

# **Submission to Revitalize the *Access to Information Act***

**Submission of June 29, 2016**

## 1. About this Submission

I am pleased to present this submission for the revitalization of the *Access to Information Act*, and I am thankful to Parliament for giving Canadians the opportunity to provide input as part of this very important process. Hopefully, this exercise will result in a new *Access to Information Act* that reflects the increased need for transparency and accountability while being easier to work with for those who are responsible for its administration.

The shortcomings identified in this submission result from my 31 years of experience in various roles with the administration of the *Access to Information Act*. That said, in order for this submission to be short and focussed, it only addresses those shortcomings that are technical in nature, and it leaves out political and philosophical considerations.

I would be please to provide additional explanations regarding those shortcomings and how to address them upon request.

## 2. Submission

### 2.1. Old Style Terminology

The use of old style and expressions or statements makes the understanding and interpretation of the *Act* difficult, especially for non-experts. Examples of statements and expressions that reflect this old style include the following terms and expressions:

- Sections 23 to 24 and 26 (exemption provisions) of the *Act*: replace the statement “*including, without restricting the generality of the foregoing, any such information*” with “*including, but not limited to, any such information*”;
- Section 3 of the *Act*: replace the expression “*machine readable records*” with “*electronic record*” or “*digital record*”.

### 2.2. Extend the Right of Access Under the Act

The right of access should be extended to all persons and organizations, regardless of citizenship, residency or other status, and the right of access should not be limited by any conditions.

Suggested changes to make to the Act:

- Add the following definition to section 3 of the Act:

*“applicant: A person or organization who submits a request for access to information under this Act.”*

- Replace the current wording of subsection 4(1) of the Act with the following wording:

*“Subject to this Act, but notwithstanding any other Act of Parliament, every applicant has a right to and shall, on request, be given access to any recorded information under the control of a government institution.”*

- Repeal the current version of subsection 4(2) of the Act.
- Renumber paragraph 4(2.1) of the Act to become 4(2).

## **2.3. Establish Requirement for Effective Retrieval of Government Records and Information**

Suggested wording to be included in section 4 of the Act:

*“4 (3.1) Government institutions shall develop and implement effective indexing as well search and retrieval systems so as to ensure the timely retrieval of all records and information which are the subject of an access request under this Act.”*

## **2.4. Define “Record” more Clearly**

Suggested wording to be included in section 3 of the Act:

*“Record: Any object, whether in paper, electronic or other format:*

- a) from which knowledge can be extracted;*
- b) which accounts for government activity; or*
- c) which was involved in, or served as a basis for a decision by a government institution.”*

**Rationale/Explanation:**

This new definition would include objects, such as samples of contaminated soil and chemical and other substances to fall within the scope of the right of access under the Act.

The current wording of section 11 of the Act should be replaced with the following wording, which aims to resolve the practical issues resulting from the extension of the right of access to those objects that constitute unconventional types of records:

*“11 An applicant may be required to pay the actual cost of extracting the knowledge from objects other than paper and electronic records, whether by way of technical, scientific or other type of analysis.”*

## **2.5. Define “Third Party” more Clearly**

The current wording of the definition of “third Party” in section 3 of the Act is confusing for non-experts and should be clarified.

Suggested wording to be included in section 3 of the Act:

*“Third party: means any person, group of persons or organization other than the applicant and the government institutions listed in Schedule 1.”*

## **2.6. Define the Terms “Law Enforcement” and “Investigation” more Clearly**

Suggested change to the wording of paragraph 16(4)(a) of the Act:

*“a) consists of a process that leads to the imposition of sanction or which carries the potential of sanction;”*

Suggested provision to be added to section 16 of the Act:

*“(5) The term investigation does not include audits and inspections.”*

## 2.7. Incorporation of the Open Government Concept in the Body of the Act

Suggested wording to be included in section 4 of the Act:

*“4 (3.2) The head of each government institution shall, in accordance with the principle of subjecting government institutions to public scrutiny, on a proactive basis and as regularly as possible make publicly available all information in which the Canadian public may have an interest, subject to the exception provisions of this Act.*

*The factors and criteria to base the proactive disclosure include, but are not limited to:*

- a) the disclosure can help the members of the public to better understand their rights and obligations under federal acts and regulations;*
- b) the disclosure can help the members of the public to better understand the decision making processes of government institutions in general as well as in regard to a specific decision;*
- c) the disclosure aims to publicly identify all individuals and organizations who influence or participate in the decision making processes of government institutions, except in instances:
  - (i) that affect directly the rights and benefits of an identifiable individual;*
  - (ii) where such disclosure may be contrary to the terms and/or spirit of the exception provisions of this Act..”**

## 2.8. Clarify the Provisions Pertaining to the Day-to-day Administration of the Act (sections 6 to 12)

- The following wording should be added to section 6 of the Act:

*“6 (1) The head of a government institution may exempt an applicant from the requirement of submitting a request in writing in those circumstances where:  
a) the applicant is not physically or mentally in a position to meet the requirement of section 6;  
b) the head of the institution deems it to be in the best interest of the applicant.”*

- The following wording should be added to section 8 of the Act:

*“8 (2) The head of a government institution shall not transfer a request for access to a record without the consent of the applicant.”*

- As previously stated, the current wording of section 11 of the Act should be replaced by the following wording:

*“11 An applicant may be required to pay the actual cost of extracting the knowledge from objects other than paper and electronic records, whether by way of technical, scientific or other type of analysis.”*

## 2.9. Clarify the Text of the Exemption Provisions

Section 25 could be eliminated by simplifying the language of all exemption provisions:

Replace the expression *“The head of a government institution shall/may (as applicable) refuse to disclose any record requested under this Act that contains information”* by *“The head of a government institution shall/may (as applicable) refuse to disclose any information requested under this Act”*.

## 2.10. Offer better Protection to Information that Pertains to Rare and Endangered Species

The following provision should be added in the Act:

**“NEW PROVISION NUMBER (1)** *The head of a government institution shall refuse to disclose information the disclosure of which could be harmful to, or interfere with the protection or the conservation of any rare, endangered or vulnerable form of life, including but not limited to, information about their physical or biological characteristics, their geographical location, the state of their natural habitat, their living and reproduction patterns as well as their defense and survival mechanisms.*

*(2) The head of a government institution may disclose the information described in subsection (1) in the public interest as defined in this Act”.*

## 2.11. Offer better Protection to Information of Aboriginal Peoples

- Repeal subsection 13(3) of the Act.
- Add the following provision in section 14 of the Act:

*“14 (1) The head of a government institution shall refuse to disclose information the disclosure of which can be detrimental to:*

- a) the social, economic or community interests; or*
- b) the cultural, spiritual or community heritage*

*of Aboriginal peoples (First Nations, Inuit and Métis).”*

## 2.12. Subject Contractor Methodologies to the Act

Clarify Crown property over information pertaining to the methodologies and other technical and scientific instruments used by contractors in the course of performing services for government institutions.

### **Rationale/Explanation:**

Such a provision would clarify the expectations of contractors as it relates to the application of the Act to the methodologies and other technical and scientific instruments that they develop to fulfill their contractual obligations vis-à-vis the Crown where the Crown was charged a fee for the development of those instruments.

## 2.13. Public Interest Disclosure

Remove subsection (6) from section 20 of the Act to make it a stand-alone provision, and modify it to read as follows:

*“The head of a government institution may disclose any information requested under this Act described in sections 14, 15, 16, 17, 18, 20, 21, 22 or 23 if*

- (a) the disclosure would be in the public interest; and*

*(b) the public interest in disclosure clearly outweighs in importance any prejudice that may result from such disclosure.”*

Guidance for the exercise of discretion as it relates to the public interest should also be provided in that section so as to reduce as much as possible the risk of political and economic biases from the exercise of that discretion.

## **2.14. Provide Guidance for the Determination of Confidentiality**

Provide criteria and factors to take into consideration when determining:

- Whether information is confidential;
- Whether information was obtained in confidence by a government institution;
- Whether it is consistently treated in confidence.

## **2.15. Establish a Five-year Requirement for the Automatic Review of the Act by Parliament**

A provision should be included in the Act to require a review of its provisions by Parliament every five years.