



Canada Infrastructure Bank

AND THE PUBLIC'S RIGHT TO KNOW



by Keith Reynolds
2017

CANADA INFRASTRUCTURE BANK AND THE PUBLIC'S RIGHT TO KNOW

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Edited by Charley Beresford

2017

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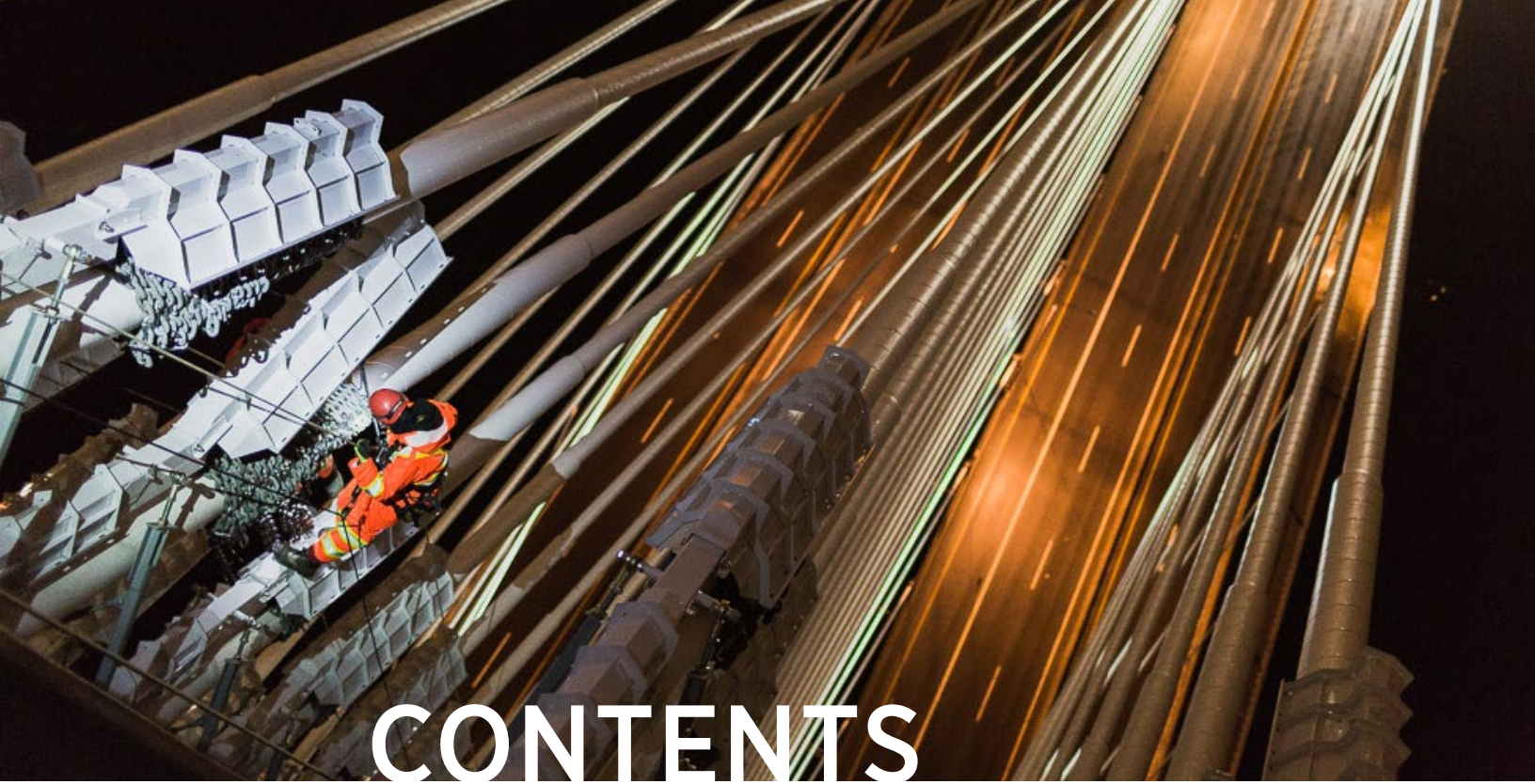
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2600-1055 West Georgia Street
Vancouver, B.C., V6E 3R5 / Tel: 604.408.2500
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PHOTO PROVINCE OF B.C.

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Introduction



How much are Canadians permitted to know about the cost and impacts of these projects, which could be 30-year contracts worth billions of dollars?

PHOTO KIRIL STRAX/FLICKR

IN RECENT YEARS, CANADIANS HAVE SEEN THEIR PUBLIC SERVICES delivered more and more frequently by private entities, particularly corporations or, in some cases, non-profit organizations. This has raised some serious issues. One of these is the cost of privately delivered services, something that has been commented on by Canada’s government auditors.

Another issue that has received less attention is the transparency of these arrangements. How much are Canadians permitted to know about the cost and impacts of these projects, which could be 30-year contracts worth billions of dollars?

This has been a subject of growing concern among the people responsible for access to information laws both in Canada and around the world. In 2015, the Information Commissioner of Canada said, “Successive governments have expanded the type and altered the structures of organizations that perform government functions. Quasi-commercial entities, special operating agencies and public-private sector partnerships have become increasingly common modes for governments to carry out their business.”¹ Information commissioners have observed that, unlike public bodies delivering government services, private companies are often largely exempt from freedom of information requests. They have called for this to be corrected.

The right of citizens to access information about the agencies that deliver services is fundamental to Canada’s democracy. In a 1997 decision, the Supreme Court of Canada found that, “The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.”² Perhaps the most important information that should be accessible to the public is information about government spending and

- 1 Information Commissioner for Canada, “Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act,” March 2015, 8, oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf.
- 2 Supreme Court of Canada, “Dagg v Canada Minister of Finance,” 1997.



finances that are funded through taxation. Citizens should remain confident in the way their tax money is spent; if this information is hidden, confidence is lost.

In June 2017, the federal government passed legislation that will undermine its financial accountability to the public. With the creation of the Canada Infrastructure Bank (CIB), the federal government will invest \$35 billion in infrastructure projects designed to attract private investors to projects. These sorts of projects — public services and infrastructure delivered by private corporations — are exactly the sort of projects where transparency is lacking.

This report examines the creation of the CIB, the government legislation preventing transparency, concerns by information commissioners, and examples from other countries on how the Canadian government can do better.

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CHAMPLAIN BRIDGE,
MONTREAL PHOTO
KMO FOTO/FLICKR

Creation of the Canada Infrastructure Bank

The CIB arose from a 2015 campaign promise to create a national bank that would use the federal government's ability to borrow cheaply to support infrastructure projects, such as providing water treatment facilities and public transit for local governments.

THE CANADA INFRASTRUCTURE BANK was established by federal legislation in June 2017. It arose from a 2015 campaign promise to create a national bank that would use the federal government's ability to borrow cheaply to support infrastructure projects, such as providing water treatment facilities and public transit for local governments. In March 2016, the new government convened an Advisory Council on Economic Growth to advise the Minister of Finance on the creation of the infrastructure bank.

Since then, the advisory council has spoken on several issues. In its first report, it responded to the campaign promise in 2015 and agreed on the need for the creation of such a bank. Instead of using its own ability to borrow, it recommended that the federal government, through the CIB, use private-sector money for these projects with "greater participation of institutional capital (e.g., capital from banks, pension funds, insurance companies, sovereign wealth funds and other long-term investors) in infrastructure as a national priority."³

It further advised that the government: "Attach revenue streams to new and in some cases existing infrastructure. Institutional investors require some source of revenue potential, which can come from multiple sources: availability payments, ancillary funding models (e.g. property value capture), and user fees. Attaching some form of revenue stream to existing or new assets can also lead to improved productivity and use of the asset as seen in many other jurisdictions."⁴

The model recommended by the advisory council could include anything up to the full privatization of assets.⁵ A likely approach that meets the requirements of the advisory council is public-private partnerships (P3s), where the private sector invests at least some of the money in return for healthy financial returns and a measure of control.

³ Advisory Council on Economic Growth, "The Path to Prosperity — Resetting Canada's Growth Trajectory," October 20, 2016, 5, budget.gc.ca/aceg-ccce/pdf/infrastructure-eng.pdf.

⁴ Ibid.

⁵ Canada House of Commons, Bill C-44, "An Act to Implement Certain Provisions of the Budget Tabled in Parliament on 22 March 2017 and other Measures," April 11, 2017, parl.ca/DocumentViewer/en/42-1/bill/C-44/first-reading#enH12005.

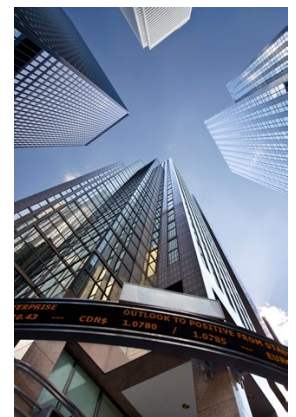


With a lack of funding alternatives, private service and infrastructure delivery, which will be encouraged by the CIB, will grow what is already an increasing trend in Canada. According to the Canadian Council for Public-Private Partnerships (CCPPP), in 2016 there were 200 P3 projects tendered or completed with a nominal cost of \$114 billion. Canada, according to one law firm working in the field, “is often described as the most active PPP market in the world.”⁶ It is also “certainly one of the most mature.”⁷

While public-private partnerships deliver infrastructure and services worth billions of dollars, they are only one of a growing number of mechanisms that see public services being delivered by private companies and organizations. This includes mechanisms known as “alternative service delivery” and contracting out government work.

The use of public-private partnerships and other private mechanisms to deliver public services has not been without controversy. Issues have been raised about the cost of procurement, the length of negotiation, and the cost of such enterprises. One of the advantages for the government is that the CIB would “leverage” the use of private investments for a range of projects.

The use of private capital would reduce government borrowing; it would not necessarily reduce costs to the public. Federally-owned Montreal bridges stand as an example of how additional costs are passed on to the public. In a 2011 study obtained through a Freedom of Information request from Infrastructure Canada, IBI Group Inc., a consulting firm, issued a report on tolling the Champlain Bridge. The report said, “It is naturally expected that toll prices conforming to a PPP model would be higher than those required to sustain a public sector undertaking.”⁸



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PARLIAMENT PHOTO DENNIS JARVIS/FICKR; TORONTO PHOTO ADIJR/ISTOCK

6 Lavery Lawyers, “Infrastructure Insider: Overview of the Canadian Public-Private Partnership Market,” December 7, 2016, lavery.ca/en/publications/our-publications/2986-overview-of-the-canadian-public-private-partnerships-market.html.

7 Ibid.

8 Government of Canada Open Government Portal, “Freedom of Information Release from Infrastructure Canada, Request Number A-2015-079,” open.canada.ca/en/search/ati.



B.C.'s Auditor General found the cost of borrowing through P3s was double the cost of public borrowing.

EVERGREEN LINE SKYTRAIN CONSTRUCTION, BURNABY, B.C., PHOTO MARK KLOTZ/FLICKR

Auditors General in British Columbia, Ontario, Quebec, and other provinces have all raised issues around the high cost of public-private partnerships. B.C.'s Auditor General found the cost of borrowing through P3s was double the cost of public borrowing.⁹ Ontario's Auditor General said Infrastructure Ontario's use of private-public partnerships has cost \$8 billion more than traditional public financing.¹⁰ While in some cases Auditors General may have had the ability to reach these conclusions, access to information exemptions would have probably prevented the public from doing so.

9 Auditor General of British Columbia, "The 2014 Summary Financial Statements and Auditor General's Findings," October 2014, 4.
10 Rob Ferguson and Robert Benzie, "Auditor General Blasts Liberals' Public-Private Funding and 'High-Risk' MaRS loan," *The Toronto Star*, December 9, 2014.

Transparency and the Canada Infrastructure Bank

WHILE THE CIB IS NOT YET OPERATIONAL, current legislation, government activity, and responses to access requests about public-private partnerships leaves little room for optimism about the CIB's future transparency.

Legislation creating the CIB specifically forbids the bank from releasing any information obtained from “proponents of, or private sector investors or institutional investors in, infrastructure projects” and it is forbidden to “knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.”¹¹ A person releasing this information may be subject “to a fine of not more than \$10,000 or to imprisonment for a term of not more than six months, or to both.”¹²

The legislation also adds the CIB to Schedule II of Canada's Access to Information Act, a part of the legislation that limits public access to information.¹³ The Access to Information Act includes this important limitation: “The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.”¹⁴ Schedule II includes information covered by parts of a wide range of Canadian legislation including the Canada Petroleum Resources Act, the Canadian International Trade Tribunal Act, and the Railway Safety Act.

Further, Canada's Minister of Finance has said cabinet will have the final say on any projects approved by the Canada Infrastructure Bank.¹⁵ Like legislation in the provinces, Canada's Access to Information Act prohibits the release of information dealt with by

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11 Canada House of Commons, Bill C-44, “An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 22, 2017 and other measures,” Division 18, Section 28.1, April 11, 2017, parl.ca/DocumentViewer/en/42-1/bill/C-44/first-reading#enH12005.

12 Ibid., Division 18, Section 31.

13 Ibid., Division 18, Consequential Amendments.

14 Canada Access to Information Act (Consolidation), R.S.C., 1985, c. A-1, laws-lois.justice.gc.ca/PDF/A-1.pdf, accessed July 17, 2017.

15 Bill Curry, “Cabinet to Have Final Word on Infrastructure Bank Projects: Morneau,” *The Globe and Mail*, May 15, 2017.

If the Canadian government will not provide the information it asserts is covered by cabinet confidence protections to its own Auditor General, the Information Commissioner, or the Federal Court, it is unlikely that CIB information reviewed by cabinet will ever be made public.

the federal cabinet or its committees. In a May 2017 report, the federal Auditor General said information needed for his work was denied in two cases. He continued, “Finance Canada confirmed the existence of the information we requested. However, as the department considered this information to be confidential to cabinet, it determined that it could not provide the information to our auditors.”¹⁶

While the government has introduced new legislation to amend its access legislation (Bill C-58), the legislation makes clear there will continue to be no independent review as to whether claims of cabinet confidence are justified. The law says the Information Commissioner may examine any information in dispute, “other than a confidence of the Queen’s Privy Council for Canada.” The legislation goes further, even preventing the Federal Court from examining records to see if they are being withheld as a legitimate cabinet secret.¹⁷

If the Canadian government will not provide the information it asserts is covered by cabinet confidence protections to its own Auditor General, the Information Commissioner, or the Federal Court, it is unlikely that CIB information reviewed by cabinet will ever be made public.

While provisions in the Access to Information Act preventing disclosure have not been used yet by the CIB, they have been used by other agencies to prevent the release of information about the CIB.

A review of Access to Information request releases from several agencies pertaining to the CIB or public-private partnerships demonstrates that many of these requests have been largely redacted for reasons of cabinet confidentiality.¹⁸ However, the ministries have used other legislation provisions to prevent the release of information, including information that is considered advice to government or consultation in which “directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate.”¹⁹

While some of the redactions may be justified, some raise questions. In a note for meetings with deputy ministers, the reason for the meeting, considerations, and questions for discussion are redacted. The question of with whom the deputy minister is meeting is also redacted.

Notes on the Gordie Howe International Bridge project, including notes by the “Secret Programs Group,” are almost fully redacted. Notes on timelines for the project as well as community benefits and labour contracting issues are also redacted.²⁰

There are a number of notes from the Advisory Council on Economic Growth. A heading on one document is titled, “Beliefs – The Council’s recommendations are

16 Auditor General of Canada, “2017 Spring Reports of the Auditor General of Canada to the Parliament of Canada,” oag-bvg.gc.ca/internet/English/parl_oag_201705_00_e_42222.html, accessed July 17, 2017.

17 Canada, House of Commons Bill C-58, First Reading June 19, 2017, Sections 27 and 45, parl.ca/DocumentViewer/en/42-1/bill/C-58/first-reading.

18 The federal government maintains a database of released Access to Information requests at open.canada.ca/en/search/ati. People may request copies of these records. While other Crown Corporations use this site, PPP Canada maintains a separate database on its site.

19 Canada Access to Information Act, *supra* note 14.

20 Infrastructure Canada, Response to Access to Information Request A-2016-060, open.canada.ca/en/search/ati.

invests heavily in the mining and energy sectors, it is also mandated to invest in other sectors of the Alaskan economy.

- In the Canadian context, Export Development Canada (EDC), a federal crown corporation, provides trade financing, insurance and risk management solutions at commercial rates to help Canadian exporters and investors expand their export business. For example, in the resource development sector, EDC has recently provided [redacted]

[redacted]

In the resource development context, EDC already has the financial tools to enable the building of infrastructure domestically, or abroad, including financing for pre-fabrication and engineering services. Financing infrastructure, however, is only a small portion of EDC's broader objective of supporting export development. [redacted]

[redacted]

C. CONSIDERATIONS

grounded in a set of fundamental beliefs about how economies and governments function." These fundamental beliefs are redacted.²¹

Even before the CIB was scheduled to come into operation, secrecy was in place. The Globe and Mail reported in July 2017 that a group of civil servants were given authority to fast track projects for private funding, months before opening its doors. "The officials are now on the verge of handing in their secret evaluations of the projects, along with any recommendations about how to use public funds to quickly pull in private dollars to pay for construction," reported The Globe and Mail.²²

While some of the redactions may be justified, some raise questions.

²¹ Infrastructure Canada, Response to Access to Information Request A-2016-129, open.canada.ca/en/search/ati.

²² Jordan Press, "Liberals Set up Fast-Track System for Infrastructure Bank Approvals, *The Globe and Mail*, July 27 2017.

FOI Legislation Governing Private Organizations that Deliver Public Services

If a government wants to release information, private entities have the option of taking the matter before the courts where release can be blocked.

WHILE CANADIAN ACCESS LAWS DO NOT COVER private organizations delivering public services, all of Canada’s jurisdictions have legislation dealing with information about private interests in the custody or control of government. This includes regulatory filings, responses to requests for proposals, contracts, and contractual negotiations.

Citizens can seek this material under access to information laws; yet, Canadian provincial and federal freedom of information laws also contain provisions protecting corporate information by requiring it to be withheld from the public. The federal access legislation requires the government to refuse to release information related to trade secrets, confidential financial, commercial, scientific or technical information, information that could reasonably be expected to prejudice the competitive position of a third party, or information that could reasonably be expected to interfere with contractual or other negotiations of a third party.²³

Canadian legislation also protects any data “supplied, implicitly or explicitly, in confidence.”²⁴ On the federal level, the Canada Development Investment Corporation (CDIC) signed contracts with Credit Suisse and the consulting firm PricewaterhouseCoopers (PwC) to “offer advice” on the possible sale of Canadian airports. As CBC News reported, a CDIC spokesperson “confirmed that the contracts with Credit Suisse and PwC contain clauses that give the firms vetoes over the public release of any information, including the cost of the work.”²⁵ Such contracted secrecy is not always successfully kept secret.

These provisions are not the only ones allowing important information about outsourced public services to be withheld from the public. In 2009, a case went before British Columbia’s Information Commissioner in which the Canadian Union of Public

23 Canada Access to Information Act, supra note 14.

24 Nova Scotia, Freedom of Information and Protection of Privacy Act, nslegislature.ca/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf, accessed July 16, 2017.

25 Dean Beeby, “Ottawa Hires Consultants to Advise on Airport Sell-offs,” *CBC News*, July 19, 2017, cbc.ca/news/politics/airports-pwc-credit-suisse-morneau-sale-equity-lease-c-d-howe-cdev-finance-canada-1.4210703.



SASKATOON P3 BRIDGE PROJECT PHOTO TED MCGRATH/FICKR

Employees (CUPE) had sought records relating to a “business case” for public-private partnerships, as well as for “value for money” reports. The commissioner ruled that because the documents had gone before the provincial cabinet or treasury board, or a committee of cabinet, these documents were cabinet secrets and could not be released.²⁶ As discussed above, the federal government takes a similar position.

In another development, in July 2017, Partnerships BC released some of the same information CUPE had sought in the 2009 case for five recent projects in response to a freedom of information request. This information had been sought unsuccessfully for 10 years.²⁷

If a government wants to release information, private entities have the option of taking the matter before the courts where release can be blocked. In 2014, for example, the Alberta Court of Appeal reviewed a decision by the Alberta Minister of the Environment to release certain information related to Imperial Oil to the City of Calgary. The court agreed with Imperial Oil that the Information in question was third party information, supplied in confidence by the third party, and that releasing the information would harm the company’s business interests.²⁸

Courts do not always rule against disclosure. In 2011, British Columbia’s Supreme Court ruled against an argument by K-Bro Linen Systems that B.C.’s Information Commissioner had incorrectly called for the release of a copy of the company’s contract with the Vancouver Health Authority. The Hospital Employees’ Union (HEU) had filed requests for the contracts in 2007.²⁹ It took four years for the information to be released.

As more than one information commissioner has noted, “access delayed is access denied.”³⁰

26 Office of the Information and Privacy Commissioner for British Columbia, Order F09-26, Ministry of Transportation and Infrastructure, Celia Francis, Senior Adjudicator, November 25, 2009, oipc.bc.ca/orders/994.

27 Keith Reynolds, “The Enormous Cost of Public-Private Partnerships, *Policy Note, Canadian Centre for Policy Alternatives – BC Office*, August 3, 2017, policynote.ca/the-enormous-cost-of-public-private-partnerships/.

28 CanLII, Alberta Court of Appeal, *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)* (2014) ABCA 231 (CanLII), canlii.org/en/ab/abca/doc/2014/2014abca231/2014abca231.html.

29 Supreme Court of British Columbia, *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904, July 7, 2011, oipc.bc.ca/orders/1202.

30 This same comment has been used by Canada’s Information Commissioner as well as Information Commissioners for Alberta and British Columbia.

Information Commissioners Express Concerns

Canada's commissioner recommended that the criteria for inclusion include whether the organization "receives substantial government funding or whether it carries out public functions or services."

A NUMBER OF CANADA'S INFORMATION COMMISSIONERS and other officers of legislatures have raised concerns about transparency and accountability when services are outsourced.

Canada

In 2015, the Information Commissioner of Canada noted the growth of quasi-commercial entities, special operating agencies, and public-private partnerships performing government functions. The commissioner said that, since many of these bodies are not covered by the federal Access to Information Act, information about public functions and services is difficult to obtain or unavailable to the public through access to information requests.

The commissioner recommended a "criteria based" approach to deciding which organizations might be covered by access to information laws. She also recommended that the criteria for inclusion include whether the organization "receives substantial government funding or whether it carries out public functions or services." She specifically recommended the inclusion of "institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider)."³¹

Subsequently, in response to questions from parliament's Standing Committee on Access to Information, Privacy and Ethics, the commissioner expanded on her comments. She said there were several reasons to extend coverage of the Act, noting, "Broad coverage enables citizens to assess the quality, adequacy and effectiveness of services provided to the public and scrutinize the use of public funds. This increase in transparency, in turn, increases accountability to the public." She continued, "This particular issue has become

³¹ Information Commissioner for Canada, "Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act," March 2015, 8, [oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf](https://www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf).



especially pressing as governments, not just in Canada, but around the world continue to downsize and divest services traditionally performed by the public service to the private sector. This criteria ensures that entities that act for the benefit of the public interest are subject to appropriate transparency and accountability mechanisms.”

Providing an example, she said, “Interestingly, when privatizing Canada’s civil air navigation service, the federal government determined that the Official Languages Act should apply to NAV CANADA as if it were a federal institution. A similar obligation was not imposed on NAV CANADA with respect to the Access to Information Act.”³²

Ontario

In 2015, Ontario’s information commissioner called for a broadening of which organizations should be covered by access legislation. The commissioner observed, “[G]overnment has changed the way it delivers public services. Increasingly, services are outsourced or delivered by public-private partnerships, arms-length agencies, delegated administrative authorities, self-funded agencies, or other service delivery models. Regardless of their status, these organizations are responsible for delivering services to the public and have corresponding duties and responsibilities.” The commissioner also noted that, unless there were compelling reasons to do otherwise, an organization should be covered by freedom of information legislation if “it receives a significant amount of its operating funds from the government” or “it delivers a program designed to support government objectives.”³³

Ontario’s commissioner noted that, unless there were compelling reasons to do otherwise, an organization should be covered by freedom of information legislation if “it receives a significant amount of its operating funds from the government” or “it delivers a program designed to support government objectives.”

WIND POWER NORTH OF TIVERTON, ONTARIO, PHOTO ONE.JUNIPER/FLICKR

32 Information Commissioner for Canada, “Striking the Right Balance: Recommendations to Modernize the Access to Information Act,” Submission to ETHI on Recommendation 1.1: Criteria for Coverage, February 25, 2016, oic-ci.gc.ca/eng/suivi-comparution-devant-ETHI-2016-02-25-ETHI-appearance-follow-up_6.aspx?pedisable=true.
33 Information and Privacy Commissioner for Ontario, “A Year of Outreach, Engagement and Collaboration: 2015 Annual Report,” 30, ipc.on.ca/wp-content/uploads/2016/03/ar-2015-e.pdf.



Quebec's commissioner said that "Given the increasingly frequent creation of these new associations between the public and private sectors, the Commission believes that organizations whose funding is largely dependent on the state must be held accountable to the public, particularly on how these funds have been used."

WALTERDALE BRIDGE
P3 PROJECT IN
ALBERTA, PHOTO DAVE
SUTHERLAND/ FLICKR

Also in 2015, the commissioner called for the proactive disclosure of all procurement records, including preliminary analyses, successful and unsuccessful bids, evaluations of bids, and contracts. The commissioner said, "We believe that proactive disclosure of procurement records will strengthen clarity and accountability around government spending, while providing tangible benefits to institutions."³⁴ The commissioner continued, "We urge all institutions governed by the Freedom of Information and Protection of Privacy Act (FIPPA) and the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) to explicitly commit to the proactive disclosure."³⁵

Quebec

Quebec's information commissioner has also raised questions about the growing role of private interests in delivering public services and the impact on government accountability. In the commissioner's 2016 annual report he said:

Today's Quebec is developing in a complex economic environment, characterized by market globalization. The internationalization of trade encourages the establishment of subsidiaries of public companies, some of which are not subject to the transparency rules established by the Access Act, even though these companies depend on public funds.

At the same time, increasing state involvement in various sectors of activity has led to the emergence of various forms of association with the private sector (partnerships, contracting out, etc.). However, these partners of public bodies are not subject to the Access Act.

Given the increasingly frequent creation of these new associations between the public and private sectors, the Commission believes that organizations whose funding is largely dependent on the state must be held accountable to the public, particularly on how these funds have been used. In recent years, there has been

³⁴ Information and Privacy Commissioner for Ontario, "Open Contracting: Proactive Disclosure of Procurement Records," September 2015, 1.

³⁵ Ibid.

*increased citizen interest in matters concerning the administration and decision-making processes of organizations that receive public funds. Making more organizations subject to the Access Act would be an effective means of ensuring effective public access to this information.*³⁶

Manitoba

In her 2014 annual report, Manitoba's ombudsperson, who serves the role carried out by information commissioners in other provinces, made an important statement on the growing role of private companies delivering public services. She said,

The emergence of arm's length, public-private hybrid organizations and subsidiary corporations is a growing trend. These entities have significant effects on citizens' daily lives by undertaking large development projects and other initiatives, often funded by public money. Such corporations, while created and/or influenced by public bodies that are subject to FIPPA, are often considered private entities, which are not subject to FIPPA.

*Given the increasing prevalence of these types of business models, it is imperative that public bodies ensure that the resulting contracts and agreements clearly document the rights and responsibilities of the parties as to their respective records, and to the records that will grow out of the business arrangement. Contracts and arrangements must be entered into in contemplation of the public body's responsibilities under FIPPA, and the public's reasonable expectations of transparency and accountability with respect to infrastructure projects and delivery of services and programs to the public. Addressing these issues at the outset will also help public bodies ensure that business arrangements provide appropriate means for the public body itself to secure necessary information throughout the lifecycle of the arrangement.*³⁷

Manitoba's ombudsperson noted that "Addressing these issues at the outset will also help public bodies ensure that business arrangements provide appropriate means for the public body itself to secure necessary information throughout the lifecycle of the arrangement."

Newfoundland and Labrador

The Office of the Information and Privacy Commissioner for Newfoundland and Labrador observes that "public bodies engage the services of private contractors on a routine basis to provide goods and services." It further notes, "We continue to deal with a relatively high volume of complaints from businesses opposing the release of public body records pertaining to contractual and related procurement information. Every access to information statute in Canada has a 'third party business exception.'"³⁸

36 Commission d'accès à l'information du Québec, Rétablir l'équilibre: Rapport quinquennal 2016, Septembre 2016, 12, our translation of the original French passage, cai.gouv.qc.ca/lancement-du-rapport-quinquennal-2016/.

37 Manitoba Ombudsman, "2014 Annual Report under The Freedom of Information and Protection of Privacy Act and The Personal Health Information Act: Upholding your Access and Privacy Rights in Manitoba," ombudsman.mb.ca/uploads/document/files/2014-ap-div-report-en-web-en.pdf.

38 Office of the Information and Privacy Commissioner for Newfoundland and Labrador, private communication with the author.

The case law is relatively well established, but some aspects continue to evolve. Seventeen of the 37 commissioner’s reports issued by the Office of the Information and Privacy Commissioner dealt with this subject matter. All 17 resulted in a recommendation for release of the information; however, several were the subject of court appeals launched by the third party businesses.”³⁹

British Columbia

According to B.C.’s commissioner, “At a time when the provincial government is outsourcing services and functions to the private sector, the public’s right of access — and the accountability it secures — should not be diminished because records move beyond the control of public bodies and into private sector hands.”

In 2004, both British Columbia’s ombudsperson and information commissioner raised the issue of public services being provided by private interests. According to the ombudsperson, in the 1970s, government activities were generally carried out by government through ministries, boards, commissions, and corporations under the ombudsperson’s jurisdiction. “More recently, however, government has undergone restructuring and services previously provided by the government agencies under the jurisdiction of the Ombudsman are now being provided through contract by non-government agencies or by new agencies created by statute to provide the service — for example, the Business Practices and Consumer Protection Authority and the Land Title and Survey Authority.”⁴⁰

In his submission to a 2004 legislative committee reviewing the legislation, the information commissioner said, “At a time when the provincial government is outsourcing services and functions to the private sector, the public’s right of access — and the accountability it secures — should not be diminished because records move beyond the control of public bodies and into private sector hands.”⁴¹

The next (acting) commissioner continued with this theme in his submission to the 2010 legislative review where he reiterated the 2004 call for the legislation to be extended to records “created by, or in the custody of an external service provider in the course of carrying out contractual duties of a public body.” He continued, “As government continues to outsource services and function still paid for by the taxpayers of British Columbia, this amendment is urgently required.”⁴²

In 2016, the B.C. special legislative committee tasked with reviewing freedom of information legislation recommended that the government, “Consider designating all publicly-funded health care organizations as public bodies under FIPPA [the Freedom of Information and Protection of Privacy Act].”⁴³

³⁹ Ibid.

⁴⁰ British Columbia Ombudsperson, Annual Report 2004, 6, bcombudsperson.ca/sites/default/files/files/Annual%20Reports/2004%20Annual%20Report%20of%20the%20Ombudsman.pdf.

⁴¹ British Columbia Information and Privacy Commissioner, Submission of the Information and Privacy Commissioner to the Special Committee to Review the Freedom of Information and Protection and Privacy Act, February 5, 2004, 29, oipc.bc.ca/special-reports/1274.

⁴² British Columbia Information and Privacy Commissioner, Submission of the Information and Privacy Commissioner to the Special Committee to Review the Freedom of Information and Protection and Privacy Act, March 15, 2010, 23, oipc.bc.ca/special-reports/1275.

⁴³ British Columbia Legislature, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, May 2016, 35, leg.bc.ca/content/CommitteeDocuments/40th-parliament/5th-session/foi/Report/SCFIPPA_Report_2016-05-11.pdf.

Comparison of International Law

NO CANADIAN ACCESS TO INFORMATION LEGISLATION directly covers private entities performing public sector functions. This is not a universal practice.

The Centre for Law and Democracy is a non-profit organization headquartered in Nova Scotia. One of its projects, cofounded by Access Info Europe, is the Global Transparency Initiative which promotes transparency in government. Part of this initiative is the global Right to Information Rating (RTI Rating), which rates 112 international jurisdictions on their government transparency based on a number of factors.⁴⁴ Subnational jurisdictions are not ranked.

One RTI Rating measurement is whether the right of access applies to: a) private bodies that perform a public function; and, b) private bodies that receive significant public funding. Canada receives zero out of a possible two points here. The report says this issue is not mentioned in the legislation.

In contrast, many other international jurisdictions extend access rights to private bodies delivering public services. This includes countries such as Germany where “For the purposes of these provisions, a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law.”

Italy applies access rules to private bodies with budgets exceeding €500,000 (about C\$750,000) financed for the most part publicly. In Iceland, the legislation applies to “the activities of private parties insofar as they have been assigned official power to take decisions regarding individual rights or obligations.” In both the United Kingdom and Denmark, government ministers are able to designate private organizations carrying out public services as being subject to access to information.⁴⁵

Since July 2016, Elizabeth Denham has served as the United Kingdom’s Information Commissioner. She previously held the role of Information and Privacy Commissioner



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44 Centre for Law and Democracy, Global Right to Information Rating, rti-rating.org/about/, accessed July 12, 2017.

45 Ibid.

for British Columbia. The commissioner wants to see more transparency around privately delivered services. In a 2016 interview she said, “Private contractors above a certain threshold for a contract or doing some specific types of work could be included under the FOI Act. The government could do more to include private bodies that are basically doing work on behalf of the public.”⁴⁶

The expansion of coverage of access to information laws to private interests has also been the subject of study by international organizations. The Organization of American States (OAS) produced a Model Inter-American Law on Access to Information to establish a broad right of access with coverage including “non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services—or functions they undertake. All of these bodies are required to make information available pursuant to the provisions of this Law.”⁴⁷

In a 2014 paper, Sandra Coliver examined the issue of expanding the coverage of access to information laws. She sets out a number of countries and international organizations that provide access to information held by private entities. “Information held by private bodies that exercise “administrative authority” or perform “public functions” appears to be covered by the RTI laws of most European countries (though not the United Kingdom), as well as at least 17 other countries: in Africa; 7 in the Americas and Caribbean..., and 3 in Asia and the Pacific.” She added, “A smaller, but steadily growing number of countries extend coverage to entities that receive public funds without reference to whether or not they perform public functions.”⁴⁸

46 Martin Rosenbaum, “New Commissioner Sets out FOI Plans,” *BBC News*, August 31, 2016, bbc.com/news/uk-politics-37201283.

47 “Model Inter-American Law on Access to Public Information,” Doc. AG/RES. 2607 (XL-O/10), adopted on June 8, 2010, oas.org/en/sla/dil/docs/access_to_information_Text_edited_DDI.pdf.

48 Sandra Coliver, “The Right to Information and the Expanding Scope of Bodies Covered by National Laws since 1989,” 2014, right2info.org/resources/publications/the-right-to-information-and-the-expanding-scope-of-bodies-covered-by-national-laws-since-1989.

Conclusion

WHEN CITIZENS ARE BLOCKED FROM KNOWING the details of government operations it undermines both the accountability of government and democracy itself. While this is particularly true for financial information, it is also true for the delivery of services. Canada, which once was one of the world's freedom of information leaders, has fallen behind. The unnecessary protection of private companies delivering public services is one of the reasons for this decline.

The federal government's \$35 billion budget to create the Canada Infrastructure Bank, which will increase the level of privately delivered public infrastructure and services while also increasing restrictions on information disclosure in the legislation, will undermine the transparency of government operations.

The Canadian government says the CIB will contribute effectively to the everyday life of Canadians. Yet, without increased transparency, Canadians will never know if this is true. Across Canada, the people whose job it is to defend our right to information have raised concerns about the growing use of private operators to deliver public services. These information commissioners have offered solutions. Their solutions call for more transparency into the operations of these public-private partnerships and other mechanisms of private delivery of public services, including full privatization. These ideas reflect a growing reality in other countries; they also inform the following recommendations.

RECOMMENDATION 1: Private entities delivering substantial public functions or services, or receiving substantial government funding to carry out public functions or services, should be subject to access to information legislation. Canadian jurisdictions should adopt a criteria-based approach based both on funding and whether the private body carries out public functions or services to determine which organizations will be covered by this legislation. This would enable Canadian jurisdictions to better ensure transparency.



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HALIFAX ROAD WORK PHOTO
KM&G-MORRIS/FLICKR



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CANADA LINE SKYTRAIN,
VANCOUVER, PHOTO
TED MCGRATH/Flickr

RECOMMENDATION 2: Canadian jurisdictions should adopt a policy of prompt and full proactive disclosure of all procurement records, including preliminary analyses, business case documents, successful and unsuccessful bids, evaluations of bids, and contracts.

RECOMMENDATION 3: Canadian jurisdictions should move to a discretionary standard for the release of information that has gone before cabinets or cabinet committees. Information commissioners should be given access to these documents and the ability to rule on whether such documents should be released.



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Columbia
INSTITUTE

2600 - 1055 West Georgia Street
Vancouver, B.C., V6E 3R5 / Tel: 604.408.2500
columbiainstitute.ca