

Mr Bernard G Fournier
Clerk of the Committee
Standing Committee on Access to Information, Privacy and Ethics (ETHI)
Room 605, 180 Wellington
House of Commons
Ottawa, ON K1A 0A6
Canada

20 October 2005

Dear Mr Fournier,

Re: Recommendations for amending the Access to Information Act 1983

I am writing from CHRI, an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people in the Commonwealth. CHRI's Right to Information programme assists Commonwealth member states to develop strong right to information (RTI) laws and to implement them effectively.

I understand that on 25 October 2005, the House Committee on Access to Information will consider a new Access to Information Bill drafted by Information Commissioner John Reid. It is very encouraging that your Committee is looking at ways of improving the Canadian national regime for accessing information. The legislation is over 20 years old and amendments are overdue to bring the law into line with developments internationally which have seen the broadening of the right to information to ensure that more people can access more information from public and private bodies which impact their lives.

Noting that your committee will likely make recommendations to Parliament for improvement of the Act, I would like to take the opportunity to submit a number of suggestions to your Committee for strengthening the national Access to Information Act to ensure that it more effectively promotes open governance, accountability and greater public participation in the democratic processes of the government.

At the outset, CHRI wishes to endorse the recommendations of the 2000 ATI Taskforce as well as to encourage the Committee to consider the recommendations in the 2005 Government Discussion Paper on ATI Reform. The Act needs to be reviewed comprehensively, and both of these papers capture some key revisions which should be incorporated into the Act. Additionally, I would like to draw certain key issues to your attention which CHRI believes would particularly improve the Act's effectiveness in promoting transparency and accountability and bring it into line with international best practice:

- **Broaden coverage:** The Act is very limited in terms of the bodies it covers. While this is understandable considering the time when the Act was passed, these days access laws are much broader in scope and cover a much wider range of bodies, In particular, no arm of Government is excluded – traditional assumptions that the Executive (historically, the monarchy) are above the law are no longer considered appropriate in a modern democracy. In addition, in recognition of the fact that governments are increasingly outsourcing key government functions to private bodies, and in keeping with the push for greater corporate social responsibility, an increasing number of access laws are making private bodies subject to disclosure requirements as well. In this context, we urge the Committee to consider recommending widening coverage of the Act to:
 - Include Parliament and officers of Parliament, such as Ministers, MPs and their advisors (see the recommendations in the 2005 Government Discussion Paper on ATI Reform), and the offices of the Auditor-General, the Access to Information Commissioner, the Privacy Commissioner and the Official Languages Commissioner;
 - Include all Crown Corporations, as there is no logical justifications for their exclusion;
 - Include private and non-government organisations that receive substantial federal funding, at least to the extent of information related to activities supported by those funds. It is hoped that this recommendation will address the current problem whereby some government bodies are setting up private trusts to undertake certain government functions specifically to avoid the disclosure obligations under the Act;
 - Include private bodies that provide essential public services, at least in relation to those services;
 - Include private bodies where the information requested is necessary for the exercise or protection of a right. Although this may be considered a radical provision, in fact Part 3 of the South African *Promotion of Access to Information 2000* includes such coverage, in recognition of the major impact the many private bodies have on the rights of ordinary citizens;

- **Narrow the exemptions:** it is important to note that while it is well-accepted that there can be a small number of legitimate exemptions in any access regime, exemptions should be kept to an absolute minimum and should be narrowly drawn. They should also all include a harm test – that is, they must require that some actual harm would be likely to occur to some legitimate interest before withholding a document can be justified.

- In keeping with the recommendations in the 2005 Government Discussion Paper on ATI Reform, the entire regime of protection for Cabinet confidences should be reviewed and narrowed considerably. Although the Cabinet is an important decision-making hub, the fact remains that information about the policy and decision-making processes of Government - particularly the highest forum of Government - is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive (in which case it will be protect by another exemption). It is not enough to argue that disclosure would inhibit internal discussions. All officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process.

Of course, it will generally not be appropriate to disclose advice *prior* to a decision being reached. In this context, protection should be provided for “premature disclosure which could frustrate the success of a policy or substantially prejudice the decision-making process”. At the very least, background information which is purely factual should be separated from Cabinet documents and disclosed.

- Make it explicit that confidentiality provisions in other legislations/statutes cannot override the Access to Information Act and require that, within 2 years, the Government reviews all legislation to identify provisions which conflict with the Act and develops a timetable for amending or repealing such provisions. International practice supports the approach that an access law should contain a comprehensive set of protections of government information.

- **Strengthen the Office of the Information Commissioner:** As recommended by the 2000 ATI Task Force, the mandate of the Office of the Information Commissioner should be expanded considerably (see the Task Force report for more). Most importantly, the Commission should be given the power to make binding decisions which will enable it to compel disclosure from bodies covered by the Act. It is VERY unusual for an Information Commission to be empowered to provide recommendations only; this strongly undermines the strength of the Commissioner. If, at the end of the day, public authorities can simply ignore the Commissioner’s recommendations, the entire access regime is weakened.

- **Speeding up the appeals process:** The Information Commission should be made to issue reports within no more than 90 days to complainants, who should be allowed recourse to a Federal Court review if they are dissatisfied with the decision made on appeal. This is an essential amendment because one of the most important features of the Office of the Information Commissioner is that it operates as a speedy alternative to slow court

processes. Ninety days, in any case, is longer than many other regimes permit.

- **Easy Access:** The process of requesting access to information must be made more user friendly for the public. More specifically, institutions should be duty-bound to assist requestors in making their information requests. There needs to be more clarity and consistency in the procedures and Rules followed in processing a request. This is required to help foster better consistency in terms of whether information should be disclosed and, if it is, what information should be provided.
- **Tracking decisions and disclosures:** In order to streamline the access system, the Act should be amended to require the Government should maintain a database of public authorities' decisions on information requests and a public register disclosing what information has been released. These tools will assist individuals when making requests and will empower the public to monitor disclosure. Information officers that fail to register their decisions should be made liable to a penalty. Such data collection and registers, if properly analysed, will also help the Government to build up a database of precedents, which could help improve the consistency of both public official and Information Commissioner's decision-making. It could also be a mechanism for assessing whether certain public authorities are more prone to secrecy than others.
- **Increasing proactive disclosure:** By keeping better registers of requests and disclosure, the Government could also better assess what types of information are being regularly requested and could use this knowledge to compulsorily require more proactive publication of key documents. This practice is followed in Scotland where information requested by an individual but considered to be in the public interest is disclosed on-line. In any case, consideration should be given to extending the proactive disclosure requirements in the law, perhaps along the lines of Trinidad and Tobago, Mexico or India, all of which publish a comprehensive range of information in an effort to reduce the burden on officials to process individual requests.
- **Training and support:** The Public Service needs to be made more aware about the benefits of the Act, not only for making governance more transparent and accountable but also for improving government processes and record management systems. These days, many access Acts include specific provisions requiring the Government to undertake training for public servants, as well as public education programmes. South Africa provides a good model, and more recently the new Indian *Right to Information Act 2005* has included training and promotion provisions in the body of the legislation. It is hoped that by enshrining this requirement in law, the Government will allocate dedicated funds to such activities.

I would note for your information that CHRI has been working on RTI issues in the Commonwealth for more than eight years, during which we have accumulated considerable best practice expertise in terms of legal drafting and implementation. This was collected in our 2003 publication, "Open Sesame: looking for the Right to Information in the Commonwealth", a copy of which is enclosed for your information. I have also enclosed a copy of a comparative table of national access regimes across the Commonwealth prepared by CHRI.

I hope the above suggestions prove helpful in your review of the Access to Information Act and in any move to propose amendments to the Parliament. Please feel free to contact me by email at majadhun@vsnl.com or Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme at charmaine@humanrightsinitiative, or telephone on +91 11 2685 0523 or +91 9810 199 754, if you require further expertise and services of our RTI team.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Maja Daruwala', with a horizontal line underneath the name.

Maja Daruwala
Director