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Submission to the Standing Committee of the House of Commons on Access to Information, Privacy and Ethics for its Study of the State of Access to Information in Canada

Key Changes Needed to Make the Federal *Access to Information Act*, Enforcement and Operation of the Federal Open Government System Effective

(February 12, 2026)

Democracy Watch calls on all federal political parties to work together, finally after more than 40 years, to enact the 17 key changes set out below to make the federal *Access to Information Act (ATIA)* an effective open government law, and to make enforcement of the *ATIA* independent, timely, transparent, effective and accountable, and to ensure adequate training and resources to ensure the federal open government system operates effectively.

These 17 key changes are based in part upon annual reports that the federal Information Commissioner has issued over the past several years, each highlighting how loopholes, and abuse of the loopholes, by many federal government institutions undermine the public's right to know. Those annual reports can be seen at: <https://www.oic-ci.gc.ca/en/resources/reports-publications>. The 17 key changes are also based on the reports that the former federal Information Commissioner, and the current Information Commissioner, have issued containing more detailed recommendations, especially calling for changes to convert all exclusions in the *ATIA* into exemptions, and to narrow the scope of all exemptions and limit them with a proof of harm test and a public interest override.¹

¹ Caroline Maynard, "Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime," (January 2021) Office of the Information Commissioner of Canada, online: <https://www.oic-ci.gc.ca/en/resources/reports-publications/observations-and-recommendations-information-commissioner-review>. Suzanne Legault, "Striking the Right Balance for Transparency, Recommendations to modernize the Access to Information Act," (March 2015) Office of the Information Commissioner of Canada, online: <https://www.oic-ci.gc.ca/en/resources/reports-publications/striking-right-balance-transparency>.

The list of 17 key changes is also based in part upon House of Commons Access to Information, Privacy and Ethics Committee's June 2016 unanimous report calling for several key changes to close loopholes and strengthen access rights and enforcement of the *ATIA*. That report can be seen at:

<https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/>.

The list of 17 key changes is also based in part on the Government of Canada's interim report on its public consultation on the *ATIA*, which was conducted in spring-summer 2021. The report made it clear that most stakeholders called for 10 changes that are incorporated into the list of 17 key changes set out below. The report can be seen at:

<https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/reviewing-access-information/the-review-process/ati-review-interim-what-we-heard-report.html>.

However, more changes are needed than have been recommended in all of the above reports, especially to ensure the enforcement system is fully independent of the Cabinet, fully resourced, timely, transparent, effective and accountable, and to ensure training of all public and government officials concerning how to create and maintain records to ensure the public's right to know is always respected and upheld, and to ensure penalties for violations of the *ATIA* (as it has become very clear that a main reason the *ATIA* is routinely and regularly violated because there are no penalties for violations).

A. Key Changes Needed to Ensure the *Access to Information Act* Requires Timely, Low-Cost Disclosure of Information the Public Has a Right to Know

1. The *Access to Information Act (ATIA)* should be changed to cover fully every "public institution" – meaning any entity which forms part of any branch of government, or which is established by or under the *Constitution* or a statute, or which is owned or controlled by another public institution, or has core operations substantially financed by a public institution, or which carries out a statutory or public function.
2. The *ATIA* should be changed to require every public institution to create detailed records of the process and reasons for all decisions and actions taken, including background factual and policy research (i.e. there must be a duty to document), and to retain and maintain those records, no matter how the records are created and no matter what type of device the records are created on, to ensure the public has access to the full record of each decision and action.
3. The *ATIA* should be changed to require every public institution to disclose records that are likely to be of public interest routinely and regularly, including online in a searchable database and in a machine-readable format.

4. The *ATIA* should be changed to require public institutions to respond to access requests “as soon as possible”. An extension of the 30-day initial time limit for responding should require the permission of the Information Commissioner and should be limited to a maximum of an additional 60 days.
5. The exceptions to the right of access in the *ATIA* should be clearly and narrowly defined and limited to the areas in which secrecy is required in the public interest. In particular:
 - a) The frequently abused s. 21 (Cabinet advice) of the *ATIA* should be changed by restricting the application of the exemption in clauses 21(1)(a) and (b) to only the part of any record that actually contains advice or recommendations;
 - b) Sections 16.1 and 16.3 to 16.5 should be changed to require the Conflict of Interest and Ethics Commissioner, the Chief Electoral Officer, the Public Sector Integrity Commissioner and the heads of government institutions to disclose investigation records after each investigation is completed (as other Officers of Parliament are required to do in ss. 16.1 and 16.2).
6. All exceptions in the *ATIA* should be strictly limited by a proof of harm test and a public interest override, and this condition should also be imposed on exceptions set out in other laws listed in Schedule II of the *ATIA*. All exceptions which protect the public interest should be subject to sunset clauses of maximum 20 years (and less than that for Cabinet records).
7. The *ATIA* should be changed to allow anyone who does factual or policy research for the government in an area not covered by an exception to speak to the media and publicly about the topic, findings and conclusions of their research without being required to seek approval first from anyone (including their superior, the Privy Council, the Prime Minister, a Cabinet minister, or any ministerial staff person).
8. The *ATIA* should be changed to remove the current restrictions on who may make an access request so that everyone, regardless of citizenship or residence, can make a request.
9. The *ATIA* should be changed to prohibit charging an application fee (the current fee is \$5 for filing an access request), and to prohibit charging search fees for records that have not been maintained in a way that facilitates access.

B. Key Changes Needed to Ensure Independent, Timely, Transparent, Effective and Accountable Enforcement of the *ATIA*

10. The *ATIA* should be changed to give the Information Commissioner explicit powers to require systemic changes in government institutions to improve compliance with *ATIA* requirements, including requiring systemic changes to ensure records are managed effectively to facilitate public disclosure.

11. The *ATIA* should be changed to empower and require the Information Commissioner to impose a sliding scale of mandatory minimum fines and unpaid suspensions as penalties for intentionally obstructing access, including by not creating records, not maintaining records properly or delaying disclosure, with loss of job and pension as the mandatory penalty for the most serious violations. The penalties should include, for government officials that attempt to escape a penalty by resigning or retiring, loss or partial clawback of any severance payment and/or partial clawback of any pension payments.
12. The *ATIA* should be changed to require the Information Commissioner to issue a public ruling published on a searchable website for every complaint they receive, and every situation they review, and the public must have a clear right in the *ATIA* to appeal any decision in court.
13. The *ATIA* should be changed to establish a fully independent, non-partisan appointments commission (with members, appointed by non-governmental organizations like the Canadian Judicial Council, serving fixed terms of office) to conduct a merit-based search for nominees for Information Commissioner, and to nominate a single qualified candidate for approval by an all-party committee of the House of Commons.
14. If a fully independent appointments commission is established as recommended above, the commission should also have the power to decide if the Information Commissioner will be reappointed for another term. If the commission is not established, the *ATIA* should be changed to make the Commissioner ineligible for a renewal of their first fixed term in office (to ensure that they do not make decisions, especially during the last couple of years of their term, to try to get reappointed for another term).

C. Key Changes to Ensure Adequate Resources for an Effective Open Government System

15. The *ATIA* should be changed to require Parliament to provide annual funding to the Office of the Information Commissioner based on the budget presented by that Office and an assessment by the Auditor General (or Parliamentary Budget Officer) of the funding needed to ensure effective, timely enforcement of the *ATIA*, effective training, and effective promotion of the right of access.
16. The *ATIA* should be changed to require a set amount of regular training by the Office of the Information Commissioner for all federal politicians, staff, appointees and government employees concerning the requirements in the *ATIA* and best-practice information and record management systems.
17. The *ATIA* should be changed to expand the mandate and budget of Office of the Information Commissioner to include promotion of the right of access and public awareness activities.