

May 13, 2016

Treasury Board of Canada Secretariat
Chief Information Officer Branch
Open Government Team (AP201618)
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Ottawa, Ontario
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Detailed submission into helping shape Canada's Action Plan on Open Government 2016–18

I am a long-time public interest researcher and a frequent user of both the *Access to Information Act* and processes for complaint available through the Office of the Information Commissioner of Canada.

The following is my input into helping shape Canada's Action Plan on Open Government 2016–18:

ATIP information use for the initiation of law enforcement and security intelligence investigations

Given the seeding of 1% of active RCMP national security criminal investigations in December 2006 through access to information and privacy (ATIP) and the as yet unknown numbers on the further and /or continuing use of ATIP information as a basis to justify national security criminal investigations,

- 1) Immediately discontinue and prohibit further use of *Access to Information Act* requester information to support the initiation, conduct or continuation of a police or security intelligence investigation, absent a warrant issued by a judge of a court of superior jurisdiction;
- 2) Mandate that the Information Commissioner of Canada be notified of all warrants issued by a judge of a court of superior jurisdiction, when a warrant is issued for any police or security intelligence investigation predicated on the use of *Access to Information Act* requester information;
- 3) Mandate that the Information Commissioner of Canada be given the opportunity to make *ex parte* representations, at any time, to a judge of a court of superior jurisdiction who issues a warrant for a police or security intelligence investigation predicated on the use of *Access to Information Act* requester information;
- 4) Mandate that the Information Commissioner of Canada lay before Parliament a quarterly report in respect of all notifications received in the immediately preceding quarter respecting warrants issued for police, or security intelligence investigations predicated on the use of *Access to Information Act* requester information;

Schedule I of the Act

- 5) Include, as institutions in Schedule I, all private and non-profit entities performing executive branch functions which are outsourced (eg. Nav Canada);
- 6) Add the Courts Administration Service and the administrative functions of the Supreme Court of Canada as institutions;
- 7) Add the Speaker of the House of Commons as an institution;
- 8) Add the Governor General as an institution;
- 9) Add, as a separate class of institutions, all private and non-profit entities to whom operational or core functions by institutions are contracted, irrespective of jurisdiction;

10) Explicitly enact jurisdictional provisions that grant the Information Commissioner the necessary powers to review institutions outside of strictly federal jurisdiction;

Information Commissioner

11) Power to order release of records ought to be given to Information Commissioner;

12) Power to compel compliance with the Act in any respect should vest directly with the Information Commissioner, enforceable by contempt of court proceedings;

Integrity of records and disclosure obligations

13) Tie the number of well-founded complaint findings by the OIC *directly* to a statutorily mandated increase in a respective institutional ATIP office's budgetary allocations *from* that institution's operating budget for the next fiscal quarter;

14) Completely remove the element of intent in section 67.1 and recreate the offence as a strict liability offence;

15) Create a *mens rea* offence prohibiting obstruction of persons filing or pursuing a request, with deemed intent provisions;

16) Enact a strict liability offence, making it a crime to directly or indirectly engage in reprisals against any person assisting the Information Commissioner during an investigation;

17) Mandate that national security confidentiality claims made by institutions during Office of the Information Commissioner of Canada investigations be rebuttable by a fact-finding standard which sets the standard for determination of findings surrounding a complaint attracting national security confidentiality claims to "the institution likely contributed to", as distinguished from "the institution likely caused", the fact pattern of subject matter for which records are sought;

18) Eliminate the indefinite availability of investigative exemptions, presently routinely abused to shield records from disclosure for what amount to indefinite periods of time, and enact a time limitation for which investigative exemptions may be claimed;

Section 24

19) Repeal section 24 of the Act;

20) All requesters to whom a response was made in which a Section 24 exemption was applied in the previous five (5) years ought to be notified that they may re-initialize their requests absent of further filing fees;

Section 69.1

21) Repeal section 69.1 of the *Access to Information Act*;

Mandatory declassification review

22) Create a mandatory Declassification Review (MDP) process, modeled after the one currently existing

in the United States, administered at first instance by the Information Commissioner;

Attorney General consent

23) The personal and signed consent of the Attorney General of Canada ought to be mandated prior to the application by an institution of subsection 10(2) to neither confirm nor deny existence of records, in each case where subsection 10(2) is invoked in a response to a request;

Deemed date of receipt for requests issued to institutions

24) A request ought to be deemed to have been received by the institution on:

- a) the fifth day after it is mailed by the requester;
- b) the day on which a courier confirms it was delivered;
- c) the day on which a requester hand-delivers it to the institution;
- d) the day on which it is e-filed.

Communications between requester and institutions

25) Modifications, alterations and rescoping of issued requests negotiated with institutions ought to be deemed of no effect until such time as a requester confirms, in writing, that he/she approves of a modification, alteration or rescoping;

26) Institutions ought to record all telephone calls between a requester, including the agent for the requester where applicable, and its ATIP office *and* be required to furnish these to the Information Commissioner upon initiation of any investigation the Information Commissioner undertakes respecting a requester's complaint against that institution;

Posting of summaries

27) Summaries of *all* completed responses to requests ought to be made available on Canada's open government access to information portal, within 24 hours of release;

28) Complaints to the Information Commissioner resulting in release of additional records ought to be duly noted on Canada's open government access to information portal in relation to the respective request, 46 days after the additional records are ordered released where no application has been brought by an institution to have the Commissioner's order judicially reviewed;

Delegation

29) A true copy of all delegation authorities and instruments issued by an institution ought to be posted in an easily accessible location, online, and updated with information current to five business days;

Private right of action

30) Enact an institutional statutory duty of care to requesters, accompanied by a standard of care wherein there is presumed liability in every case of deemed refusal;

All of which is respectfully submitted,

Fred Joseph Ernst
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cc. The Honourable Scott Brison, President of the Treasury Board
Suzanne Legault, Information Commissioner of Canada
Canadian Journalists for Free Expression