Submission To the House of Commons Standing Committee on Access to Information, Privacy and Ethics on moving ahead with new Transparency Legislation

ReMaking and RePlacing the Antiquated Limited Broken Access to Information Act

Ken Rubin.ca **April 2016**

Canada needs to embrace transparency legislation that is bold. For too long, Ottawa's antiquated and dysfunctional 1982 Access to Information Act has blocked fuller transparency and encouraged secrecy practices. The right to access should not be hindered by barriers that include lengthy delays, high fees, creative avoidance and multi exemptions and exclusions. Governments and information commissioners to date unfortunately have sought housekeeping and quick fix changes that do not abandon the culture of secrecy.

The best way to move forward is with a comprehensive bill for open government that brings together several transparency measures. That's because better access to government information alone will not bring about transparency or a culture of openness without a combination of measures to create more effective means for greater public disclosure.

In other jurisdictions like New York state, for instance, they combine transparency measures such as a "sunshine" open meeting component with record disclosure in their information laws to make disclosure more effective. Other countries like Mexico have shown the way in law by designating specified categories for pro-active disclosure that go beyond digital data banks and traditional access to fewer and fewer records. Brazil incorporated inquiries into "historic truths" side by side with its transparency legislation. Sweden is one country with a long tradition in transparency who has successfully combined freedom of the press and protection against censorship with access to public records in companion legislation. New Zealand, a parliamentary democracy, treats access to cabinet records more as an invitation to open government at work rather than as the centre cornerstone of a culture of secrecy.

So Canada must catch up and toughen and expand its right to know legislation and become a leader.

Central to this substantial effort is the creation of a pro-active disclosure code and transparency agreements with the purpose of guaranteeing information rights, freedom of expression, and freedom to participate. The key ingredients for this to happen are:

. a clear purpose clause The sole purpose of a newly created Right to Know Act is to enhance freedom of expression and maximize disclosure and accountability. This elaborates on an essential part of the Canadian Charter of Rights and Freedoms. The existing Access to Information Act's emphasis on secrecy goals ("necessary exceptions to the right of access should be limited and specific") needs to be dropped.

. a pro-active disclosure code A pro-active disclosure code would create a legal mandatory obligation, making data on public monies, health, safety, environmental and consumer matters widely available via the Internet in a digital machine readable usable format on a regular and instantaneous basis. The code would set out the operative principles: right to transparency and broad access, right to proactive service for access, right to wide coverage, right to effective decision record keeping and retrieval, right to

independent review. Fair disclosure practices include a prior understanding that data submitted or gathered, save private personal information, is subject to access disclosure provisions.

Under this code, proactive disclosure will no longer be limited to a few selective administrative records. Simply belatedly posting on government web sites limited information about some senior officials' travel costs is, for example, insufficient.

. pro-active disclosure agreements Governments and corporations would put in place agreements to actively disclose their information and explain their actions consistent with the code. It would mean enacting federal, provincial and international information disclosures codes. Pro-active disclosure would as well become an integral section in all legislative bills.

. wide public and private sector coverage A pro-active disclosure code system would enable much broader private as well as public sector coverage. No public monies would go to those private agencies receiving federal benefits, or to those organizations carrying out public functions that do not have disclosure service agreements. Coverage would include the Prime Minister, PMO, Cabinet, Ministers and Parliament. No corporate third parties would have special veto powers to object to disclosure.

. wide record coverage Available records from institutions would include procurement, budget, infrastructure, government operations, and safety and health data. Restrictions would be removed on accessible machine readable records.

The means to achieve broader disclosure have to include:

. open meeting requirements Effective public entry to the decision-making meetings of boards and commissions should be required instead of the real business being done behind closed doors.

. early public policy notification and participation requirements Nothing helps transparency more than involving the public early on and ensuring that public participation and consultations are more than token.

. duty to proactively electronically publish and publicize A transparency system needs reliable connectivity to the Internet where institutional data is transmitted and set out. Effective education is needed about the availability of pro-active disclosures.

. independent budget and legislative reporting officers Having an independent parliamentary budget officer provides a fuller picture of financial costs and projections ensuring that parliament and the public are better served. In addition, a new parliamentary legislative officer would make public analyses of ever increasing complex legislative proposals available to parliament and the public.

The administrative tools an effective disclosure system needs are:

. duty to document No transparency and accountability system can survive without up-to-date and immediate retrieval of information as well as a responsive management and effective information management system. What needs to be preserved and documented are decisions and their background, day to day operations, and matters of significant public interest.

. duty to investigate There needs to be a triggering mechanism that allows public inquiries to be initiated to gather and uncover affairs of significant public interest. These include matters of food safety, climate change, aboriginal rights/disparities, healthcare, corporate and government waste. Just as the Truth and Reconciliation Commission sought out information on residential schools and various inquiries sought out data and reported, Canada's transparency act would have an embedded public inquiry mechanism that gets at the truth through investigation, documentation and public reporting.

. duty to assist and service Often overlooked is the necessity of pro-active service and interaction. Instead of codes of silence and public relations, enforceable codes of service and disclosure are required.

. quick inexpensive access to government and corporate information There should be no fees and prompt service. Data needs to be releasable immediately and pro-active disclosure agreements should eliminate the need for lengthy consultations and time extensions.

. an arms-length public access authority An administration agency is needed whose prime goal is to encourage getting answers and releasing information, not to tangle it up or deny it.

. broader information commission mandate and binding powers Broader commission powers are required to ensure that records are created and quickly retrievable and released, access to meetings is granted, whistle blowing data is not hidden and that agencies meet their obligations to provide disclosure. The information commissioner must promptly undertake mediation where appeals are received and failing that proceed to inquiries with the power to issue binding orders and be prepared to if necessary to go to higher courts should orders not be honoured. A strengthened commissioner would also have an audit and education mandate and assist institutions and groups to set up and maintain disclosure practices. The commission will also assess the implications of existing and proposed legislation in terms of access/accountability and review information keeping for effective retrieval.

. independent priority court review The courts can perform an even broader role protecting the rights of disclosure and freedom of expression and prompt and affordable access to justice.

. penalties for altering, withholding and distorting records Disclosure agreements need a system of incentives, enforcement and penalties. Tougher sanctions for non-compliance include deterrent fines and jail terms.

In order for transparency to grow and thrive, further oversight, assistance and protection are needed, including:

. permanent parliamentary oversight Parliament must be vigilant in its promotion of legislation with transparency clauses, re-examine the many secrecy provisions in federal acts, assist parliament to pass legislation that expands access and transparency, and regularly review the right to know legislation.

. intervention assistance Those members of the public with fewer resources need to have the means and support to challenge secrecy practices.

. protection of an accessible, open and neutral internet and telecommunications and of an

independent media The mediums of the internet and telecommunications and an independent media help make public interaction and discourse possible so fuller transparency and freedom of expression can be facilitated. Censorship, publication bans, interfering with net neutrality, preventing full interactive communications must be severely restricted so as to not compromise freedom of expression and transparency.

. whistle blowing protection Strengthening public and private sector whistle blowing protection fits well in a broader transparency and accountability bill. Whistle blowers need firm protection if they release spending and safety and health information publicly after trying from the inside to do so.

Elevating exceptions to disclosure as a one of the "principle" purposes of transparency legislation helps perpetuate a culture of secrecy and information "by default".

The top-down secrecy approach that places recent cabinet records out of the reach of Canadians and hides policy options and on-going work as advice must end. Gone are the many sweeping special interest secrecy claims like policy advice and lengthy exclusions of cabinet records.

A mandatory general public interest override would apply to the few remaining narrower exemptions for private personal information, national security, trade secrets, unannounced monetary decisions, uncompleted criminal law investigations, and certain cabinet records. Narrowing the application of exempt areas also means greatly reducing the time periods for protection and applying significant injury tests and eliminating secrecy overrides in other legislation.

Concluding Remarks

No one disputes that the Access to Information Act is broken but there is a great divide in what steps be taken. The Liberal government now says it will not put before the public its promised legislation until 2018 and claims it can introduce order making power changes before then but keeps the prime focus of exemptions and exclusions in place. The current information commissioner follows a well-worn path of limited administrative changes that will not result in fixing the legal secrecy framework and practices entrenched in Ottawa.

A basic change in attitude and political will is required that places information rights, freedom of expression, and freedom to participate as paramount. What is not wanted is more default and delay systems, codes for silent conduct and superficial chat dialogues. There should be no confusion with open data sets as the equivalent of giving Canadians the right to know how its government operates.

What legislators thirty-four years later need to address in a non-partisan way is that disclosure becomes the norm and is no longer a consolation prize secondary to the many entrenched secrecy claims of special interests. Starting with cabinet and senior officials, their privileges can no longer be by law sacrosanct and closed off "confidences".

Canadians need more than access to public records: they need mechanisms to finally create a public disclosure atmosphere that rejects fear, avoidance, deception and secrecy.

Canadian legislators should not be lulled into doing very little on transparency reform and must significantly roll back government delays and denials and put forward bold multi-transparency initiatives.

Ken Rubin