to impose a mandatory proactive disclosure requirement on specific government institutions. This alternative would be preferable if our concerns with the ATIA are not addressed, so long as the new statute expressly restricted or eliminated the application of the ATIA exemptions to environmental enforcement information.

## **CONCLUSION**

In closing, both our organizations welcome the initiation of the Open Dialogue process and we would like to thank you for taking the time to consider our comments.

Should you have any questions about the above comments, please contact Kyra Bell-Pasht at (416) 960-2284 ext. 224 and at [kyra@cela.ca](mailto:kyra@cela.ca) or Robert Peterson at (613) 562-5800 ext. 3397 and at [rpeterson@ecojustice.ca](mailto:rpeterson@ecojustice.ca).

Sincerely,

CANADIAN ENVIRONMENTAL  
LAW ASSOCIATION

A handwritten signature in black ink, appearing to read 'Kyra Bell-Pasht', with a long horizontal flourish extending to the right.

Kyra Bell-Pasht  
Counsel

ECOJUSTICE

A handwritten signature in black ink, appearing to read 'Robert Peterson', with a long horizontal flourish extending to the right.

Robert Peterson  
Counsel