



FIPA response to Treasury Board Consultation on Open Government

January 16, 2012

The BC Freedom of Information and Privacy Association (FIPA) is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well.

Please find below our submission on Open Government in response to this somewhat *ad hoc* consultation, which was announced by the President of the Treasury Board, the Honourable Tony Clement, on December 6, 2011.

This submission also includes links to past submissions we have made to various other bodies on the same topic for your information and convenience.

Introduction

Congratulations. We did not think it was possible to create a consultation document on Open Government without making a single mention of Access to Information, but you did it. Bravo.

This is not unexpected, given the appalling condition of the ATI system, and this government's apparent hostility to allowing citizens to exercise their right to have access to the information within government vaults.

In 2006, the Conservative Party ran on a platform of eight promises to improve the public's access to government information. To date less than one has been implemented.

A summary of those promises is listed below.

- To expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.
- To implement the Information Commissioner's recommendations for reform of the Access to Information Act.
- To give the Information Commissioner the power to order the release of information.
- To subject the exclusion of Cabinet confidences to review by the Information Commissioner.
- To oblige public officials to create the records necessary to document their actions and decisions.
- To provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.
- To ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.
- To ensure that the disclosure requirements of the *Access to Information Act* cannot be circumvented by secrecy provisions in other federal acts.

Only the first of these commitments was partly implemented, and since that time this government has established a number of other federal entities which are outside the provisions of the ATIA. Some, like P3 Canada, have a budget of more than a billion dollars.

In 2007-08, then Commissioner Robert Marleau issued a special report on what he referred to as a crisis in government information management generally, and the ATI system in particular.

He identified 12 points which he said were essential to deal with the immediate crisis in the system.

In 2009 the ETHI Committee issued a unanimous all party report responding to that urgent request for action from the Commissioner.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E&Mode=1&Parl=40&Ses=2&File=21>

The Minister Responsible for the ATI Act, Rob Nicholson, summarily rejected the unanimous report, claiming that additional training would solve the issues.

“Legislative amendments must be examined in the context of administrative alternatives, such as enhanced guidance and training that can be equally effective to realize continued improvements.”

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=4139070&File=0>

While we are dealing with the need for training and administrative improvements, this minister has failed to use his own department’s website to post his speeches. The last posting is dated March 31, 2010. This means Canadians who want to know what the Minister of Justice has said must needlessly file an ATI request, pay five dollars to the Receiver General of Canada and go through the wringer that is the ATI system.

<http://www.justice.gc.ca/eng/news-nouv/index.asp?tid=3>

Perhaps some improvements could be made through “enhanced guidance and training”.

Since then, we have had a Supreme Court ruling that ministers’ offices (and the people who work in them) are beyond the ATIA. This means the people most likely to interfere with a citizen’s ATI rights are the only ones who cannot face prosecution under the Act.

When FIPA, the Canadian Taxpayers Federation and Newspapers Canada asked the ETHI committee to look into the need for legislative change in this area, the Conservative majority on the committee refused to do so. Not only that, the Prime Minister’s Parliamentary Secretary made a point of voicing his support for a former ministerial staffer who threatened a SLAPP suit against all three organizations for daring to mention his name in the letter to the Committee. <http://fipa.bc.ca/home/news/289>

In light of these facts, it is beyond belief that a government would conduct a consultation on Open Government and not even mention Access to Information. The system is in crisis and the government must act immediately to make the necessary legislative and other changes

Open Government is more than just open data

In February 2011, FIPA presented a submission to the Access to Information, Ethics and Privacy Committee (ETHI) of the House of Commons in response to their request for input on Open Government. The link to that submission is below.

http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_Sub_to_ETHI_Committee-Feb_2_2011.pdf

In that submission we stated that initiatives in the field of 'open data' cannot take the place of action to repair our seriously crippled Access to Information system.

Without the ability to pull information from government vaults, be they paper or electronic, an open data system that allows the government to push the information it deems suitable for public consumption will be a Trojan horse for those who prefer that information stay within the control of the bureaucracy.

What we said at that time is just as true today.

However, this consultation shows that the government has decided on the Trojan horse model, ignoring the right of Canadians to demand information from government and producing a number of shiny technological variations of the push model instead. Information will be made available, but only the information deemed suitable for release by the political leadership and the bureaucracy.

This is not open government.

Consultation issues

As noted in the introduction to this submission, the timing of this consultation is not conducive to receiving the best input from Canadians on how they see the need for improvement to transparency in this country.

First, this consultation appears to be in response to the Open Government Partnership's requirements for membership rather than any actual interest in what Canadians may have to say about the transparency (or lack of same) in the federal government. It appears to have been put together quickly to meet the deadline of March 2012 set by the OGP for the next stage of the process. This will be the government setting out a list of commitments which are supposed to be the result of the responses received during consultation.

<http://www.opengovpartnership.org/new-country-guidance>

The federal government has a website called 'Consulting Canadians', where such consultations are normally listed.

<http://www.consultingcanadians.gc.ca/dp.aspx?dd=51&lang=eng&tp=c>

Interestingly, this one does not appear there, but only on the Treasury Board website. So an individual or group looking at the most obvious place for government consultations would not be able to find it.

The time period was announced by Minister Clement on December 6, 2011, with a 'Twitter chat on December 15 and deadline for submissions greater

than 140 characters of January 16, 2012. This is extremely short, especially since it includes the Christmas and New Year holiday periods. This is not what you would expect to see if a detailed response was being sought.

Arguably, the government has not met the minimum Open Government Partnership's consultation requirements. Those requirements are listed below, with notations as to shortcomings in the current process.

IV. Public Consultation on OGP Commitment Development

<http://www.opengovpartnership.org/ogp-participation>

OGP participants commit to developing their country action plans through a multi-stakeholder process, with the active engagement of citizens and civil society. Taking account of relevant national laws and policies, OGP participants agree to develop their country commitments according to the following principles:

Countries will make the details of their public consultation process and timeline available (online at minimum) prior to the consultation.

See above

Countries will consult widely with the national community, including civil society and the private sector; seek out a diverse range of views and; make a summary of the public consultation and all individual written comment submissions available online

Don't see how the government can claim to have satisfied this provision

Countries will undertake OGP awareness raising activities to enhance public participation in the consultation

Ditto

Countries will consult the population with sufficient forewarning and through a variety of mechanisms—including online and through in-person meetings—to ensure the accessibility of opportunities for citizens to engage

Certainly no in-person meetings that we are aware of, engagements appears to consist solely of the one hour twitter event for each official language group, and receipt of submissions either to a series of questions or to the consultation generally.

Countries will identify a forum to enable regular multi-stakeholder consultation on OGP implementation—this can be an existing entity or a new one

Not done

Countries will report on their consultation efforts as part of the self-assessment, and the independent reporting mechanism will also examine the application of these principles in practice.

TBA

Conclusion

Under OGP rules, governments set their own goals which are supposed to reflect the results of the consultations. This government asked 10 questions, almost all of which relate to technology, open data, and social media. There is not a single question related to Access to Information – as noted earlier, the term is never, ever used in any of the government's communication materials about Open Government. This speaks volumes.

It can be presumed that as a result, the government of Canada will be able to point to a number of responses concentrating on open data and technology to claim that these are the major issues for open government in Canada and shape its goals accordingly.

The government can also pretend that there is no problem with the Access to Information system, and even if there is a problem, the people of Canada don't care about it.

If this approach is successful, it will undermine transparency and open government.

We hope we are wrong about this, but past experience (cited above) does not give us grounds for optimism.