



Canada

**Submission on Access to Information Reform in
Quebec**

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Executive Summary

It is clear that major reforms are needed to ensure that the rules and systems for ensuring that citizens of Quebec can access information held by public bodies (the right to information) are effective. Quebec's Act on Access to Documents held by Public Authorities and the Protection of Personal Information falls far short of international standards. According to the RTI Rating, an internationally renowned methodology for assessing the strength of right to information (RTI) legislation, Quebec ranks 10th among Canada's 14 jurisdictions, with a score that puts their legal framework behind Rwanda and South Korea and only just ahead of Mongolia.

In the aftermath of Quebec's most recent election in 2014, the incoming Premier, Philippe Couillard, promised an era of unprecedented transparency. We welcome this commitment, but experience across other Canadian jurisdictions has taught us to be wary. It is easy for political leaders to voice support for transparency, but backing words up with real change is another matter.

The current proposals for reform, as spelled out in the document *Pour un gouvernement plus transparent, dans le respect du droit à la vie privée et la protection des renseignements personnels* (the Proposals) would, if put into effect, be a significant step forward. However, more needs to be done if Quebec is to put in place an effective and modern RTI system.

The Centre for Law and Democracy prepared an in-depth analysis of Quebec's RTI Act in 2013 and it has now analysed the current set of Proposals. In addition to implementing the Proposals, some of the key areas where further reform is needed are as follows:

- The external benefits of transparency should be noted in the law and then the law should be required to be interpreted so as best to give effect to those benefits.
- The law should apply to all information held by or which can relatively easily be compiled by public bodies.
- Effective measures should be put in place to promote compliance by public bodies with the timelines in the law and the fees for providing information should be reduced.
- The regime of exceptions should be reviewed and amended to bring it fully into line with Orientation No. 6, which calls for all exceptions to be strictly harm-based.
- The law should include a broad public interest override which provides for all exceptions to be overridden whenever this is in the overall public interest, broadly defined.
- Exceptions which are overbroad or simply unnecessary should be reviewed and repealed or amended as necessary.
- The oversight body, the Commission d'accès à l'information (CAI), should retain its current adjudicative function.

Introduction¹

This Submission was prepared in response to a set of policy proposals – *Pour un gouvernement plus transparent, dans le respect du droit à la vie privée et la protection des renseignements personnels* – (the Proposals) tabled by the Quebec Minister responsible for Access to Information and the Reform of Democratic Institutions, Jean-Marc Fournier. The objective of the Proposals, which include 31 specific recommendations or Orientations, is to reform Quebec's Act on Access to Documents held by Public Authorities and the Protection of Personal Information (the Act). The Submission was drafted by the Centre for Law and Democracy (CLD), an international human rights organisation based in Halifax, Nova Scotia, which provides expert legal services and advice on foundational rights for democracy (see www.law-democracy.org).

There can be little doubt about the need for reform. The importance of the right to access information held by public bodies, or the right to information, is well established. An effective right to information law is key to preventing corruption as well as other forms of mismanagement in the public sector. As Louis Brandeis, an eminent jurist from the United States, once noted: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."² Quebec's struggles with corruption have been widely documented. Due to its overriding importance, the right to information is recognised as a human right under international law.³ The Supreme Court of Canada has recognised the right to access information held by public bodies as a constitutional right, based on the right to freedom of expression.⁴

It is also well established that the right to information system in Quebec is in serious need of reform. The RTI Rating is a globally recognised analytical tool developed by CLD and Access Info Europe (AIE) which measures the strength of legal frameworks for RTI against established international standards and better national practice around the world. The RTI Rating assigns scores to a legal framework based on performance across 61 Indicators grouped into seven categories, with a possible maximum score of 150 points. The RTI Rating is applied on an ongoing basis to every national-level RTI law globally.⁵

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² Louis Brandeis, "What Publicity Can Do", *Harper's Weekly*, 20 December 1913. Available at: www.law.louisville.edu/library/collections/brandeis/node/196.

³ See leading decisions on this: *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights) and *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05 (European Court of Human Rights). See also the UN Human Rights Committee's 2011 General comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), 12 September 2011, CCPR/C/GC/34, para. 18. Article 19 is the one in the ICCPR which guarantees freedom of expression.

⁴ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

⁵ See www.rti-rating.org/.

In 2012, CLD carried out an assessment of the legal framework for RTI in Quebec and other Canadian jurisdictions using the RTI Rating, which revealed significant problems in every Canadian jurisdiction.⁶ However, even when measured against the weak performance within Canada, Quebec's system is notably deficient, ranking 10th amongst the 14 Canadian RTI regimes (at the federal, provincial and territorial levels), with a score of just 81 points, or 54% of the possible maximum. When compared to countries around the world, the Quebec Act also fares very poorly, specifically ranking in 58th place globally from among the 102 laws which have been assessed.⁷ Although Canadian jurisdictions have traditionally done poorly on the RTI Rating, signs of change are starting to emerge. Earlier this year, Newfoundland and Labrador introduced major reforms to their access to information act, which now scores 111 points on the RTI Rating, easily putting it in top position within Canada and in 15th place globally.⁸

The RTI Rating only measures the legal framework for RTI and not how it is implemented, but evidence suggests that implementation is equally problematic in Quebec. In its annual review of public bodies' performance in responding to access to information requests, the *National Freedom of Information Audit* gave Quebec's provincial bodies an 'F' on both the speed of disclosure and on the completeness of disclosure.⁹

In short, there is a pressing need for major reform of Quebec's right to information framework. In 2013, Quebec's Committee on Institutions held a general consultation on the Act, as well as its implementation and the general legal framework for ensuring government transparency in Quebec. CLD prepared a Submission at that time which identified several weaknesses in the Act, including an unduly broad regime of exceptions, the absence of a public interest test for releasing information, excessive fees and limits on the oversight body's powers and mandate.¹⁰ CLD also sent a representative to present our recommendations to the Committee of the National Assembly reviewing the law.

It appears that Quebec's government is now committed to substantial RTI reform. Following his election as Premier, Philippe Couillard pledged to create "the most transparent government that Quebec has ever seen."¹¹ In March, the government issued the Proposals, which put forward wide-ranging ideas for revamping the RTI law. We welcome the Quebec government's commitment to move forward on this vital issue. At the same time, the Proposals, while putting forward many important ideas for improvement, fail to correct a number of substantial problems with the Act.

⁶ The full results are available at www.law-democracy.org/live/global-rti-rating/canadian-rti-rating.

⁷ See: <http://www.rti-rating.org/country-data>.

⁸ See <http://www.law-democracy.org/live/newfoundland-and-labrador-enacts-canadas-best-access-law/>.

⁹ Canadian Newspaper Association, *National Freedom of Information Audit 2013-2014* (2014). Available at: <http://www.newspaperscanada.ca/public-affairs/FOI2013-14>.

¹⁰ See <http://www.law-democracy.org/live/canada-serious-problems-in-quebecs-openness-law/>.

¹¹ CBC News, "Philippe Couillard pledges transparency, integrity", 8 April 2014. Available at: <http://www.cbc.ca/news/canada/montreal/quebec-votes-2014/philippe-couillard-pledges-transparency-integrity-1.2602822>.

This Submission outlines the major problems with Quebec's Act from the perspective of international standards, discusses the ideas set out in the Proposals and makes recommendations for further reform of the Act. The recommendations are based on an assumption that the Proposals being put forward will be accepted (i.e. they build on the Proposals, rather than the existing Act). Where we believe more is needed than is included in the Proposals, the recommendations address that. Where we do not support the Proposals, the recommendations indicate that. CLD has prepared this Submission with a view to assisting the Quebec government to put forward legislative proposals which are as fully in line as possible with international human rights standards in this area, in order to provide for a robust right to information in Quebec in line with its constitutional and international obligations.

1. Recognition of the Right to Information

In recognition of its importance and the fact that it is a human right, a strong right to information law should establish a clear presumption in favour of access to all information held by public bodies, subject only to limited exceptions. It should also recognise the benefits of the right to information and require its provisions to be interpreted in a manner that best gives effect to those benefits. Quebec's current Act fails to do any of these things.

The Proposals, in Orientation No. 1, recommend some important improvements here, including substantive additions to note that the right of access is grounded in principles of transparency, protection of private data and a free and democratic society. The Proposals would also add new objects to the Act, including that everyone enjoys a right of access, that exceptions are to be limited, that the oversight authority should be independent, that personal data should be protected and recognising an individual right of access.

These are positive and significant steps forward. At the same time, the proposed principles and objects are mainly 'internal' in nature, inasmuch as they refer to the way in which the system of access will work. It is also important to refer to the external benefits of the right of access, including democracy (already mentioned as the first principle) but also combating corruption, facilitating participation, enhancing accountability and so on.

Orientation No. 5 proposes some important rules of interpretation, namely that exceptions should be interpreted in a limited manner, that there must be a clear link with an exception in the law before access may be refused and that the harm from disclosure should be concrete, not simply theoretical. These are very welcome and important. However, it is also important to provide a link between the approach to interpretation and the statement of external benefits of the law. This can, for example, be particularly important in relation to assessing whether information should be released in the overall public interest.

Recommendations:

- The list of principles and objects of the RTI law should refer to a wider range of

- external benefits of transparency.
- The rules of interpretation should be expanded to require the law to be interpreted in the manner that best gives effect to its principles and objects.

2. Proactive Publication

An important thrust of the Proposals is to expand the scope of proactive publication in various ways, including by establishing proactive publication as the dominant approach towards openness, by expanding the specific categories of information subject to proactive disclosure and by expanding the range of bodies that are subject to proactive disclosure obligations. The Proposals also call for standardising the manner in which information is to be made available in order to render it more legible and easily accessible, and for putting in place specific institutional structures to promote proactive disclosure. These proposals are very welcome and are very much in line with modern trends regarding openness.

At the same time, it is of the greatest importance that, when it comes to implementation, proactive disclosure does not receive a disproportionate amount of attention to the detriment of responsive or request-driven transparency. Unfortunately, this has been something of a tendency in many Western countries, driven in part by a focus on open data and its economic potential. This also appears to be a risk associated with the Proposals. For example, Orientations No. 3 and 28 refer to the publication of a five-year review of implementation of the Law and its regulations, but they seem to focus far more on proactive disclosure than on other aspects of implementation.

3. Scope

According to international standards, the right to information should apply to all information held by any public body. This includes information held by the executive, legislative and judicial branches of government, crown corporations, constitutional, statutory and oversight bodies, and any other body which is owned, controlled or substantially funded by a public body, or which performs a statutory or public function.

Currently, the Act extends obligations of openness to the government, the Conseil exécutif, the Conseil du Trésor, government departments and agencies, health and social service institutions, the Lieutenant-Governor, the National Assembly, agencies whose members are appointed by the National Assembly, and every person designated by the Assembly to an office under its jurisdiction or under its supervision. However, section 34 of the Act grants ministers' offices, municipal bodies and offices of National Assembly members the right to refuse to respond to requests if they do not feel releasing the information would be expedient.

Orientation No. 7 would modify these provisions to limit the scope of section 34 both in terms of the individuals and bodies it covers and by excluding documents prepared for those individuals and bodies by administrative staff (albeit with some exceptions), while documents prepared by political staff would remain subject to the expediency rule. Although this is a step in the right direction, ultimately it does not go far enough. The distinction between political and administrative staff is at best unclear, so that officials will retain considerable discretionary powers to determine whether to respond to requests. Furthermore, the Act already contains ample, indeed excessive, exceptions to protect internal deliberative documents and advice – notably in sections 29.1, 30, 33(6) and 35 – so that the type of exclusion envisaged by section 34 is simply unnecessary.

Orientation No. 11 would expand the application of the Act to corporations which are entirely owned by the State, and promote clarity by requiring the responsible minister to publish a list of all bodies covered by the Act. This is, once again, too limited. Any company which is controlled by a public body, even if it is not entirely owned by that body, should be subject to the Act. Control is normally present where ownership exceeds 50% and is often effectively present at much lower levels of ownership.

The Proposals fail to address certain other problems with the Act. One is that section 1 of the Act limits its scope to documents kept by a public body “in the exercise of its duties”. There is no need for such a qualification of the right of access, which simply creates an unfortunate discretionary power for officials to refuse to disclose information. That fact that public bodies hold information should create a sufficient presumption that it is related to their duties. Furthermore, section 9 specifically excludes personal notes written on a document, sketches, outlines, drafts, preliminary notes and “other documents of similar nature”. According to international standards, the right to information should apply to all information held or produced by a public body. While personal notes can sometimes legitimately be withheld on grounds of privacy or internal decision-making, this should be done through the application of the regime of exceptions rather than a categorical exclusion along the lines of section 9.

The Proposals also fail to address the problems with section 15 of the Act, which states that public bodies do not have to disclose information where this would require “computation or comparison”. Although it is understood that public bodies have limited resources, international standards mandate that they should be required to undertake reasonable processing of documents so as to be able to satisfy requests. As it currently stands, section 15 would allow public bodies to refuse a request even where the information could be generated in minutes through a simple, automated computer procedure.

Recommendations:

- Section 34, which grants discretion to refuse to respond to requests on grounds of expediency, should be removed entirely from the law.
- The Act should be extended to include all corporations which are controlled by public bodies.

- The right of access to information should apply to all information produced or held by public bodies, regardless of the reasons that it is being held.
- Section 15 should be amended to require public bodies to undertake a reasonable amount of computation or comparison to respond to requests.

4. Requesting Procedures

A very welcome suggestion, in Orientation No. 31, is the idea of introducing a central, online portal for making requests for information. This has the potential to alleviate many of the procedural barriers to making requests for applicants, as well as to facilitate the process for public bodies and to make it easier to track and report on requests.

Under the current system, however, response times for information requests is a problem in every jurisdiction in Canada and it is particularly problematic in Quebec. The Act's requirement that public bodies respond to an access request within twenty working days, with a possible extension of ten days, is reasonable. However, the Act fails to require public bodies to respond to requests as soon as possible. The *National Freedom of Information Audit* suggests that Quebec's public bodies have a significant problem adhering to the legal timeframes. The provincial government took an average of 31 days to process requests while the average time for Montreal and Quebec City was 35 and 22 days, respectively.

These figures suggest that information requests are not being appropriately prioritised. An explicit aim of the Proposals is to introduce a culture of openness and transparency within public bodies and the speed of administrative responses to access requests is a significant indicator of its attitude towards disclosure. Significant efforts are required to improve timelines for response, and experience in other jurisdictions suggests that a carrot and stick approach is most likely to be effective here. Carrots could include better training for officials and devoting more resources to responding to requests. Sticks that have been used in other jurisdictions include depriving public bodies of the right to charge for requests where they fail to respect the legal time limits (Uruguay and Guatemala) and requiring permission from the oversight body (the Information Commission) to refuse to grant access where timelines have not been respected (Mexico).

A related problem is in the costs of obtaining information. Although the Act does not allow a fee to be charged for filing access requests, it allows for disproportionate charges to be levied for many other services relating to the completion of requests, such as charging \$0.38 for a photocopy, \$15.25 for a diskette and so on. These fees are not in line with the actual and direct costs incurred.

Recommendations:

- Public bodies should be required to respond to requests as soon as possible.
- Consideration should be given to putting in place both positive measures – such

as more training and resources – and remedial measures with a view to reducing the timelines for responding to requests.

- Public bodies should only be able to charge reasonable fees (i.e. based on actual and direct costs) for external costs (i.e. not including staff time) for responding to requests.

5. Exceptions

The right to information is not absolute; however, international law dictates it may only be overridden in limited and justifiable circumstances. Specifically, information should be withheld only if its disclosure would materially harm a legitimate interest, and the harm caused by the disclosure outweighs the public interest in releasing the information. This effectively leads to a three-part test for assessing the legitimacy of exceptions: (1) they should be based on narrow and legitimate interests; (2) they should extend only to information the disclosure of which would pose a serious risk of harm to those interests; and (3) they should be subject to a public interest override.

The current regime of exceptions in the Act is problematical at all three levels of the test, inasmuch as it includes exceptions which are not legitimate or sufficiently narrowly drawn, it does not impose a harm test on several exceptions and it provides for only a limited public interest override.

In terms of the harm test, several sections of the current Act – including sections 22 (industrial secrets), 23 (confidential third-party information) and 28(3) (investigative methods), as well as several of the exceptions relating to ‘internal documents’ (see below) – lack any harm test. The Proposals appear to introduce measures to address this. Orientation 4(2) would require information officers to give reasons for any refusal to disclose information, including by identifying the harm that disclosure of the information would cause. Orientation No. 6 is even more explicit, calling for consistent use of the term “likely to cause harm”, for this to be a mandatory requirement for each exception, for a clearer definition of the notion of harm and a requirement of a direct link between disclosure and harm to justify the withholding of information, and for the information officer to explain the direct link between disclosure and the risk of harm.

CLD very much welcomes these general proposals, which are fully in line with international standards. However, we also note that much needs to be done to incorporate them properly into the text of the Act and that the current regime of exceptions would need to be very carefully reviewed to ensure that every separate exception met these standards.

In terms of the public interest override, section 41.1 of the Act currently states that certain exceptions do not apply to information which reveals or confirms the existence of an immediate hazard to life, health, safety or the environment. This formulation is unduly limited inasmuch as it fails to capture many other types of public interest, such as exposing corruption or facilitating public participation. It is also unduly limited inasmuch as it does

not extend to the exceptions found in sections 28, 28.1, 29, 30, 33, 34 and 41 of the Act. As a result, information about deliberations of the Conseil executif, for example, may not be released even if it would reveal a grave threat to lives and safety. The Proposals do little to address these major structural limitations of section 41.1. Orientation No. 9 is positive inasmuch as it would reduce the burden on the requester to demonstrate a risk to the environment, but far more is needed to establish an effective public interest override.

One of the most problematical areas of exceptions in the Act, as it currently stands, relates to a package of issues connected to what may be referred to as internal or deliberative information. This includes section 30, which allows for non-disclosure of any decisions taken by the Conseil executif, one of its cabinet committees or the Conseil du Tresor. A number of other exceptions cover so-called internal documents of one sort or another. Section 29.1 exempts all information from *in camera* deliberations; section 33(6) contains a mandatory exception for deliberations of the Conseil executif or a cabinet committee; section 35 allows public bodies to refuse to disclose information relating to deliberations during board meetings, and section 31 allows for a preliminary or final draft of a bill or regulations to be withheld.

These exceptions fail to refer to any harm at all – they are what are sometimes termed class exclusions – and so it is not clear how they would be amended so as to ensure the proper application of Orientation No. 6. According to international standards, it is legitimate for public bodies to refuse to disclose information if (unduly early) disclosure would harm a policy or threaten the free and frank provision of advice (both clearly identified harms). However, information the disclosure of which would not be harmful to the decision-making process should be disclosed, and information should normally be disclosed once the deliberative process has been concluded (i.e. once a decision has been reached). The exceptions noted above should be amended to refer to a legitimate interest which needs protection and to apply only where disclosure would pose a clear risk of harm to that interest, in line with Orientation No. 6.

Section 18 excludes information received from another government, government agency or international organisation, while section 19 exempts information the disclosure of which would be detrimental to relations with another government or international organisation. While the latter includes a harm test, the former does not and is not, therefore, legitimate. Section 22 excludes information the disclosure of which “would likely hamper negotiations in view of a contract, or result in losses for the body or in considerable profit for another person”. Section 20, which also excludes information which could hamper negotiations, and section 27, which excludes strategies for collective bargaining, are both unnecessary in light of section 22.

Section 31, dealing with legal opinions, is also problematic. Public bodies do not require the same degree of solicitor-client privilege as private individuals. Privilege exists to allow lawyers to plan their strategies for upcoming litigation (litigation privilege) and to promote candour and disclosure between lawyers and clients. While litigation privilege is clearly necessary for government lawyers, it is neither necessary nor legitimate to render confidential all communications between public bodies and their lawyers. An important

part of those communications have nothing to do with litigation and, instead, involve advice about policy or other normal operations of government. There is no warrant for applying different standards of disclosure to these conversations than to any other official deliberations, although such communications might, in appropriate cases, be protected by exceptions relating to negotiations, frank advice or policy development. Section 31, which allows for the refusal to disclose legal opinions concerning the application of the law to a particular issue, or the constitutionality or validity of legislative or regulatory provisions, is therefore unnecessary. Section 32, which applies to information which may impact on the outcome of judicial proceedings, should be limited to information which would ordinarily be covered by litigation privilege.

Orientation No. 8 would place limitations – both substantive and procedural – on the power to refuse to disclose commercially sensitive information provided by third parties, and is to that extent welcome. However, the main problem with the exception found at section 23 is that it lacks a harm test, and instead applies whenever a third party has treated information as confidential (the test for which would become stricter in accordance with Orientation No. 8). Better practice in this area, as well as proper application of Orientation No. 6, would require the insertion into this exception of a harm test, such as found in section 24, which requires the disclosure to harm the competitive position of the third party. Indeed, it is unclear why section 23 is needed at all given the presence of section 24.

Sections 21, 28, 28.1, 29, 29.1, 30, 30.1, 41, 86 and 87 allow public bodies to refuse to confirm or deny the existence of certain categories of otherwise exempt information. This should apply only where the mere confirmation or denial of the existence of the information would itself harm a protected interest. The Act fails to place that limitation on this exception.

Orientation No. 10 would reduce the overall time limit on secrecy for certain documents (i.e. the sunset clauses). This is welcome, and is also in line with global trends in this area. However, it is also important to extend the application of sunset clauses so as to cover all of the exceptions in the Act which protect public interests, which is not presently the case.

Recommendations:

- Careful thought needs to be given as to how to transform Orientation No. 6 from a statement of principle to an operative rule, i.e. as to how to give it proper effect in relation to all of the exceptions in the Act.
- Section 41.1 should be amended to transform it into a broad public interest override, applying to all exceptions and requiring the disclosure of information whenever the overall public interest, regardless of the specific nature of that interest, outweighs the secrecy interest.
- The ‘internal documents’ exceptions found at sections 29.1, 30, 31, 33(6) and 35 should either be removed entirely or narrowed down so that they protect only legitimate interests against harm and only for so long as disclosure would pose a risk of harm (which would often not be the case after a final decision had been

- reached in the matter).
- Sections 18, 20, 27 and 31 are unnecessary and should be deleted.
 - Section 32 should be limited in scope to legal proceedings to which the government is a party and to information which is part of the public body's litigation strategy.
 - Sections 21, 28, 28.1, 29, 29.1, 30.1, 41, 86 and 87 should be limited in scope to situations where merely confirming or denying whether information exists would harm a protected interest.
 - Sunset clauses should be introduced for all exceptions which protect public interests.

6. Oversight and Appeals

One of the most important factors underpinning successful implementation of an RTI law is a strong oversight body. In Quebec, the Commission d'accès à l'information (CAI) is a relatively strong body compared to other provincial oversight bodies. In our 2013 Submission, we recommend expanding its powers and mandate, including by giving it the power to require public bodies that repeatedly breach the Act to put in place appropriate structural measures to address this and to promote public awareness about the right to information, as well as to exercise oversight over training of officials on implementation of the Act.

We welcome the decision to expand the CAI's mandate in terms of promoting public awareness of the right to information. However, the Proposals fail to give the CAI a mandate to oversee the training of officials or to require public bodies to put in place the structural measures that are needed to implement the Act properly. The Proposals do make a number of other institutional recommendations to strengthen implementation, including assigning new responsibilities to deputy ministers and heads of public bodies, as well as to the responsible Minister. Careful thought needs to be given to which entity or individual is best placed to lead on which issue. There are considerable advantages to allocating a strong promotional role to the oversight body, given its dedicated professional expertise and legitimacy on RTI, as well as its independence from political forces.

Far more serious is the proposal, in Orientation No. 30, to limit the CAI to a mediation role, and to transfer its current adjudicative functions to the Quebec Administrative Tribunal. There are undoubtedly benefits to promoting mediation as a solution to RTI complaints. However, long-standing experience both within Canada and in other countries makes it perfectly clear that there is no reason why a body which plays an adjudicative role might not also undertake mediation. In the case of Indonesia, for example, the governing legislation explicitly mandates the oversight body to conduct both roles.

Experience in a large number of jurisdictions suggests that there are significant benefits to having an administrative oversight body adjudicate complaints at the initial level of appeal, as compared to the courts. The appeals process should be simple, speedy and not require a lawyer. In contrast, complainants are generally advised to retain legal counsel in cases

before the Quebec Administrative Tribunal,¹² which is likely to make the process far more costly and time consuming, placing it beyond the reach of many citizens. Furthermore, a specialised oversight body such as the CAI has the advantage of intimate knowledge of RTI issues, which the Quebec Administrative Tribunal is unlikely to provide. For these reasons, democracies and even developing countries around the world have chosen to establish administrative oversight bodies with the power to adjudicate information disputes. By proposing to move in the opposite direction, Orientation No. 30 poses a serious risk to the success of the RTI system in Quebec.

Recommendations:

- The CAI should retain its adjudicative function in relation to information disputes, in addition to playing a mediation role in these cases.
- The CAI should be able to require public bodies that repeatedly breach the Act to put in place appropriate structural measures to address the problem.
- Careful thought should be given to which bodies should undertake which particular promotional measures, taking into account the CAI's strengths in terms of its specialised expertise on RTI and independence.

Conclusion

Over the past several decades, countries around the world have embraced the right to information by adopting increasingly strong laws and putting in place robust systems to implement those laws. However, as the rest of the world has moved forward, Canada has not and its national, provincial and territorial RTI systems have stagnated. This was implicitly recognised by Minister Fournier in his Foreword to the Proposals, when he noted that this is the first major review of the Act since it was first adopted in 1982, well over thirty years ago. Quebec, with a legal framework that ranks near the bottom of all Canadian jurisdictions, in terms both of the letter of the law and the way it is implemented, is in particular need of a strong reform effort.

Newfoundland and Labrador has shown an early initiative in this area, with its recent adoption of a robust and fundamentally reformed RTI law. The current reform process is an ideal opportunity for Quebec to pick up the baton and to put in place a strong legislative framework for RTI, providing its citizens with the open government it has promised them. CLD urges the Quebec government to seize this opportunity to protect a fundamental human right and offers its assistance to this end as the process moves forward.

¹² See <http://www.fondationdubarreau.qc.ca/pdf/publication/seul-devant-tribunal-administratif-en.pdf>.



Follow-up Submission on Access to Information Reform in Quebec

September 2015

In August, the Centre for Law and Democracy (CLD) provided a Submission to the process of consultation on access to information law reform in Quebec (available at: <http://www.law-democracy.org/live/quebec-access-to-information-reform-proposals-only-a-start/>). On 3 September 2015, Toby Mendel, Executive Director of the Centre for Law and Democracy, appeared before the Commission des institutions of the Quebec National Assembly to present the CLD Submission and answer questions. During the question period, requests for follow-up material were made by some members of the Commission. This Follow-up Submission provides further material in response to those questions.

1. Examples of Laws Which Empower Oversight Bodies to Impose Structural Reforms on Public Authorities

Members of the Commission asked Mr. Mendel to provide examples of countries where the access to information law gives the oversight body (such as the information commission) the power to order public authorities to take structural measures to bring themselves into compliance with the rules in the law. India is a key example of a country which has empowered its oversight bodies, the Central and State Information Commissions, to impose structural remedies on public authorities. The power to do so arises in the context of an individual appeal arising from a request for information. In deciding such an appeal, section 19(8) of the Indian Right to Information Act, 2005, provides:

In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

- (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—
 - (i) by providing access to information, if so requested, in a particular form;
 - (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;

- (iii) by publishing certain information or categories of information;
- (iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;
- (v) by enhancing the provision of training on the right to information for its officials;
- (vi) by providing it with an annual report in compliance with clause (b) of subsection (1) of section 4;
- (b) require the public authority to compensate the complainant for any loss or other detriment suffered;
- (c) impose any of the penalties provided under this Act;
- (d) reject the application.

Some other examples of oversight bodies which have this power include:

Antigua and Barbuda: Freedom of Information Act, 2004:

Article 42(4):

In a decision pursuant to subsection (1) [on a complaint], the Commissioner may-

- (a) dismiss the application; or
- (b) require the public authority or private body to take such steps as may be necessary to bring it into compliance with its obligations pursuant to Part II.

Article 43(1):

Where Commissioner decides that a public authority has failed to comply with an obligation pursuant to Part II, the Commissioner may require the public authority to take such steps as may be necessary to bring it into compliance with its obligations under Part II, including the following-

- (a) appointing an information officer;
- (b) publishing the relevant information and categories of information;
- (c) making relevant changes to its practices in relation to the keeping, management and destruction of records, and the transfer of records to the Archives and Records Office;
- (d) enhancing the provision of training on the right to information for its officials;
- (e) providing the Commissioner with an annual report, in compliance with section 14.

Brazil: Article 16(2) of Law n. 12.527 of November 18, 2011:

After upholding the appeal, the Office of the Comptroller General [the local oversight body] shall require the organ or entity [i.e. public authority] to take the necessary steps to comply with this Law.

Maldives: Section 64(a) of the Right to Information Act, 2014:

Having examined an appeal or complaints lodged before the Information Commissioner, the matter can be settled in the following ways:

...

- (8) to order to strengthen the document management system of a specific state-office, or to order to reform relevant procedure;

Sierra Leone: Section 45(1) of the Access to Information Act, 2013:

The Commission shall, on the receipt of an application for review under section 43, as soon as is reasonably possible, and in any case not later than fifteen days after giving both the

complainant and the relevant public authority an opportunity to respond in writing, make an order–

- (a) rejecting the application; or
- (b) requiring the public authority to take such steps as may be necessary to bring it into compliance with its obligations under this Act, including–
 - (i) providing access to information;
 - (ii) providing access to information in a particular form;
 - (iii) requiring a public or private body to compensate the complainant for any loss or other detriment suffered; or
 - (iv) imposing a fine on the public authority.

2. Examples of Public Interest Overrides from Other Laws

During question period in his presentation to the Commission, Mr. Mendel was also asked about the form which public interest overrides from other countries took. Such overrides operate so that, even where information is covered by a relevant exception in the access to information law, the information shall still be disclosed when this is in the overall public interest.

Bosnia and Herzegovina: Article 8 of the Law on Freedom of Access to Information:

1. A competent authority [i.e. public authority] shall disclose the requested information, notwithstanding that it has claimed an exemption under Articles 6, 7 or 8, where to do so is justified in the public interest having regard to both any benefit and harm that may accrue from doing so.
2. In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.

Colombia: Article 21 of Law 1712 of 2014:

(2) No public authority may refuse to indicate whether a document in its possession or deny the disclosure of a document, unless the damage this will cause to the protected interest outweighs the public interest in access to information. [Spanish original: (2) Ninguna autoridad pública puede negarse a indicar si un documento obra o no en su poder o negar la divulgación de un documento, salvo que el daño causado al interés protegido sea mayor al interés público de obtener acceso a la información.]

(3) The exceptions to access to information contained in this Act do not apply in cases of violation of human rights or crimes against humanity, and in all cases the rights of the victims of such violations must be protected. [Spanish original: (3) Las excepciones de acceso a la información contenidas en la presente ley no aplican en casos de violación de derechos humanos o delitos de lesa humanidad, y en todo caso deberán protegerse los derechos de las víctimas de dichas violaciones.]

India: Section 8(2) of the Right to Information Act, 2005:

Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1) [which sets out the exceptions in the access to information law], a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Liberia: Section 4.8(c) of the Freedom of Information Act, 2010:

Exemption must be justified; not merely Claimed: A public authority or private entity may not refuse access to or disclosure of information simply by claiming it as “confidential or secret”. In order to qualify to be exempted from disclosure, it must be clearly demonstrated that:

...

- (c) The harm to be caused by the disclosure is greater than the public interest in having the information disclosed.

Maldives: Section 20(b) of the Right to Information Act, 2014:

Notwithstanding anything in any section of this Chapter [which deals with exceptions], a state-office shall disclose information upon request where larger public interest warrants the disclosure of such information rather than denial of access and where the interest protected by non-disclosure is outweighed by the interests of the larger public upon disclosure.

Mexico: Article 14(3) of the Federal Transparency and Access to Public Government Information Law (2002):

Information may not be classified [i.e. rendered secret] when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.

South Africa: Section 46 of the Promotion of Access to Information Act, 2000:

Despite any other provision of this Chapter [which deals with exceptions], the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—

- (a) the disclosure of the record would reveal evidence of—
 - (i) a substantial contravention of, or failure to comply with, the law; or
 - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

3. Examples of Better Practice Rules on Internal Exceptions

India: Section 8(1) of the Right to Information Act, 2005:

Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

...

- (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Mexico: Article 14(1) of the Federal Transparency and Access to Public Government Information Law (2002):

The following will also be considered exempted information:

...

- (vi) That which contains the opinions, recommendations or points of view that are part of a public servant's deliberative process, until that time when a final decision is adopted, which itself must be documented.

Slovenia: Article 6(1) of the Access to Public Information Act (2003):

The body shall deny the applicant access to requested information if the request relates to:

...

- 7. Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;

...

- 9. Information from the document that is in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents;

...

- 11. Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

South Africa: Section 44 of the Promotion of Access to Information Act, 2000:

(1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body—

(a) if the record contains—

- (i) an opinion, advice, report or recommendation obtained or prepared; or
- (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(b) if—

- (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

- (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if—

- (a) the disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body;

- (b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was—
 - (i) made to the person who supplied the material; and
 - (ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or
 - (c) the record contains a preliminary, working or other draft of an official of a public body.
- (3) A record may not be refused in terms of subsection (1) if the record came into existence more than 20 years before the request concerned.
- (4) A record may not be refused in terms of subsection (1) or (2) insofar as it consists of an account of, or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000.

4. Examples of Western Countries Which Include Private Bodies Which Undertake Public Functions Within the Scope of Their Laws

Croatia: Article 5.2 of the Act on the Right of Access to Information (2013):

“Public authority bodies” for the purpose of this Law, are ... legal entities performing public service, legal entities which in line with special provisions are financed partly or entirely from the state budget or budget of local and regional units of government or from public funds (taxes, contributions, etc.), as well as companies in which Republic of Croatia and local and regional units of government have separate or joint majority ownership rights;

Poland: Article 5(5) of the Act of 6 September 2001 on access to public information:

[E]ntities representing other persons or organisational units, which perform public functions or dispose of public property as well as legal persons, in which the State Treasury, units of local authority or economic or professional local authority hold dominant position in the understanding of the provisions of competition and consumer protection.

Portugal: Article 4 of Law no. 46/2007 of 24 August 2007:

1. The present Law shall apply to the following bodies and entities:
 - ...
 - g) Other bodies which engage in administrative functions or exercise public authority.
2. The provisions of the present Law shall also apply to documents held or drawn up by any body which possesses legal personality and has been created to fulfil needs of general interest that do not possess an industrial or commercial nature in a specific manner, and to which any of the following circumstances applies:
 - a) The majority of the funding for the body's activities is provided by any of the entities referred to by the previous paragraph or the present paragraph;

Serbia: Article 3 of the Law on Free Access to Information of Public Importance (2003):

In terms of this Law, a public authority body (hereinafter: public authority) shall denote notably:

- 1) A state body, territorial autonomy body, a local self-governance body, as well as an organization vested with public authority (hereinafter: state body);
- 2) A legal person founded by or funded wholly or predominantly by a state body."

South Africa: Section 1 of the Promotion of Access to Information Act, 2000:

‘public body’ means—

...

- (b) any other functionary or institution when—
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;

United Kingdom: Section 5(1) of the Freedom of Information Act, 2000:

The Secretary of State may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—

- (a) appears to the Secretary of State to exercise functions of a public nature, or
- (b) is providing under a contract made with a public authority any service whose provision is a function of that authority.