

Enabling Access and Reuse of Public Sector Information in Canada:

Crown Commons Licenses, Copyright, and Public Sector Information

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A. INTRODUCTION

Although the proactive disclosure of public sector information has been called a “basic right of citizens”¹ and a “public right,”² Canada has not yet implemented a national strategy to support public access to public sector information and enable its reuse. Public sector information, which is information created by government in the course of governing, is essential for transparency, accountability, democratic participation, and citizen engagement. This article examines public sector information and analyzes developments in Canada and other jurisdictions to promote its public access and reuse. It discusses the extent to which public sector information has been integrated into copyright reform efforts and, where public sector information is copyright protected, it discusses the mechanisms available within the copyright framework to facilitate public access and reuse of public sector information, focusing in particular on licensing. In Canada, Crown copyright restrictions and complicated licensing limit access to public sector information. The article recommends that Canada

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1 “Web Inventor Calls for Government Data Transparency,” *BBC News*, <http://news.bbc.co.uk/2/hi/technology/8572809.stm>, quoting Tim Berners-Lee.

2 American Library Association, “Key Principles of Government Information,” www.ala.org/ala/issuesadvocacy/advocacy/federallegislation/govinfo/key.cfm.

establish a centralized portal for open government data (www.data.gov.ca) and implement Crown Commons licenses, which together would advance the objective of open government data by ensuring that public sector information is accessible online in usable formats, easily found, and not encumbered by restrictive Crown copyright licensing conditions.

Increasingly governments are recognizing public sector information as a public resource and “national asset”³ and acknowledging that government has a responsibility to publish and publicize this information, which has been publicly funded and generated for public purposes. Many open government data initiatives are in place, which can serve as examples to Canada in the design of a national strategy. Within Canada, provinces and municipalities are advancing open data projects, and at the federal level some categories of information, such as geospatial information, have already been made available through open licensing. Further, many countries, including the United Kingdom, Australia, New Zealand, and the United States, have launched open government data consultations and projects, such as open government data portals and licensing innovations, which Canada could study. Canada should develop a framework for the proactive disclosure of open government data, and this article describes two initiatives that are central to this strategy: an open government data portal and Crown Commons licensing.

In “Crown Copyright and Copyright Reform in Canada,” I examined the history, policy, and status of Crown copyright and reform efforts in Canada and internationally.⁴ Crown copyright applies to material which is produced by the Crown and its employees in the course of their duties. Although seemingly an arcane area of copyright law, Crown copyright is critical to public awareness and engagement with public sector information. Unlike the United States, where a work of the federal government is in the public domain, and unlike other Commonwealth jurisdictions including the United Kingdom, New Zealand, and Australia, which are actively reforming Crown copyright, Canada’s Crown copyright reform is latent. In Canada, Crown copyright protects copyrightable public sector information. In addition to Crown copyright restrictions, there are other barriers to the public’s access to this information. Although the govern-

3 Barack Obama, Memorandum on Transparency and Open Government, www.whitehouse.gov/the_press_office/Transparency_and_Open_Government.

4 Elizabeth F. Judge, “Crown Copyright and Copyright Reform in Canada,” *In the Public Interest*, ed. Michael Geist (Irwin Law, 2005), 550–96, www.irwinlaw.com/pages/content-commons/crown-copyright-and-copyright-reform-in-canada---elizabeth-f-judge.

ment generates a vast amount of information, which is publicly funded, the public often has limited awareness of, and limited access to, this material. There is no central government data portal in Canada, no central catalogue to search for public sector information or the departments and agencies that create and house it, no centralized site to request access to it, and no uniform set of licensing terms for its reuse.

Although the current bill to amend the Canadian *Copyright Act*, Bill C-32, which proposes the *Copyright Modernization Act*,⁵ incorporates many positive developments over its predecessors Bill C-60⁶ and Bill C-61,⁷ such as provisions enabling non-commercial user-generated content, format- and time-shifting, backup copies, and expanded exceptions for distance learning, libraries, and fair dealing for purposes of education, parody, and satire (although these exceptions are significantly qualified by the digital lock conditions), like its predecessors it fails to address Crown copyright reform. Bill C-32 makes many strides that are to be lauded (such as the provisions enabling academic, non-commercial use of copyrighted material). However, Crown copyright is nowhere addressed specifically in the bill. Some of the exceptions in Bill C-32 could be applied to Crown copyright material, including the exceptions for parody and satire, distance learning instruction, libraries, user-generated content, and the internet exception for education, but without an explicit legislative reform of Crown copyright, the public still must navigate a profusion of copyright terms, proliferating licenses, and multiple access points for material protected by Crown copyright. Additionally, because the existing and proposed general exceptions to copyright (classified according to the purpose for the use or the category of user) are typically based on subjective and flexible criteria, the public would not be able to predict with certainty that a given exception could be relied on to make an intended use of public sector information non-infringing, which impedes access.

Assuming that Crown copyright reform or its abolition is unlikely to be prioritized for the copyright reform agenda in the short- (or medium-) term in Canada, Crown Commons licensing should be adopted as an interim, or

5 Bill C-32, *Copyright Modernization Act, An Act to amend the Copyright Act* (first reading 2 June 2010), www2.parl.gc.ca/content/hoc/Bills/403/Government/C-32/C-32_1/C-32_1.PDF.

6 Bill C-60, *An Act to amend the Copyright Act* (first reading 20 June 2005), www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html.

7 Bill C-61, *An Act to amend the Copyright Act* (first reading 12 June 2008), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3570473&file=4.

alternative, means to facilitate the access and use of public sector information. If copyright amendments similar to those proposed in Bill C-32 are implemented and no progress is initiated on Crown copyright reform and abolition, significant advances can still be done by working within the current copyright landscape to facilitate access to public sector information. To promote access to public sector information, the Government should implement two important initiatives as part of Canada's digital agenda: creating a central open government data site (along the models of the recent initiatives of the United States, the United Kingdom, New Zealand, India or Australia and the established proactive disclosure policy of Mexico)⁸ and adopting Crown Commons licensing.⁹ Crown Commons licensing, modeled on the success of the user-friendly, familiar, and simple Creative Commons licenses, would encourage access and use of public sector information by providing clear and consistent licensing that is easy for the public to understand and apply.¹⁰ The gamut of benefits to encouraging public sector information access, use, and, importantly, reuse, include greater government transparency and accountability, greater citizen participation and engagement, and creative and innovative reuse of public sector information, which would, in turn, provide benefits back to the government and the public.

B. PUBLIC SECTOR INFORMATION

Public sector information (also called PSI or "open government data") is simply information that is created by the public sector. According to the OECD's definition, public sector information is "information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institution."¹¹ "Information" in this context is a broad

8 United States, www.data.gov; United Kingdom, www.data.gov.uk; New Zealand, <http://data.govt.nz>; India, <http://india.gov.in/documents.php>; Australia, <http://data.australia.gov.au>; Mexico, www.portaldetransparencia.gob.mx/pot.

9 I adopt the "Crown Commons" licensing term from the recommendations of the United Kingdom's *Power of Information Taskforce Report* for a Crown Commons branded license, described as a licensing scheme that is transparent, highly permissive, easy to use, and easy to understand. *Power of Information Taskforce Report* (2009), available at National Archives (GBR), <http://webarchive.nationalarchives.gov.uk/20090315235357/http://poit.cabinetoffice.gov.uk/poit>, Recommendations 8 and 12.

10 Creative Commons, www.creativecommons.org.

11 OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36 (30 April 2008), www.oecd.org/dataoecd/41/52/44384673.pdf at 4, note 1 [OECD, *Recommendation on Public Sector Information*].

notion, encompassing documents, databases, compilations of data, as well as audio and visual media. Typically public sector information is defined so as to exclude from its scope information whose release is limited or prohibited under statutes or common law privileges. Under these exclusions, which are consistent with the public interest, public sector information notably does not include: personal information, defined as information about an identifiable person, which is protected by data protection laws, including protections in federal and provincial privacy legislation and access to information laws;¹² information covered by statutory protections for national defence and security;¹³ information protected by an evidentiary privilege (such as solicitor-client communications); and information protected by other statutory and common-law protections for confidentiality. The definition of public sector information also excludes material in which the government is not the owner of copyright or is not authorized to exercise the copyright rights.

The definition for public sector information invokes descriptive and prescriptive aspects. In one sense of the term, public sector information is defined as the full scope of all information that is created by the public sector, and then a normative argument is made that such information, as broadly defined, *should be made open* to the fullest extent possible. As used in another sense, public sector information comprises only that information which *has been made open*, in a manner that facilitates use and reuse, typically by unrestricted or minimally restricted access to digital materials online.¹⁴ For this article, I use public sector information in the first broad descriptive sense — information that is generated by the government — and then normatively argue that it should be made open to the fullest extent possible, with appropriate exceptions in the public interest.

Given that public sector information includes information that is produced or commissioned by the Crown, its scope parallels the material covered by Crown copyright under section 12, and, for subject matter that is eligible for copyright protection, copyright is generally held by the

12 See, for example, *Privacy Act*, R.S.C., 1985, c. P-21, <http://laws.justice.gc.ca/en/P-21/index.html>, s. 3; *Access to Information Act*, R.S.C., 1985, c. A-1, <http://laws.justice.gc.ca/en/A-1/index.html>, s. 19.

13 See, for example, *Security of Information Act*, R.S., 1985, c. O-5, <http://lois.justice.gc.ca/en/O-5/index.html>; *Canada Evidence Act*, R.S., 1985, c. C-5, <http://laws.justice.gc.ca/en/C-5>, s. 39; *Access to Information Act*, R.S., 1985, c. A-1, <http://laws.justice.gc.ca/en/A-1>, ss. 15–16; *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c. 5, <http://laws.justice.gc.ca/en/P-8.6>, s. 7(3)(c.1).

14 See, for example, *s.v.* “open government data,” www.opengovdata.org.

Crown.¹⁵ The scope of Crown copyright excludes subject matter that is not eligible for copyright (such as raw data), material produced by government employees outside the scope of their responsibilities, and material that the government commissions but for which the author retains copyright. In the latter two cases, the individual authors could hold copyright in the works.¹⁶ Public sector information can thus be contrasted in scope and copyright protections with information covered by access-to-information legislation. Under access-to-information legislation, the scope includes all information “under the control” of the government,¹⁷ and therefore includes information which third parties submit to government (voluntarily or in accordance with a legal mandate) and information created outside of government but held by government institutions. Access to information legislation thus implicates distinct and significant third-party copyright and privacy interests that public sector information does not trigger.

Public access to public sector information is essential for transparency, accountability, civic education, and citizen participation. The wealth of information generated by the public sector, including legal, technical, financial, and administrative information, is critical to decision making within and outside government. Indeed, government is said to be the biggest user of government data. Public sector information is used by government for decisions related to governance and service delivery (for example, census data, geospatial information, registries, electoral boundaries, budget information, and public health and safety information) and is a critical information source for those outside of government. For members of the public, the press, civil society organizations, academics, businesses, and other groups within the private sector, access to public sector information, such as legislative debates, judicial decisions, government activities, reports, and other research promotes government transparency and accountability, improves democratic participation, informs public policy, supports decision making, and is a foundation for research and innovation. Access to public sector

15 Government-generated information could include personally identifiable information, and the discussion for facilitating access and use of PSI assumes that such information, in accordance with governing privacy legislation and access to information legislation, would not be included.

16 *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/c-42/38965.html>, ss. 3, 13.

17 *Access to Information Act*, above note 12, s. 2 states: “The purpose of this Act is to extend the present laws of Canada to provide right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.”

information enables the public to be informed of governmental policy decisions, obligations, and activities and to be knowledgeable about the duties and rights of citizens. As the Open Government Data Working Group writes: “Open data promotes increased civil discourse, improved public welfare, and a more efficient use of public resources.”¹⁸

Although the benefits to access and *use* of public sector information are profound, the advantages that can be harnessed from a *reuse* of public sector information are just starting to be realized. With social media tools and applications for user-generated content, which facilitate interactive and collaborative information sharing, such as mapping tools, blogs, mashups, wikis, and video-sharing sites, individuals can modify and create new information based on public sector information with momentous implications for innovation and creation. As the OECD summarizes in its *Recommendations on Public Sector Information*, countries should adopt a default rule of openness for public sector information in order to:

increase returns on public investments in public sector information and increase economic and social benefits from better access and wider use and re-use, in particular through more efficient distribution, enhanced innovation and development of new uses; [and. . .] promote more efficient distribution of information and content as well as the development of new information products and services particularly through market-based competition among re-users of information.¹⁹

C. OBSTACLES TO ACCESS: CROWN COPYRIGHT AND RESTRICTIVE LICENSING

However, access to public sector information is stymied by Crown copyright restrictions, complicated licensing, and access barriers, which contribute both to the perception and reality of limited access. First, public sector information is generally protected by Crown copyright, which prevents unauthorized reproduction of the material. The *Berne Convention for the Protection of Literary and Artistic Works* permits Member States to “determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.”²⁰

18 “Open Government Working Group,” www.opengovdata.org/home/8principles.

19 OECD, *Recommendation on Public Sector Information*, above note 11.

20 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, as last revised 24 July 1971, WIPO, www.wipo.int/treaties/en/ip/

Most European countries exclude official texts and other public sector information from copyright protection and database rights, and similarly in the United States federal legal texts are in the public domain.²¹ In Commonwealth countries, however, these texts have traditionally been protected by Crown copyright.

In Canada, Crown copyright is set out in section 12 of the *Copyright Act*, which provides that copyright belongs to Her Majesty for any work that “is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department . . . subject to any agreement with the author” and shall continue for a period of fifty years from the end of the calendar year in which it was published and the remainder of that year.²² Section 12 thus covers any works generated by government and its employees within the scope of their duties and works commissioned by government, unless there is an agreement with the author providing otherwise.²³ It is axiomatic that copyright protects original works of authorship²⁴ and does not protect “ideas, procedures, methods of operation, or mathematical concepts.”²⁵ Originality is defined as the non-mechanical

berne/trtdocs_wo001.html, art.2(4) [Berne Convention].

21 See, for example, in the Netherlands, art. 11 of the *Copyright Act 1912* (NED), English version available at www.ivir.nl/legislation/nl/copyrightact.html (no copyright in laws, judicial or administrative decisions) and art. 8(1) *Database Act* (NED), English version available at www.ivir.nl/legislation/nl/databaseact.html (no *sui generis* database protection for databases produced by public authorities and containing laws, judgments, administrative orders, and resolutions); *Copyright Act* (USA), 17 *United States Code* ss. 101, 105, www.copyright.gov/title17/92chap1.html (no copyright protection for any “work of the United States Government,” defined as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties”).

22 *Copyright Act*, above note 16, s. 12.

23 Although Canada does not have a separate database right, in countries that do, such as the United Kingdom, database rights for databases generated by the government are also held by the Crown. Many countries with database rights exempt a subset of Crown material, such as legal cases, from the database right. See above note 21. Creative Commons Zero licenses and Open Data Commons licenses are both designed for database owners to waive *sui generis* database rights (in jurisdictions where those rights apply) and copyright in original selections or arrangement of data compilations.

24 *Copyright Act*, above note 13, s. 2, s.v. “every original literary, dramatic, musical and artistic work,” and s. 5.

25 See *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 U.N.T.S. 299, WTO, www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm, s. 9(2) [TRIPs or TRIPs Agreement].

and non-trivial exercise of skill and judgment.²⁶ To be eligible for Crown copyright protection, there must be original expression in copyrightable subject matter. Literary and artistic works, such as biographies, maps, debates, court judgments, written reports, photographs, and the like are straight forward copyrightable subject matter. With respect to data, Crown copyright does not protect raw data (unprocessed data, such as numbers entered into a database), but it does protect an original expression of the data (for example, an original map is a copyrightable artistic work based on geospatial data) and compilations (including compilations of data), providing that there is an original selection or arrangement of the data (that is, there has been human intervention where skill and judgment has been exercised).

A non-exhaustive list of material covered by Crown copyright is legislation, regulations, court and tribunal reasons for judgment, consultation papers, government forms, press releases by government, committee reports, annual reports, government research documents, as well as any of the following that are prepared or published by or under the direction or control of Her Majesty or a government department and satisfy copyright originality: standards, original selections or arrangements of data (e.g., original selections of census data or crime statistics), value-added material (e.g., headnotes to cases), statistical analyses, maps, official biographies, histories, photographs, illustrations, websites, software, ministerial speeches, and legislative summaries.²⁷

Traditionally, Crown copyright has been justified on the grounds of integrity, accuracy, authenticity, and revenue generation.²⁸ On behalf of maintaining Crown copyright, it is argued that Crown copyright protects the public by identifying and safeguarding the authentic version. Given that the Crown can control reproduction of Crown-copyrighted material, the Crown conceptually has control of both the version and metadata.

26 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, <http://csc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>. For an analysis of copyright originality standards internationally and the global influence of *CCH*'s standard, see Elizabeth F. Judge and Daniel Gervais, "Of Silos and Constellations: Comparing Notions of Originality in Copyright Law," (2009) 27:2 *Cardozo Arts & Entertainment Law Journal* 375–408.

27 An extensive list of the types of material that are protected by Crown copyright is provided in Annex A of the United Kingdom's Green Paper on Crown Copyright: *Crown Copyright in the Information Age*, Green Paper (GBR, 1998), www.opsi.gov.uk/advice/crown-copyright/crown-copyright-in-the-information-age.pdf, App. A.

28 See Judge, "Crown Copyright," above note 4, part C.

Crown copyright, it is argued, deters the misuse of official trusted versions, such as through misrepresentations that an inaccurate or incomplete version is official or by inappropriate juxtapositions that give the appearance that the Crown is endorsing those products or services. Supporters observe that Crown copyright enables the Crown to recoup the costs associated with developing the information, which provides funding for other public services, and, they argue, it is appropriate to charge for access to Crown-copyright protected material on at least a cost-recovery basis. This is particularly so, they argue, when user fees are targeted to commercial enterprises who will be engaged in profit-making endeavours by reselling the information because the public should not have to underwrite the costs of material that appeals only to small groups or specialized interests or to support commercial entities seeking to profit from material that has been generated at public expense. One argument for user fees is that they generate revenue, which can then be used to offset the costs of creating and disseminating public sector information and underwrite its future generation. Finally, supporters of Crown copyright reason that, as copyright is generally intended to be an incentive to create, a consequence of abolishing Crown copyright is that the supply and range of material that government produces will be diminished.

Needless to say, it is in the public interest to ensure integrity and accuracy of public sector information, as supporters of Crown copyright have observed, and Crown copyright is not inherently at odds with these objectives. The goal of facilitating access to public sector information of course presumes that it is accurate, complete, up-to-date versions to which the public is given access. The original justifications for Crown copyright were to control the dissemination and reproduction of Crown works to ensure the material's integrity and accuracy and to provide public notice of its authenticity. In that sense, Crown copyright at its inception enabled access and integrity by exercising government control over the reproduction and circulation of government materials. However, although Crown copyright is not inherently in tension with the goal of access, Crown copyright can be exercised to limit practical and effective public access to public sector information, and there is no longer (if ever) a necessary linkage between rigorous Crown-controlled access, on the one hand, and accuracy and integrity, on the other hand. While at one time and particularly with print publications, Crown copyright may have been a reasonable means to ensure that the public had access to accurate and complete versions of public sector information despite the concomitant control over dissemination, newer technologies enable other means to achieve the dual goals of access

and integrity. That is, the ends of Crown copyright are commendable but there are better methods of obtaining them.²⁹

Indeed, increased access to public sector information in itself supports accuracy and integrity of those materials. The more accessible the official versions are, the greater the opportunities for the public to find and identify accurate and complete public sector information. In conjunction with increased access, other mechanisms, such as official marks, are preferable mechanisms to meet the objectives of accuracy and integrity than Crown copyright. Digital official copies can and should be made available on official government websites and through other official channels, along with the government's official mark. With the repeal of Crown copyright, the public could access and use this material housed on official sources, on condition that the official mark is not used in association with other copies, which would satisfy the objective that the public have access to an authentic trusted copy of the material. It would also spur value-added projects that would enhance the knowledge base as the private sector exploits the social, cultural, political, and economic potential in public sector information.

As a counter to the assertion by Crown copyright supporters that fees should be charged for public sector information, it should be emphatically stressed that public sector information belongs to the public, is already publicly funded, and hence should be publicly accessible. It is true that the revenue from user fees for Crown-copyright protected information can be substantial. A United Kingdom study of departmental revenue in the period 1996–1997 from royalty income, licensing, direct sales income, and data provision charges for Crown copyright material put the total sums received at 200 million pounds.³⁰ However, in addition to the fact that the public has already paid for the information to be generated and additional fees impose a second payment for the same material, which should properly be considered a public asset, the full transaction costs of access fees should be considered when weighing the revenue. In addition to the costs of collecting, producing, updating, and distributing the information, user fees add the costs of licensing and fee-setting; costs associated with fulfilling individual information requests, such as searching, retrieving, transmitting, and reviewing information; and other administrative costs. These transaction costs reduce the net financial advantages of assessing

29 See Elizabeth F. Judge, "Copyright, Access, and Integrity of Public Information," (2008) 1 *Journal of Parliamentary and Political Law* 427–441.

30 *Crown Copyright in the Information Age*, above note 27, App. B.

a fee, and hence a true cost-recovery system is difficult to attain without imposing burdensome high fees. Fees require that the government dedicate significant resources to the administrative task of establishing and maintaining collection systems, including the costs of deciding which public sector information is fee-based, what the fee is, and what the price discrimination is between individuals, non-profit, and commercial enterprises. Fees that target particular types of information or particular classes of users have associated administrative burdens of categorizing information, allocating amounts, classifying users, and establishing verification and recordkeeping procedures.

By contrast, *unlocking* government data, which the public has already been paid for and which has already been generated by government in the process of governing, garners economic efficiencies for the public and the government, as individuals create new applications and uses for this data and commercial enterprises add value to the information by repackaging it, with additional benefits for the economy. Focusing only on the revenues received from user fees ignores the benefits that both the public and the public sector gain from the innovative reuse of public sector information. Governments and intergovernmental bodies are increasingly recognizing the economic efficiencies of opening data. As the United Nations' *E-Government Survey 2010* commented, "Open data enhances public sector efficiency by transferring some of the analytical demands of government to third parties such as non-governmental organizations, research institutes and the media, which have been found to combine data from various sources in original and inventive ways."³¹ Similarly, British Prime Minister

31 United Nations, *E-Government Survey 2010: Leveraging E-Government at a Time of Financial and Economic Crisis*, www2.unpan.org/egovkb/documents/2010/E_Gov_2010_Complete.pdf at 16. See also Peter Weiss, *Borders in Cyberspace: Conflicting Public Sector Information Policies and Their Economic Impacts*, Summary Report, National Weather Service (2002), www.weather.gov/sp/Borders_report.pdf (concluding, in a study comparing the United States' open data model for weather data to the European cost recovery model, that charging marginal cost for dissemination (which is negligible and effectively free) leads to optimal economic growth in society and "far outweighs the immediate perceived benefits of aggressive cost recovery," and that open government information policies "foster significant, but not easily quantifiable, economic benefits to society" at 17). Other studies posit that an open government data policy increases citizen self-reliance and reduces government regulatory costs. See Ed Mayo and Tom Steinberg, *The Power of Information: An independent review* (June 2007) www.opsi.gov.uk/advice/poi/power-of-information-review.pdf at para. 117 (government collecting and sharing information with its citizens facilitate citizens' "choice" and "voice" and are "practical, often more efficient, alternatives to top-down traditional regulation"); and *Putting the Frontline First*,

David Cameron's letter to government departments on plans to open up government data highlighted economic benefits: "Greater transparency across Government is at the heart of our shared commitment to enable the public to hold politicians and public bodies to account; to reduce the deficit and deliver better value for money in public spending; and to realize significant economic benefits by enabling businesses and non-profit organizations to build innovative applications and websites using public data."³²

Other negative effects associated with fees further reduce their attractiveness. Most methods of collecting fees would also be likely to entail recordkeeping about the requestor and the requested information, which has attendant privacy risks.³³ In addition to the privacy implications, the mere imposition of fees has a chilling effect, discouraging the public from asking for the information.

As to the notion that repealing Crown copyright would decrease the amount of public sector information, this seems wholly unlikely. In contrast to individual authors, public sector information has numerous other incentives (and obligations) supporting the generation of public sector information, namely: it is publicly funded; it is generated by employees whose duties it is to produce such information; and government itself relies on the information to fulfill its responsibilities and to provide essential services.³⁴

In addition to the structural barriers that Crown copyright poses to public access of public sector information, access problems are exacerbated by the public's perceptions (and misperceptions) of Crown copyright, which deter people from trying to use material that is covered by Crown

below note 92 at 26 (stating "data can also be used in innovative ways that bring economic benefits to citizens and businesses by releasing untapped enterprise and entrepreneurship" and citing studies predicting significant increase in economic growth if more publicly held data is released for reuse).

32 David Cameron, Letter to Government departments on opening up data (31 May 2010), www.number10.gov.uk/news/statements-and-articles/2010/05/letter-to-government-departments-on-opening-up-data-51204.

33 For example, under the current transaction-based copyright clearance process, personal information is collected on the Application for Crown Copyright Clearance Form and the Government of Canada Publications website notes that personal information "may also be shared with other government departments if your inquiry relates to these departments for review and decision." "Application for Copyright Clearance," Government of Canada Publications, <http://publications.gc.ca/site/eng/ccl/copyrightClearance/apply.html>.

34 Judge, "Crown Copyright," above note 4, part H(2).

copyright. The United Kingdom's 2009 *Power of Information Taskforce Report* found that Crown copyright was poorly understood by creators and reusers of data, and, although the Taskforce believed Crown copyright was designed to encourage reuse in the majority of cases, it acknowledged that intent was not appreciated by the public; to the contrary, many felt Crown copyright deterred potential reusers.³⁵ It is fair to infer that there is also public discontent with the range and type of exceptions for Crown-copyright protected information. As with copyright exceptions generally, the statutory language incorporates subjective criteria such that, even where an individual is familiar with the copyright landscape and understands which exceptions could apply, it is difficult to predict with confidence that a given use will fit the exception's scope. Canada's current fair dealing provision in section 29, which provides that "fair dealing" for the purpose of "research or private study" is non-infringing, is a good example of the inherent subjectivity in the principles, which has the benefit of allowing the statutory exception to be applied to a variety of contexts, but which has the drawback of making it hard for members of the public to know if a given activity will come within the scope of the section. If exceptions are structured to be flexible and to fit a variety of factual contexts, it is a necessary consequence that they will lack certainty and predictability. Thus while Bill C-32's exceptions, on the positive side, enlarge the acts and purposes that can be done with copyrighted works and provide more flexibility, it will remain difficult to ascertain precisely what activities will be non-infringing as long as Crown copyright applies.

Moreover, along with the deterrence of Crown copyright's structural barriers and public perceptions of their complexity, complicated licensing structures exacerbate the obstacles that Crown copyright erects to public access to public sector information. For public sector information that is protected by Crown copyright, individuals must either rely on a statutory exception or (if there is no exception or if an individual wants more predictability that a given act will be allowed) permission to reproduce the material must be obtained in advance. Licenses are the legal mechanism for the copyright holder to grant permission to reproduce copyrighted material. The licensing options for the Crown include the following: the Crown can permit certain described activities for certain categories of material in advance, provide uniform licensing, or have individual licenses. Currently, Canada does not have an "all-of-government" licensing model, under which a uniform license template applies to all public sector information.

35 *Power of Information Taskforce Report*, above note 9 at 25.

There are two positive examples of licenses for Canadian Crown copyrighted material which facilitate open access to public sector information. First, the *Reproduction of Federal Law Order* is an example of preemptive licensing, in which the Crown provides blanket permission to any member of the public to reproduce certain Crown copyrighted material provided specified conditions are met. The *Reproduction of Federal Law Order* permits anyone, “without charge or request for permission,” to reproduce federal statutes and regulations and reasons for decision of federally constituted courts and administrative tribunals, “provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.”³⁶ Another example is the template licenses developed by GeoConnections (an organization that is part of Natural Resources Canada), which are designed to provide model terms and a uniform approach to licensing geographical information held by any federal department or agency.³⁷ However, these two examples of licenses that facilitate access apply only to circumscribed categories of public sector information and are premised on two different approaches to licensing.

Beyond these examples, the process of seeking permission to use Crown copyrighted works is often a difficult one to navigate. Generally, copyright clearance of Government of Canada works is handled by the Crown Copyright and Licensing Section of Public Works and Government Services.³⁸

36 *Reproduction of Federal Law Order*, PC 1996-1995, SI/97-5, 19 December 1996, <http://laws.justice.gc.ca/eng/SI-97-5/page-1.html>, vol. 131, no. 1, *Canada Gazette — Part II* 444 (8 January 1997).

37 GeoConnections, *The Dissemination of Government Geographic Data in Canada: Guide to Best Practices*, version 2 (Ottawa: Natural Resources Canada), http://www.geoconnections.org/publications/Best_practices_guide/Guide_to_Best_Practices_Summer_2008_Final_EN.pdf.

38 The Crown Copyright and Licensing Section “can help to facilitate the use of Government of Canada works in all existing formats through the permission-granting process” and has the following responsibilities: providing assistance, advice and support to the public and to Government of Canada departments and agencies with respect to Crown copyright issues; administering and protecting copyright in works authored by Government of Canada departments and agencies; negotiating and issuing licensing agreements for non-commercial and commercial rights associated with works subject to Crown copyright; offering information sessions to author departments; and investigating potential copyright infringement on Government of Canada works. Government of Canada, “Crown Copyright and Licensing,” <http://publications.gc.ca/helpAndInfo/cc-dac/about-e.html>. Orders for printed publications are made through Publishing and Depository Services, Government of Canada Publications, <http://www.publications.gc.ca>, which has an online catalogue.

The clearance process is a transactional application, requiring that someone interested in accessing the material seek individual permission in advance, and submit detailed information about the requester, the intended use, the copyright rights involved (reproduction, translation, telecommunication, etc.), the format, number of copies, end use, commercial sale price or cost-recovery basis, area of distribution, and any prior approvals for the same material.³⁹ Notwithstanding the challenges of this clearance process, there may be additional hurdles. For Crown copyright material, it is not always readily apparent where the desired material resides, if it is available electronically, which license pertains, if any copyright pertains, or whom to ask. There is a proliferation of licenses for Crown copyrighted material, the licenses are housed on different sites, license terms vary, the language is not uniform, access fees may be imposed, and the terms are not always in plain language.⁴⁰ By corollary, it may be difficult to determine if material is covered by Crown copyright at all, if copyright is held by a third party, if the copyright has expired, or if the material is otherwise in the public domain. The websites of public bodies, for example, may contain copyrighted works from various third-party owners, material in the public domain, and material where the copyright has expired, and various licensing terms may apply, including preemptive permissions for certain works and individual copyright clearances for others.⁴¹

39 See "Application for Copyright Clearance on Government of Canada Works," <http://publications.gc.ca/site/eng/ccl/copyrightClearance/application.pdf>.

40 See Judge, "Crown Copyright," above note 4 at parts D and E; Judge, "Copyright, Access, and Integrity of Public Information," above note 29 at "Practical Problems for Increasing Access within Crown Copyright."

41 For example, on Library and Archives Canada, the copyright page provides that copyright for material in the collections may be owned by Library and Archives Canada, or a third party, or may be in the public domain. For the website, prior written permission is required to reproduce material, and the reproductions must comply with standard conditions (identifying Library and Archives Canada as the source, exercising due diligence to ensure accuracy, not representing the reproduction as official or as being endorsed by Library and Archives Canada, and not modifying the reproduction). For the collections, some material is covered by use and reproduction restrictions and requires written permission; some material's copyright is owned by Library and Archives Canada and requires written permission from Library and Archives Canada for reproduction; some material's copyright is owned by third parties and requires written permission from the copyright owners, which is obtained through the Copyright Bureau; some material is in the public domain and can be reproduced without permission or payment but must abide by the standard conditions for reproduction described above; and some material has a pre-authorized license permitting users to reproduce the material for certain purposes without obtaining

Building on the copyright restrictions and complicated licensing, the public's relative inexperience with and scanty knowledge of public sector information compounds the lack of access to the data. In Canada, there is no central catalogue or searchable database for public sector information, making it difficult for the public to identify useful material and once identified to locate it. Public sector information is dispersed and fragmented across different databases and controlled by different departments, with different practices for publicizing the information. Although increasingly public sector information is born digital, it often is not made available in an open format⁴² through open architecture, it may not have sufficient security protections to prevent unauthorized access (or it may incorrectly block legitimate access), it may lack metadata, and it may not be in an accessible format that is suitable for people with disabilities or who require translations.⁴³

Two reform issues are implicated by the intersection of Crown copyright and public sector information: first, whether the material should continue to be covered by Crown copyright and second, how to make the data more "open." With respect to Crown copyright, there is a spectrum of options ranging from full abolition of Crown copyright to retaining the status quo. The policy options include: abolish Crown copyright for all material that originates with the government and place it in the public domain; abolish Crown copyright for particular categories of material; retain Crown copyright but waive it for certain categories of material or for certain defined purposes; waive Crown copyright except for certain categories of material or certain defined purposes where it is enforced; retain Crown copyright but use uniform licensing with common terms; retain Crown copyright

copyright permission. "Copyright," Library and Archives Canada, www.collection-scanada.gc.ca/notices/016-200-e.html.

42 Open formats are machine readable, platform neutral, and available to the public without restrictions.

43 Best practice technical recommendations and implementation guidance for publishing public sector information can be found in Tim Berners-Lee, "Putting Government Data Online," (24 June 2009), www.w3.org/DesignIssues/GovData (recommending linked data (which is open, modular, and scalable), persistent web addresses, and open formats); Webcontent.gov (USA), "Provide Appropriate Access to Data," www.usa.gov/webcontent/usability/accessibility/access_to_data.shtml (guidance for United States federal public websites); Joshua Tauberer, "Open Data is Civic Capital: Best Practices for 'Open Government Data,'" v. 1.3 (14 April 2010), <http://razor.occams.info/pubdocs/opendataciviccapital.html> (recommending globally unique identifiers (GUIDs) and Linked Open Data (LOD; see www.linked-data.org), and other ideas from the Semantic Web.

but bring all licensing and administration under the control of a centralized body; retain Crown copyright and have decentralized control with multiple licenses, with terms, practices, and fees set by the department or agency that generates the information; or retain Crown copyright and individual permissions but provide fast track licensing.⁴⁴

In “Crown Copyright and Copyright Reform in Canada,” I argued that the policy objectives that have been claimed for Crown copyright of maintaining the integrity and accuracy of Crown-generated material can be achieved as well or better through other models which promote open access to this material and detailed the case for abolishing Crown copyright.⁴⁵ As yet, repealing Crown copyright has little priority in the copyright reform agenda and that option has failed to be implemented in Bill C-32. While the best option is to abolish Crown copyright, in the meantime, much can be done by working within the copyright structure to facilitate access to public sector information.

Until such time as Crown copyright is repealed, other steps can be taken that would make significant advances toward the goal of open data. But what does “open” mean? The definition and understanding of “open” for open data, open access, open government, and open source are contested, and there is no consensus on the important issue of whether material can be copyrighted and nevertheless qualify as “open.” Some definitions of open access require that public sector information be free of copyright, while others reason that the goals of transparency, accountability, and reuse can be accomplished with material that is protected by Crown copyright provided that there is permissive licensing.

Several guidelines for open data have been proposed, and these share many of the same principles. According to the Open Knowledge Foundation, “A piece of knowledge is open if you are free to use, reuse, and redistribute it — subject only, at most, to the requirement to attribute and share-alike.”⁴⁶ The Open Government Working Group, convened in Nov-

44 Options such as these have been canvassed in other jurisdictions in Crown copyright public consultation documents. See for example, *Crown Copyright in the Information Age*, above note 27, ch. 5; United Kingdom, Minister for the Cabinet Office, *Future Management of Crown Copyright*, CM 4300 (London: Her Majesty's Stationer's Office, 1999), www.hmso.gov.uk/archives/copyright/future_management_cc.doc; Copyright Law Review Committee (Aus.), *Crown Copyright Report*, Final Report (April 2005), www.ag.gov.au/agd/WWW/clrhhome.nsf/Page/RWP3D1B9A992032DBE9CA256FEB00239309.

45 Judge, “Crown Copyright,” above note 4.

46 “Open Knowledge Definition,” www.opendefinition.org. The Open Knowledge Foundation Working Group on Open Government Data is developing principles for making

ember 2007, developed “Eight Principles of Open Government Data” for governments to become “more effective, transparent, and relevant to our lives.”⁴⁷ These eight principles, which have garnered significant support, recommend that the data be

- 1) *complete* (all public data, which is data that is not subject to valid privacy, security, or privilege limitations, is made available);
- 2) *primary* (published as collected at the source, with the finest possible level of granularity (e.g., preservation-quality high resolution images) and not in aggregate or modified forms (i.e., non-aggregate numeric and tabular data presented according to best practices));
- 3) *timely* (made available as quickly as necessary to preserve the value of the data, with the reasonableness of time for releasing data, changes, and updates being determined by the nature of the dataset);
- 4) *accessible* (available to the widest range of users for the widest range of purposes, meaning access through the internet);
- 5) *machine-processable* (reasonably structured to allow automated processing, and thus images of text will not suffice for the text itself);
- 6) *non-discriminatory* (available to anyone, with no requirement of registration and allowing data to be accessed anonymously);
- 7) *non-proprietary formats* (available in a format over which no entity has exclusive control, and in cases where non-proprietary formats may not reach a wide audience the availability of multiple formats may be necessary); and
- 8) *license-free* (not subject to any copyright, patent, trade-mark, or trade secret regulation, although reasonable privacy, security and privilege restrictions may be allowed as governed by other statutes).

Additionally, compliance must be *reviewable*, with a contact person designated to reply to people trying to access the data and to complaints about violations of the principles, and a tribunal or court should have jurisdiction to review the application of the principles.

As the Working Group’s annotations to the principles indicate, these principles are premised on information that is digital (they define data as “electronically stored information or recordings”) being made available digitally. Although the principles observe that it is also desirable that non-digital information be made available digitally, they do not mandate

official information legally and technically open: <http://wiki.okfn.org/wg/government>.

47 “8 Principles of Open Government Data,” <http://www.opengovdata.org/home/8principles>.

that step, which acknowledges the large undertaking required to convert information in other formats and media to digital (e.g., scanning paper documents). The Working Group Recommendations for data accessibility elaborate that accessibility for digital information entails online publishing, in compliance with industry protocols and formats and with accessibility standards for persons with disabilities and those who need translation services. The Working Group additionally notes that complying with the principles of accessibility and machine-processable data require that there be a means to extract and import the raw data and that the data be properly encoded. The technical recommendations for machine-processable data (recommendation 5) include persistent identifiers, documented data formats, notifications of data format changes, and RSS feeds. For licensing, the benchmarks recommended by the Working Group to be in accordance with the principles of non-proprietary data formats and license-free data are that the data can be used in free software applications and that individuals are permitted (and able) to redistribute the data without restriction.

Significantly, these principles address *how* to make data open rather than *what* data to make open. The Working Group emphasizes that the principles “specify the conditions public data should meet to be considered ‘open,’” but they “do not address what should be public and open.” As it notes, “[p]rivacy, security, and other concerns may legally (and rightly) prevent data sets from being shared with the public.” Hence, as to copyright, although principle 8 states that government data must be license free and not subject to intellectual property regulation, the Working Group acknowledges in its comments that because “government information is a mix of public records, personal information, copyrighted work, and other non-open data,” the objective is for clarity in what data is available, what licensing applies, what the terms of service are, and what legal restrictions apply. Thus, the recommendation rather is that “[d]ata for which no restrictions apply should be marked clearly as being in the public domain,” and that “the data to be made ‘open’ be properly specified.”⁴⁸

Comparable principles are endorsed by other organizations.⁴⁹ The American Library Association, for example, offers eleven “Key Principles of Government Information,” with similar perspectives to the Working Group. The first two principles succinctly encapsulate the open govern-

48 *Open Data Policy Recommendation*, <http://wiki.opengovdata.org/index.php?title=OpenDataPolicyRecommendation>, annotations.

49 See, for example, Association of Computing Machinery U.S. Public Policy Committee (USACM), *Recommendations on Open Government*, www.acm.org/public-policy/open-government; OECD, *Recommendation on Public Sector Information*, above note 11.

ment position, asserting that “[a]ccess to government information is a public right that must not be restricted by administrative barriers, geography, ability to pay, or format,” and “government has a responsibility to collect, maintain, and disseminate information to the public.” Unlike the Open Government Working Group’s focus on making digital information publicly accessible, the ALA’s aim is comprehensive, emphasizing that the information generated by government serves as the official public record of government, and hence government has an obligation to preserve information from all eras of a country’s history and regardless of form or format. For copyright, the ALA’s principle 11 eschews the application of any “copyright or copyright-like restrictions” on government information, which impedes public access, because the “property rights of government information reside with the people.”⁵⁰

Although there are divergences of opinion on whether copyright is consistent with “open” data, it is certainly consistent with these principles and guidelines that advances toward open data can be made even if the copyright landscape retains Crown copyright in public sector information.

D. ACHIEVING OPEN DATA

If Crown copyright is not repealed, access to public sector information can be greatly enhanced and improved by making it more open, specifically through two initiatives: open access to public sector information on a “data.gov.ca” model, and open licenses on a Crown Commons model. Both of these actions must be accomplished to achieve truly open data. If public sector information is free of copyright restrictions but is not published online in usable formats or cannot be found, it is not accessible; likewise, if the data is available online but encumbered by restrictive license conditions, it is not accessible. Thus, in countries that exclude public sector information from copyright, public sector information may still not be accessible if it is not published electronically or if it is not available in open government data portals where it can be easily found. Conversely, in countries where public sector information is protected under a form of government copyright or Crown copyright, it can still be made available through permissive licensing and open government data catalogues and portals.

To achieve open data, public sector information must be available in an open data catalogue and must either be free of copyright restrictions or

50 “American Library Association, “Key Principles of Government Information,” above note 2.

published under open licensing. Although this article focuses on those initiatives, a truly comprehensive open government data strategy would also look to history and to the future: first, by addressing measures to digitize both printed archival public sector information and historical information in other non-electronic formats and media; and second, by ensuring that the open government data strategy evolves to consider new technologies for disseminating public sector information, while also preserving public accessibility and reuse of the current repertoire of digitalized public sector information when new media and formats are adopted.

To alleviate the restrictions described in Part C on public sector information, the next most desirable option if Crown copyright is retained is to implement uniform licensing on a preemptive permission model. The license should be made available online, and clearly set out the permitted material and activities in advance in familiar recognizable terms, so that the license, the scope of the material, and the range of permitted uses are publicly known. The default should be public access to public sector information, with limited clearly defined exceptions for restricting access only where such restrictions are in the public interest. The least restrictive conditions that are consistent with the purpose of the document should be imposed, with a default to an attribution-only license where possible. For material such as primary legal sources, where the integrity of the text is especially important, minimal conditions, such as those in the *Reproduction to Licence Order*, could be imposed, whereas for other material, an attribution-only condition would suffice.

1) Data.gov.ca

To achieve (more) open data in Canada, public sector information should be available on a data.gov.ca portal, free of subscriptions and passwords. The W3C eGov Interest Group has developed a working draft of technical guidelines for the “logistics and practicalities of opening government data,” emphasizing standards and methodologies to encourage the publication of open government data and public use of the data.⁵¹ The OECD’s *Recommendation on Public Sector Information* recommends “information asset lists and inventories, preferably published on-line, as well as clear presentation of conditions to access and re-use at access points to the in-

51 W3C [Daniel Bennett & Adam Harvey], “Publishing Open Government Data,” Working Draft (8 September 2009), www.w3.org/TR/gov-data. See also, Tim Berners-Lee, “Putting Government Data Online,” (24 June 2009), www.w3.org/DesignIssues/GovData.

formation” in order to strengthen awareness of the public sector information available for access and reuse.⁵²

Given that public sector information is publicly funded and generated for public purposes, government has an obligation to publish and publicize public sector information, and this mandate should be fulfilled through an open government data portal. There should be a single portal for data.gov.ca, providing a publicly accessible, comprehensive, and centralized database for public sector information, which catalogues the information and provides it in full text free of charge and free of restrictions. The portal should include an online catalogue identifying the datasets, databases, and other information resources available to the public and the department or body submitting them and should incorporate search tools which allow searches by agency, keyword, file type, and data category.⁵³ Public sector information should provide cross-references for the location of the data in the websites of the relevant department and in the centralized portal. Finally, the data on the portal should be licensed under Crown Commons licenses, described in the following section.

2) Crown Commons Licenses

In addition to a centralized open government data site, there should be Crown Commons licensing, modeled on Creative Commons licenses, providing a uniform approach across government for public sector information. Creative Commons licenses have the potent advantages of brand loyalty and familiarity for online users. Under Creative Commons licenses, authors can choose among four license conditions: attribution, share alike, non-commercial, and no derivative works. There are six main Creative Commons licenses, which, in ascending order from least to most restrictive conditions, are: Attribution (cc by), Attribution Share Alike (cc by-sa), Attribution No Derivatives (cc by-nd), Attribution Non-Commercial (cc by-nc), Attribution Non-Commercial Share Alike (cc by-nc-sa), and Attribution Non-Commercial No Derivatives (cc by-nc-nd). Each license is identified by a logo with the appropriate symbols for the applicable four conditions.⁵⁴ Most jurisdictions that have adopted Creative Commons licences for public sector information are using an attribution-only license. In Canada, when Crown copyright material is made available under a permissive license, the

52 OECD, *Recommendation on Public Sector Information*, above note 11.

53 See, for example, the search tools on the US site, www.data.gov.

54 “About Licenses,” *Creative Commons*, <http://creativecommons.org/about/licenses>.

conditions of the license generally mirror the requirements of the *Reproduction of Federal Law Order*, namely attributing the source, exercising due diligence to ensure accuracy, and not representing that the reproduction is an official version of the information reproduced nor as having been made in affiliation with or endorsement of the issuing governmental body.⁵⁵ The closest Creative Commons license to these conditions is an Attribution license; the no-derivatives condition goes farther than these requirements, though it does capture some aspects of the concerns for integrity and accuracy that the standard Canadian conditions reflect.

Crown Commons licenses would exploit and build on the many advantages of Creative Commons licenses to create a branded license that recognizes the special traits of Crown copyright, provides uniform standardized licensing for public sector information in the model of Creative Commons, and is a recognizable symbol of open government data for the public. Further, by building on the Creative Commons model while acknowledging the particular context of Crown copyright, Crown Commons licenses would promote sharing and aggregation of national and international public sector information through a model that would be recognizable to users from other countries and be interoperable with Creative Commons licenses. Crown Commons licenses would keep the benefits of Creative Commons licensing and follow their templates but would importantly identify the material as public sector information, which would build awareness of this public resource and identify the material as having the integrity and accuracy of public sector information.

In keeping with the legacy of Creative Commons licenses, Crown Commons licenses should be open, human- and machine-readable, user-friendly licenses, with simple clear terms that provide public assurance that the material can be used and reused without infringing, and employing easily recognized symbols for open government data practices, similar to the

55 See, for example, *Reproduction of Federal Law Order*, above note 36. An example of a permissive license with similar terms to the *Reproduction of Federal Law Order* is the “Permission to Reproduce” statement in *Improving Canada’s Digital Advantage: Consultation Paper on a Digital Economy Strategy for Canada* (Canada, 2010), http://de-en.gc.ca/wp-content/uploads/2010/05/Consultation_Paper.pdf, copyright page. Often the copyright page does not have a “permission to reproduce” statement and includes only a copyright notice. See, for example, Office of the Privacy Commissioner of Canada, *Annual Report to Parliament 2009: Report on the Personal Information and Electronic Documents Act*, www.priv.gc.ca/information/ar/200910/2009_pipeda_e.pdf, which identifies copyright in the Minister of Public Works and Government Services Canada 2010. An electronic copy of that document is available to the public through www.priv.gc.ca.

iconic symbols that brand Creative Commons licenses. Rather than merely “allow” public access and use, the license should positively encourage the reuse of public sector information. Across public sector information, the default should be to allow, and encourage, reuse of the material, with only limited exceptions as required for the public interest.

In contrast to the traditional Crown copyright model, which is based in part on revenue generation and is publicly perceived to deter use, a Crown Commons license would promote the innovation and efficiencies created when the public is free to add value. Such benefits include integrating datasets, using the data across multiple databases for new purposes, developing new applications, creating mashups and visualizations to re-present information in a qualitatively different manner, and enabling information to be localized and personalized.⁵⁶ The reuse of such publicly funded information through Crown Commons licenses will add to the knowledge base, facilitate research, increase productivity, and enlarge cultural and informational output. Crown Commons licenses promise to be more efficient and more cost effective than the multiple and customized licenses and individual clearance processes that currently govern Crown copyright material, and the reuse of public sector information is itself likewise an efficient, cost-effective, and value-maximizing use of publicly funded datasets.

Although in special cases, some public sector information may require more complicated or customized licensing (perhaps because of exceptional public interest concerns, such as an enhanced need to control versions more tightly for reasons of public safety or health), such instances should be rare, and the norm should be that public sector information is made publicly accessible and is licensed according to Crown Commons templates with minimal conditions.

The concept of a Crown Commons license advocated here would build on the success of Creative Commons and other open licensing models, and on the efforts of other Commonwealth jurisdictions to open access to Crown-copyrighted material. The idea of a Crown Commons branded license was vetted in the United Kingdom *Power of Information Taskforce Report* in 2009.⁵⁷ Recommendation 8 states that government should ensure there is a uniform system for releasing and licensing information across all public bodies and individual public bodies should not be permitted to vary those standard terms. Specifically, “the system should create

56 See, for example, Patrick Cain’s “Map of the Week” series in the *Toronto Star*, <http://thestar.blogs.com/maps>.

57 *Power of Information Taskforce Report*, above note 9, Recommendation 8.

a ‘Crown Commons’ style approach, using a highly permissive licensing scheme that is transparent, easy to understand and easy to use, modeled on the ‘Click Use’ license.” Recommendation 12 further recommended that the Office of Public Sector Information (OPSI), which is part of the National Archives, should “begin a communications campaign to re-present and improve understanding of the permissive aspects of Crown Copyright along the lines of creative commons.” It also recommended that there should be permission to scrape Crown copyright data and that prosecution under the *Computer Misuse Act* should be removed, and that these initiatives could also fall under the Crown Commons brand.⁵⁸

It should be emphasized that adopting Crown Commons licenses is not tantamount to a waiver or abolition of Crown copyright. The licenses work within the current copyright structure (or as amended under Bill C-32, since the proposed amendments do not change Crown copyright) to facilitate access, use, and reuse of public sector information, but Crown copyright is retained. Until Crown copyright is repealed, such licenses would greatly improve access to public sector information by institutionalizing a culture of least restrictive terms for Crown-copyrighted material to change both the public’s and the public sector’s perception of the role of Crown copyright. By providing clear and advance notice of permitted activities and conditions of use for Crown-copyrighted material, Crown Commons licenses would encourage the public to access public sector information and stimulate the reuse of public sector information.

However, given that Crown Commons licensing would be implemented within the Crown copyright regime, some caveats need to be highlighted. First, Crown Common licenses are based on copyright residing with the Crown, and premised on those rights the Crown then authorizes public use. The licenses therefore should clearly define the Crown-copyright protected subject matter so that the Crown does not erect further access restrictions by asserting rights in information which is in the public domain or by claiming rights held by third parties. Thus, the licenses should differentiate three categories of material:

- 1) Crown-copyrighted material;
- 2) material that is in the public domain (i.e., the subject matter is not eligible for copyright (such as raw data or other information that does not qualify as an “original expression”) or copyright has expired); and

58 *Ibid.*, Recommendation 12. The open data initiatives that the UK Government has launched are discussed in part F.

- 3) third-party material to which the government does not have copy-right.

Crown Commons licenses are intended to be applied to public sector information and thus should exclude third-party copyrighted material (which material might be physically held by the government but where third parties retain copyright). In addition to distinguishing between Crown-copyrighted material and third-party copyrighted material, the licenses should also distinguish between non-copyrightable subject matter (such as raw data and whole-of-universe compilations of data), on the one hand, and copyrighted and copyrightable material such as original expressions of data, on the other hand.⁵⁹ Government websites are a common context where such distinctions are critical, given the number of rights holders and types of material. The task of identifying copyrights and rights holders of material housed on a government website is admittedly complex but is an important step to ensure that Crown Commons licensing is not applied to public domain material, which needs no permission for reuse, and is not applied to third-party material, where the copyright is not held by the Crown. Disambiguating the copyright ownership would avoid public misperceptions that a daunting permission process involving multiple copyright owners, including the Crown, must be navigated, if the Crown does not in fact have a claim to the information.

Although third-party copyright is by definition not “public sector information” and not suitable for Crown Commons licenses, there are many contexts where both third-party copyright and public sector information will be closely implicated. For example, publications by researchers who are supported by a federal granting agency are typically copyrighted to the individual author. These publications should be deposited in open access databases, published in open access journals, and/or licensed under Creative Commons or similar open licensing models, but they would not fall under the scope of Crown Commons licenses.⁶⁰ Similarly, third-party copyrighted material held by federal or provincial museums, libraries, archives, and universities or on government registries or in submissions to

59 This aligns with *Open Data Policy Recommendation*, above note 48, Recommendation 8.

60 For open access licensing, open access journals, and self-archiving for scholarly works, see the Science Commons' Scholar's Copyright Project, <http://sciencecommons.org/projects/publishing>; Directory of Open Access Journals, www.doaj.org (open access journals); and SHERPA/RoMEO, www.sherpa.ac.uk/romeo/ (publisher copyright policies and self-archiving).

government would not come within the scope of Crown Commons licenses, unless an appropriate assignment of rights is made.

In conjunction with the adoption of Crown Commons licenses, therefore, the government should clearly identify which material is protected by Crown copyright and which of that material is under a Crown Common license (and preferably all Crown copyright material should be licensed under Crown Common licenses, except for discrete categories of information where a thoughtful analysis concludes it is in the public interest to exclude them; in those exceptional cases, the least restrictive license that safeguards the public interest should govern). New Zealand, in its “Suggested All-of-government Approach to Licensing” made a similar recommendation that if Creative Commons licensing was adopted for public sector information, then appropriate guidance material should be released which would explain copyright and Crown copyright, the categories of public sector information that are not subject to copyright, and the key differences between the existence of copyright in the material and the licensing of such material.⁶¹ Importantly, non-copyrightable information, such as raw data and third-party copyrighted material, should be as clearly differentiated as possible from Crown-copyright protected material.

It is also important to emphasize that licensing alone does not resolve the lack of access to public sector information and therefore must be done in conjunction with an open government data portal. After all, if the public cannot find public sector information, the fact that it is under a Crown Commons license does not make the information “open.” Canada should make public sector information accessible in a centralized searchable open government data portal, and, until Crown copyright is repealed, the portal should be branded with Crown Commons licenses, with generous permissions.

The next sections look at current initiatives for open data in Canada and other jurisdictions, and the final section concludes with recommendations for Canada.

61 New Zealand, “A Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments,” Open Government and Data Re-use Project (2009), www.scribd.com/doc/19092928/Open-Government-Information-and-Data-ReUse-Project-Discussion-Paper at para. 190.

E. CANADA'S OPEN DATA INITIATIVES

Canada lacks a centralized open data portal, but discussions to explore access to public sector information are beginning.⁶² The House of Commons' Standing Committee on Access to Information, Privacy and Ethics announced in April 2010 that it would study proactive disclosure, with the Chair noting "this is the way governance is going," and although "we have activity in that regard in Canada, . . . certainly there are other countries that are ahead of us."⁶³ Canada's Office of the Information Commissioner is actively advocating for a "made in Canada" strategy for proactive disclosure. The Interim Commissioner speaking before the Committee called proactive disclosure, which she described as government making government records available in open standard formats and permitting unlimited use and reuse of the information, an "essential component of the broader concept of open government." The speech laid out five overarching principles for a Canadian strategy, which flagged Crown copyright as an issue. The five principles are commitment to a cultural change for open government through accountability and deliverables, broad public consultations, accessibility for the public to integrated information from a variety of sources to reduce bureaucratic silos, addressing and resolving related issues (privacy, confidentiality, security, Crown copyright, and official languages), and anchoring open government principles in statutory and policy instruments.⁶⁴ In March 2010 and May 2010 appearances before the Committee, Commissioner Robert Marleau urged that the "more

62 With the lack of a federal Canadian centralized resource for public sector information, some private initiatives for open data directories have been created, including <http://openparliament.ca> and www.datadotgov.ca. DatadotGov.ca is led by David Eaves, an advocate for open government. But of course, as the creators of these sites would acknowledge, citizen-led sites cannot substitute for a government-run site since control to the supply of public sector information is in the hands of the government and is precisely what necessitates an open government data portal run by the government. Examples from other countries of citizen-run sites publishing available open government data include My Society (www.mysociety.org) in the United Kingdom and Watchdog.net (<http://watchdog.net>) and GovTrack.us (www.govtrack.us) in the United States.

63 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, Meeting No. 5, 3d Sess., 40th Parl., (1 April 2010), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4408693&Language=E&Mode=1&Parl=40&Ses=3, at 1110.

64 Suzanne Legault, "Proactive Disclosure," Address by the Interim Information Commissioner of Canada, Standing Committee on Access to Information, Privacy and Ethics (29 April 2010), www.infocom.gc.ca/eng/pa-ap-appearance-comparution-2010_3.aspx.

proactive disclosure we have . . . the better” and emphasized that user fees are not in keeping with the principle of the right of citizens to have access, where the normal way to get information is simply to ask for it for free, since the taxpayer has already paid for the document that he or she may be looking for.”⁶⁵ The Commissioner noted that Canada’s access to information laws regime lags behind the “next generation of laws,” which include “features such as universal access,” and make “use of modern technologies to proactively disseminate information.”⁶⁶

At the federal level, some individual federal departments have their own open data initiatives. Additionally, discrete public sector information is also released, usually because of statutory mandates for that category of information. For example, the *Public Servants Disclosure Protection Act* mandates that if wrongdoing (such as misuse of public funds or criminal violations) is found, public access to the information describing the wrongdoer and the corrective action must be provided promptly.⁶⁷ The Treasury Board mandates proactive disclosure on federal government departments’ and agencies’ websites of travel and hospitality expenses, contracts over ten thousand dollars, grants and contributions over twenty-five thousand dollars, and position reclassifications.⁶⁸

Perhaps the most exciting federal project for open data and open licensing is GeoConnections’ GeoGratis, GeoBase and Discovery Portal databases for geospatial information and template licenses.⁶⁹ The open architecture database design reflects extensive consultation on intended user applications, purposes, requirements, and operability, which is further enabled by the open licensing. The GeoConnections templates are a positive example at the federal level of an open data license. In connection with the geospatial databases, GeoConnections published a *Best Practices*

65 Robert Marleau, Information Commissioner of Canada, Evidence, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 2d Session, 40th Parliament (9 March 2009), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3732736&Language=E&Mode=1&Parl=40&Ses=2, at 1615.

66 Robert Marleau, Information Commissioner of Canada, Evidence, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 2d Session, 40th Parliament (27 May 2009), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3924567&Language=E&Mode=1&Parl=40&Ses=2, at 1535.

67 *Public Servants Disclosure Protection Act*, R.S.C. 2005, c. 46, <http://laws.justice.gc.ca/en/P-31.9/FullText.html>, s. 11(1)(c).

68 Treasury Board of Canada Secretariat, “Proactive Disclosure,” www.tbs-sct.gc.ca/pd-dp/index-eng.asp.

69 Geobase, www.geobase.ca/geobase/en/about/faq.html; GeoGratis, <http://geogratiss.cgdi.gc.ca>; GeoConnections Discovery Portal, <http://geodiscover.cgdi.ca>.

Guide, which explains various distribution models for open government data and contains several template licenses for access, use, and reuse of the geospatial data; all of the licenses provide unrestricted rights for internal use, two have no restrictions on data use, and four permit value-added derived products.⁷⁰ The web-wrap license agreement is a no-fee unrestricted license promoting the widest public use and private benefit of the data at no cost to the licensee, and grants unrestricted data use, downstream data distribution (on share-alike license terms), and the right to create and market value-added products.⁷¹ This is a pertinent illustration of how a combination of an open data portal and open licensing together support “open data.”⁷²

In 2010, Canada launched a national consultation on a digital economy strategy. The consultation paper, *Improving Canada's Digital Advantage*, is organized around five themes: innovation using digital technologies, digital infrastructure, growing the ICT industry, Canada's digital content, and building digital skills. Although open data is within the mandate of digital content, the consultation document lamentably does not include

70 For a table with the key distinctions between the licenses, see “Key Characteristics of Model Licence Agreements,” table, GeoConnections, *The Dissemination of Government Geographic Data in Canada*, above note 37 at 31–32.

71 GeoConnections, *The Dissemination of Government Geographic Data in Canada*, above note 37 at App. A, s. 3.1, “royalty-free, non-exclusive, world-wide, non-assignable licence to use, reproduce, extract, modify, translate, further develop and distribute the Canada Digital Data, and to manufacture and license Value-Added Products, and to sublicense any or all of such rights.”

72 Although the GeoConnections uniform templates, which can apply to any geospatial data held across federal departments and agencies, are a positive development for simplified open licensing, the licenses do not adequately differentiate between Crown-copyrighted material and uncopyrightable raw data. For example, the Agreement defines “data” as any “expression of original data,” rather than the copyright standard of an “original expression” of data or an original selection or arrangement of a compilation of data. The license terms could be interpreted to include material that is outside the scope of Crown copyright, and the potential overreaching may also then result in downstream users asserting questionable copyright claims to data products generated from this geographic data. See Elizabeth F. Judge and Teresa Scassa, “Intellectual Property and the Licensing of Canadian Government Geospatial Data: An Examination of Geoconnections' Recommendations for Best Practices and Template Licences,” (2010) 54:3 *The Canadian Geographer / Le Géographe canadien* 366–74. These licenses do provide a positive example of open licensing for public sector information being applied at the federal level, and if licenses like GeoConnections' templates were applied to public sector information where the copyrights clearly are held by the Crown, the concern about uncopyrightable raw data potentially being included in the scope of the license would not arise.

a comprehensive open data strategy, and mentions only open access to research that is federally funded.⁷³ As Michael Geist observed, the consultation document “lacks a clear vision of the principles that would define a Canadian digital strategy,” and one “missed opportunity was to shine the spotlight on the principle of ‘openness’ as a guiding principle.”⁷⁴ Notably, however, many of the public submissions advocate open data for public sector information, and the most popular idea by public votes in the idea forum for the digital content theme is a passionate call for open government data, indicating the strong interest within the online community for access to public sector information.⁷⁵

Provincially, Quebec is the only province to have established a program for access to public sector information. Quebec’s regulation, *Règlement sur la diffusion de l’information et sur la protection des renseignements personnels*, came into force in November 2009 and requires that the province, municipalities, and other public bodies publicly disclose through government websites fifteen categories of information to the public interest, such as documents disclosed in response to access to information requests, research, and statistical reports.⁷⁶ The regulation was provided for by a 2006 amendment to the *Loi sur l’accès aux documents des organismes publics et sur la protection des renseignements personnels*.⁷⁷ British Columbia has es-

73 *Improving Canada’s Digital Advantage*, above note 55. Incidentally, the document’s “Permission to Reproduce” statement on the copyright page gives broad permission to reproduce without charge or further permission, provided due diligence is exercised to ensure accuracy, Industry Canada is identified as the source, and that the reproduction is not represented as an official version nor as having been made with the endorsement of Industry Canada.

74 Michael Geist, “Opening Up Canada’s Digital Economy Strategy,” (16 June 2010), www.michaelgeist.ca/content/view/5122/125.

75 Tracey Lauriault, “Open Access to Canada’s Public Sector Information and Data,” http://de-en.gc.ca/idea-list/?idea_theme=18&idea_filter=0. This comment is incorporated in *Consensus Submission to the Federal Government Consultation on a Digital Economy Strategy for Canada*, Faculty of Information Identity, Privacy and Security Institute (IPSI), Knowledge Media Design Institute (KMDI), University of Toronto (9 July 2010), s. 4.9, “Open Data.”

76 *Règlement sur la diffusion de l’information et sur la protection des renseignements personnels*, L.R.Q., c. A-2.1 (23 April 2008), www.institutions-democratiques.gouv.qc.ca/acces-information/documents/reglement-diffusion.pdf (in force November 2009).

77 *Loi sur l’accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q., c. A-2.1, www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/A_2_1/A2_1.html, art. 16.1, which provides: “16.1. Un organisme public, à l’exception du Lieutenant-gouverneur, de l’Assemblée nationale et d’une personne qu’elle désigne pour exercer une fonction en relevant, doit diffuser, dans un site Internet, les documents ou renseignements accessibles en vertu de

tablished a website for open data (<http://data.gov.bc.ca/>); however, thus far the site includes only aggregated data from various levels of government on climate change.⁷⁸ In several other provinces, consultation processes are in place, with the support of provincial information and privacy commissioners.

Interestingly, the most active Canadian initiatives and experiments for open government data are by municipalities (to which Crown copyright in right of the province applies). Edmonton, Mississauga, Nanaimo, Ottawa, Toronto, and Vancouver all have open data catalogues online, and Calgary passed a motion in March 2010 for a pilot data catalogue.⁷⁹ These municipal data catalogues are in early iterations and most post only raw data, although some also include reports and other city documents. Typically, the sites include alphabetical catalogues, multiple formats, and subscriptions for updates through RSS feeds. The open licenses retain Crown copyright and generally grant permission to modify and distribute the datasets in other media and formats, on condition that the reference URL be provided for downstream users, thus encouraging applications development and integration of datasets.

For example, in Vancouver, the city council motion endorsed the principles of open and accessible data (to “freely share with citizens, businesses and other jurisdictions the greatest amount of data possible while respecting privacy and security concerns”), open standards (for “data, documents, maps and other formats of media”) and open source software (placing open source software on an “equal footing with commercial systems during procurement cycles”).⁸⁰ The motion further resolves that Vancouver will identify immediate opportunities to distribute more of its data; index, publish, and syndicate its data to the internet using prevailing open standards, interfaces, and formats; develop plans to digitize and

la loi qui sont identifiés par règlement du gouvernement et mettre en oeuvre les mesures favorisant l'accès à l'information édictées par ce règlement.”

78 Ministry of Environment, British Columbia, “Climate Change Data Catalogue,” <http://data.gov.bc.ca>.

79 See City of Edmonton, “Open Data Catalogue,” <http://data.edmonton.ca>; Mississauga Data, www.mississauga.ca/data; Nanaimo Data Catalogue, www.nanaimo.ca/datafeeds; Open Data Ottawa, www.ottawa.ca/online_services/opendata/index_en.html; City of Toronto, www.toronto.ca/open; City of Vancouver, “Open Data Catalogue,” Beta Version 2, <http://data.vancouver.ca>; City of Calgary, “Access to City Data and Services,” Minutes of the Regular Meeting of Council (22 March 2010), 26–27.

80 “Open Data, Open Standards and Open Source,” Motion B2 (mover Councillor Andrea Reimer) (May 2009), <http://vancouver.ca/ctyclerk/cclerk/20090519/documents/motionb2.pdf>.

distribute archival data to the public; ensure that data supplied to the city by third parties (e.g., developers, contractors, and consultants) be in a prevailing open standard format and not copyrighted unless legal considerations prevent that; and license software application, so that other municipalities, businesses and the public can use them without restriction. The City of Vancouver's Beta Data Catalogue currently provides a panoply of open data, including bikeway paths, recycling schedules, easements, election boundaries, sanitary lines, one-way streets, street lighting, and water mains.⁸¹

The public access granted so far to federal, provincial, and municipal information has already spawned interesting applications and mashups, including maps of restaurant health inspections,⁸² applications to report local potholes and broken street lights to which several municipal governments respond,⁸³ postal code lookup services to track MP votes,⁸⁴ a garbage and recycling collections reminder service for Vancouver residents (where collection dates revolve),⁸⁵ an application for finding licensed childcare providers in Toronto,⁸⁶ and VisibleGovernment.ca's two initiatives (Expense Visualizer and Disclosed.ca), which scrape and aggregate information whose disclosure is mandated by the Treasury Board directive described above but which are published on over a hundred different government sites in different formats.⁸⁷ Expense Visualizer scrapes federal government travel and hospitality data and offers a web visualization tool for users to compare expenses,⁸⁸ and Disclosed.ca scrapes information about past contracts across Canadian government department and agencies.⁸⁹

In addition to open licensing, some governments do acknowledge the reciprocal benefits to the government and the public when public reuse of open government data is encouraged, a phenomenon David Eaves characterizes as the "long tail of public policy."⁹⁰ As an example of a governmental

81 City of Vancouver, Open Data Catalogue, <http://data.vancouver.ca/datacatalogue/index.htm>.

82 Eatsure.ca, www.eatsure.ca.

83 FixMyStreet.ca, www.fixmystreet.ca.

84 How'd They Vote, <http://howdtheyvote.ca>.

85 Vantrash, <http://vantrash.ca>.

86 City of Toronto, Data Catalogue, Licensed Day Care Centres, www.toronto.ca/open/datasets/child-care.

87 "Projects," Visible Government, www.visiblegovernment.ca/projects.

88 Expense Visualizer, www.visiblegovernment.ca/projects/expenses.

89 Disclosed.ca, www.disclosed.ca.

90 David Eaves, "Open Data: An Example of the Long Tail of Public Policy at Work," <http://eaves.ca/2010/05/21/open-data-an-example-of-the-long-tail-of-public-policy-at-work>.

body recognizing these synergies and explicitly sponsoring public initiatives for open government data reuse, the City of Edmonton is hosting an “Apps4Edmonton” contest for new Edmonton municipal applications for data analysis or visualizations that use the city’s open data catalogue or any public data. The City of Edmonton also asks participants to identify additional datasets required to create or enhance applications and the City will prioritize making that data available.⁹¹

F. INTERNATIONAL OPEN DATA INITIATIVES

Globally there are numerous interesting projects to facilitate public access and use of public sector information through open government data portals and open access licensing. In December 2009, the governments of the United States, United Kingdom, and Australia all launched major open government programs, which included open government data initiatives.⁹² Many jurisdictions are considering adopting or have implemented Creative Commons licenses for public sector information, and usually use Creative Commons Attribution 2.5 or 3.0 licenses. Other jurisdictions, such as the United Kingdom, are using or planning to use customized government licenses that are interoperable with Creative Commons. Notably these efforts are going on at all levels of government, from national federal governments, to state and provincial governments, to local and regional governments at the level of cities and counties. Major open government data portals have been established in the United States, United Kingdom, Australia, New Zealand, Mexico, and Norway, which Canada could emulate.⁹³ Significant projects to open particular categories of public sector information have been implemented in numerous countries.

91 Apps4Edmonton, www.edmonton.ca/city_government/open_data/apps4edmonton.aspx.

92 United States, “Open Government Directive” (8 December 2009), www.whitehouse.gov/open/documents/open-government-directive; United Kingdom, *Putting the Frontline First: Smarter Government*, (December 2009), www.hmg.gov.uk/media/52788/smarter-government-final.pdf; Australia, *Engage: Getting on with Government 2.0*, Report of the Government 2.0 Taskforce, (December 2009), www.finance.gov.au/publications/gov2otaskforcereport/doc/Government2oTaskforceReport.pdf [Australia, *Report of the Government 2.0 Taskforce*].

93 United States, www.data.gov; United Kingdom, www.data.gov.uk; New Zealand, <http://data.govt.nz>; India, <http://india.gov.in/documents.php>; Australia, <http://data.australia.gov.au>; Mexico, [www.portal.detransparencia.gob.mx/pot](http://portal.detransparencia.gob.mx/pot); Norway, <http://data.norge.no>. See also Estonia’s statistical database, <http://pub.stat.ee/px-web.2001/Dialog/statfile1.asp>.

Moreover, inter-governmental bodies, such as the European Union and the United Nations, and other international bodies have recommended opening access to public sector information and are implementing Creative Commons-compatible licenses for their materials.⁹⁴ Globally in other nations and intergovernmental bodies, geospatial information is an early and the most dynamic category of datasets of public sector information to be made available under open licensing and catalogued through open data portals, as geospatial data likewise is for Canada's federal open data initiatives.⁹⁵

In the United States, federal government works are free of copyright restrictions and thus the federal initiatives focus on proactive publishing of public sector information in usable formats.⁹⁶ The Obama Administration issued an Open Government Directive in December 2009 directing the heads of Executive branch departments and agencies to take specific actions to implement the three open government principles of transparency, participation, and collaboration, which had been laid out in the President's Memorandum on Transparency and Open Government.⁹⁷ Specifically, the Open Government Directive requires that federal departments and agencies expand access to information, by making it available online in open formats, and mandates that each agency publish at least three high-value datasets which have not been previously available online or in a downloadable format and register them on www.data.gov, and create an Open Government webpage with mechanisms for public feedback on the quality

94 A wiki with a working list of individual governmental and intergovernmental projects using Creative Commons or other open licensing for public sector information can be referenced at "Government Use of Creative Commons," http://wiki.creativecommons.org/Government_use_of_Creative_Commons. Other bodies are also adopting open data policies: see, for example, the World Bank's Open Data Catalog, <http://data.worldbank.org>.

95 See, for example, EU, *Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)*, Official Journal L 108/1 (25 April 2007), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:108:0001:0014:en:PDF> (addressing the sharing, access, and use of interoperable spatial data and spatial data services across levels of public authority and different sectors by establishing an EU-community-wide infrastructure for spatial information based on Member States implementing common rules); Geoscience Australia, www.ga.gov.au (licensed under a Creative Commons 3.0 Attribution Australia license).

96 *Copyright Act* (USA), above note 21, at s. 105.

97 "Open Government Directive," above note 92; Obama, Memorandum on Transparency and Open Government, above note 3.

of published information and priorities for publication.⁹⁸ Data accessed through www.data.gov has no restrictions on end uses. For data quality, the submitting agency retains version control of the datasets.⁹⁹

In the European Union, the 2003 Directive on the Reuse of Public Information provides a general framework of minimal conditions for reuse of public sector information, with reuse defined as any purpose other than the initial purpose within the public task for which the documents were produced, but not including documents exchanged between public sector bodies for public sector tasks.¹⁰⁰ Namely, the Directive's conditions mandate that public sector information that Member States make available for reuse should be accessible in all formats and languages and by electronic means where possible, and that Member States have transparent conditions for reuse, avoid discrimination between market players, publish standard licenses online which do not unnecessarily restrict either reuse or competition, and have practical finding tools such as portal sites or lists of information assets.¹⁰¹

The Directive states as an objective for institutions at the local, national, and international level that "[m]aking public all generally available documents held by the public sector — concerning not only the political process but also the legal and administrative process — is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy."¹⁰² However, the Directive does not oblige Member States to allow reuse of all public sector documents or to create or adapt documents for

98 Each agency's webpage will be located at [www.\[agency\].gov/open](http://www.[agency].gov/open).

99 Data Policy Statement, www.data.gov/datapolicy.

100 European Union, *Directive 2003/98/EC of the European Parliament and the Council on the Re-Use of Public Sector Information* (17 November 2003), http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf, *Official Journal* L345/90-96 (31 December 2003) [EU Directive on Re-Use of Public Sector Information] at ch. 1, art. 2, s. 4.

101 *EU Directive on Re-Use of Public Sector Information*, above note 100. Preceding the Directive, a 1998 green paper, European Commission, *Public Sector Information: A Key Resource for Europe: Green Paper on Public Sector Information in the Information Society*, COM(1998)585 (1998), ftp://ftp.cordis.europa.eu/pub/econtent/docs/gp_en.pdf, considered whether Europe's different conditions for access to public sector information (such as different exemptions, time, format, and quantity) created European-level barriers, discussed whether existing policies in EU institutions for access and dissemination of information were adequate, canvassed issues associated with European-level action (including different copyright and liability regimes, privacy considerations, competition, and the possibility of European meta-data), and highlighted a range of actions that could be initiated at the European level.

102 *EU Directive on Re-Use of Public Sector Information*, above note 100 at para.16.

reuse or to continue to produce certain types of documents for reuse; rather, the Directive builds on existing national access regimes, and its rules apply to those documents that the Member States make accessible.¹⁰³ Thus, the Directive's general principle is that "where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out . . . and shall be made available through electronic means."¹⁰⁴ Further, a Member State can decide "to no longer make available certain documents for re-use or to cease updating these documents," if the decision is made publicly known at the earliest opportunity by electronic means wherever possible.¹⁰⁵ The Directive does not change the existence or ownership of copyright held by public sector bodies or limit its exercise, as long as the Member State is in compliance with the Directive; however, public sector bodies should exercise their copyright so as to facilitate reuse.¹⁰⁶ If Member States license documents for reuse, the Directive mandates that license conditions be fair and transparent and be in a digital format that can be processed electronically and that Member States encourage standard licenses.¹⁰⁷ Additionally, although the Directive helpfully supports making public sector information available for reuse, it does not mandate free access and allows public sector bodies to impose a charge equal to cost recovery plus a reasonable investment, where cost recovery is the "total costs of collecting, producing (which includes the costs of creation, collation, dissemination and user support), reproducing and disseminating documents."¹⁰⁸ Member States can also differentiate charges between commercial and non-commercial reuse.¹⁰⁹ The Directive does not apply to documents which are excluded from access regimes (e.g., to protect national security or commercial confidentiality) nor to documents held by public service broadcasters, educational institutions, research facilities, or cultural establishments (e.g., museums, archives, libraries, and theatres).¹¹⁰

103 *Ibid.* at para. 9; ch. 3, art. 5, s. 1. "Document" is defined broadly as "any representation of acts, facts or information — and any compilation of such acts, facts or information — whatever its medium (written on paper, or stored in electronic form or as a sound, visual or audiovisual recording), held by public sector bodies" (at para. 11 and ch. 1, art. 2, s. 3.).

104 *Ibid.* at ch. 1, art. 3.

105 *Ibid.* at para.18.

106 *Ibid.* at para. 22.

107 *Ibid.* at para.17 and ch. 3, art. 8.

108 *Ibid.* at para.14.

109 *Ibid.* at para.19.

110 *Ibid.* at ch.1, art. 1.

Many European countries have expanded beyond the Directive's obligations with open public sector initiatives. The European Public Sector Information Platform, which is funded by the European Commission and bills itself as "Europe's One-Stop Shop on Public Sector Information (PSI) Re-use,"¹¹¹ reports developments, monitors progress, and circulates best practices on public sector reuse, both in Europe and internationally.

In the United Kingdom, *The Re-use of Public Sector Information Regulations 2005* implement the EU Directive.¹¹² Additionally, the Government has launched several open government projects. The Information Asset Register notifies the public of information resources held by the UK Government, focusing on unpublished resources.¹¹³ The United Kingdom's "Smarter Government" initiative presents an action plan for open government. One of the five ways under action one's plan to strengthen the role of citizens and civic society is "radically opening up data and public information to promote transparent and effective government."¹¹⁴ In *Putting the Frontline First*, which describes the action plan, the government sets out five principles for public data, defined as "government-held non-personal data that are collected or generated in the course of public service delivery." Specifically, public data will be published in reusable, machine-readable form, using open standards following the recommendations of the World Wide Web Consortium; public data will be available and easy to find through a single online access point; published raw data will be represented in linked data form; more public data will be released under open licenses enabling free use (for commercial reuse as well); data underlying the government's own websites will be published in reusable form; and data that is personal, classified, commercially sensitive, or belongs to third parties will be protected.¹¹⁵ The UK Government also pledged to have the majority of government-published information to be reusable linked data by June 2011 and to establish a common license to reuse data that will be interoperable with the Creative Commons license.¹¹⁶

In furtherance of the open government goals, a panel of technical experts, including Tim Berners-Lee, is working on overseeing the creation of a single online point of access for public sector information, selecting and

111 European Public Sector Information Platform, www.epsiplatform.eu.

112 United Kingdom, *The Re-use of Public Sector Information Regulations 2005*, No. 1515, www.opsi.gov.uk/si/si2005/20051515.htm (in force 1 July 2005),

113 United Kingdom, OPSI, *Information Asset Register*, www.opsi.gov.uk/iar/index.

114 United Kingdom, *Putting the Frontline First*, above note 92 at 19.

115 *Ibid.* at 26.

116 *Ibid.* at 28.

implementing common standards for the release of public sector information, developing Crown copyright and Crown Commons licenses, and working on standards for public data.¹¹⁷ Thus far, the United Kingdom has established an open government data portal, as part of the Government's wider transparency program, and is developing customized open licenses for public sector information that will be interoperable with Creative Commons licenses. On data.gov.uk all content is made available for reuse commercially and non-commercially under terms that are designed to be interoperable with the Creative Commons Attribution 3.0 license.¹¹⁸

In June 2010, the UK Government announced the "next generation" of its licensing framework to allow reuse and repurposing of a broad range of public sector information. Part of the new framework is a new license, which builds on the licensing experience with data.gov.uk and is intended to be interoperable with Creative Commons licenses.¹¹⁹ The new common license will be machine-readable, non-transactional (users do not need individual permission for-reuse) and free, and is designed to be more open than the current Click-Use online licenses for the reuse of Crown and Parliamentary copyrights, which are transactional licenses requiring individual application through the HMSO's online licensing system, and which are intended to be replaced by the new license.¹²⁰

Australia's Government 2.0 Taskforce Report makes explicit recommendations on public sector information accessibility, Crown copyright, and licensing, and urges the Government to extend those principles into a national information policy by all levels of government in Australia (federal, state, territory and local). Recommendation 6 of the Report states "[b]y default public sector information should be free, based on open standards, easily discoverable, understandable, machine-readable, freely reusable and transformable, and released as early as practicable and regularly updated to ensure accuracy." Both the Taskforce Report and the Government Response support using a Creative Commons attribution license (CC BY)

117 United Kingdom Cabinet Office, Digital Engagement Blog, <http://blogs.cabinetoffice.gov.uk/digitalengagement/?tag=tim+berners-lee> (June 2009).

118 "Terms and Conditions," <http://data.gov.uk/terms-and-conditions> (permitting users to freely copy, distribute and transmit data, adapt data, and exploit data commercially by sub-licensing, combining it with other data, or including it in the users' products or applications).

119 "Development of the UK Licensing Framework," (29 June 2010), <http://data.gov.uk/blog/development-uk-government-licensing-framework>.

120 National Archives (GBR), "Licences for Re-using Public Sector Information," www.nationalarchives.gov.uk/information-management/our-services/click-use.htm.

as the default standard for licensing public sector information owned by the Commonwealth. Both support amending copyright policy so Crown copyrighted works are automatically licensed under a Creative Commons attribution license when they become available for public access under Australia's *Archives Act 1983*. In addition to licensing and Crown copyright, both also endorse agencies ensuring that the public sector information they release is "discoverable and accessible" on Australia's open government data portal and providing details about the nature and format of the information.¹²¹ Additionally, at the state level, Queensland supports Creative Commons attribution licensing for state public sector information, and Victoria supports open access as the default for public sector information and developing a whole-of-government framework using Creative Commons licenses as a default for public sector information.¹²² Australia has established an open government data portal site (data.australia.gov.au) for Australian government public information datasets, though it is still beta.

New Zealand's Open Government Information and Data Re-use Project, part of the State Services Commission, is studying approaches for opening New Zealand's public sector information and encouraging its reuse. In March 2009, the Project released a Discussion Paper calling for an "all-of-government approach to opening up public sector copyright material for re-use."¹²³ As the Discussion Paper described, the "fragmented approach to licensing of Crown copyright and other copyright material," the "confusion around the concept of Crown copyright and distinctions between copyright and licensing," and the "proliferation of different and inconsistent licenses across government" "can give rise to confusion among users" and "impede rather than motivate the re-use and positive exploita-

121 Australia, *Report of the Government 2.0 Taskforce*, above note 92 at Recommendation 6; Australia, *Government Response to the Report of the Government 2.0 Taskforce*, *Engage: Getting on with Government 2.0* (May 2010) at 10–11.

122 Queensland (Aus.), *Government Information Licensing Framework*, www.gilf.gov.au; Victoria (Aus.), *Report of the Economic Development and Infrastructure Committee on the Inquiry into Improving Access to Victorian Public Sector Information and Data*, Parliamentary Paper No. 198, Session 2006–2009 (June 2009), www.parliament.vic.gov.au/images/stories/committees/edic/access_to_PSI/EDIC_ACCESS_TO_PSI_REPORT_2009.pdf, ch. 6; Victoria (Aus.), *Whole of Victorian Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data* (2009), www.diird.vic.gov.au/diird-projects/access-to-public-sector-information at 8.

123 New Zealand, "A Suggested All-of-government Approach," above note 61.

tion of public sector information.”¹²⁴ The Discussion Paper considered the possibility of adopting Creative Commons licenses for Crown copyright material. Although the project notes that Creative Commons licenses are unlikely in themselves to alleviate public confusion around the intricacies of Crown copyright, their introduction would bring “much greater clarity and consistency of approach to the licensing of Crown copyright material and other public sector copyright material.”¹²⁵ The Discussion Paper recommended an all-of-government adoption of a suite of open content licenses for copyrighted public sector material that was appropriate to be made available for reuse. It also concluded that Creative Commons licenses were the most obvious candidate of licenses for the government to adopt, possibly in conjunction with more restrictive licenses.

Public sector bodies commenting on the Discussion Paper strongly supported the all-of-government adoption of Creative Commons licenses for public sector information, along with one or more restrictive licenses. The Feedback Summary considered including Creative Commons Zero licenses, in effect waiving Crown copyright, in the suite of applicable Creative Commons licenses for public sector information.¹²⁶

New Zealand has both an open government data portal and a framework of principles for open licensing of Crown copyrighted works.¹²⁷ In August 2010, following the release of a draft framework the previous year, New Zealand released its New Zealand Government Open Access and Licensing framework (NZGOAL), which sets out open access and open licensing principles for public sector information, including both non-copyrighted data and copyrighted works.¹²⁸ In its principles, NZGOAL’s framework usefully distinguishes between non-copyright data and copyrighted works. For non-copyright information and data, NZGOAL supports an “Open Access Principle” of providing online public access and unrestrictive copying and reuse and including a no-known rights statement at the point of release.¹²⁹ For Crown-copyrighted works, the Framework supports an “Open Licens-

124 *Ibid.* at para. 185.

125 *Ibid.* above note 61 at paras. 186-189.

126 New Zealand, *Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments: Summary and analysis of departmental feedback*, Open Government Information and Data Re-use Project (29 May 2009), www.e.govt.nz/library/info-and-data-reuse-feedback-summary-may-2009.pdf.

127 New Zealand Government Datasets, www.data.govt.nz.

128 New Zealand, New Zealand Government Open Access and Licensing framework (NZGOAL) (27 August 2010), www.e.govt.nz/library/NZGOAL.pdf.

129 NZGOAL, above note 128 at para. 29.

ing Principle” to make Crown-copyrighted works available online using the Creative Commons Attribution (cc by) license as the default license in order “to promote the greatest reuse of state services agencies’ copyright works and interoperability between the different license types.”¹³⁰ The framework sets out restrictions where these principles do not apply, and in those contexts, the agency should first consider other Creative Commons licenses, and if they cannot be applied, then consider making the work available under the NZGOAL restrictive license.¹³¹ Although the Feedback Summary vetted the idea of Creative Commons Zero licenses, NZGOAL concluded they were unnecessary and would raise policy and legal issues. While the open government data portal is being populated, New Zealand has already published a list of some of the datasets, databases, and other information resources which are already available online and their location.¹³²

G. CONCLUSION

To achieve open public sector information, it must be published, easy to find, in reusable formats, and either free of Crown copyright restrictions or available under open licenses that allow and encourage reuse. Preferentially, Canada’s digital copyright strategy should examine reforming Crown copyright and study existing working models of public domain government information. Until Crown copyright repeal is prioritized, however, several initiatives can be developed to advance open public sector information, including establishing an open government data portal and adopting Crown Commons licensing.

The government should establish a single portal for public sector information at data.gc.ca, which should be a comprehensive and cumulative catalogue of public sector information that lists the public sector information, indexes information by the governmental body submitting the dataset and by category, provides search tools, and cross-references data

130 *Ibid.* at para. 26, note 6.

131 *Ibid.* at paras. 29–31. The restrictions include instances where open access or open licensing would be contrary to legislation, the agency’s own legitimate commercial interests, or the public interest, or that “would . . . threaten the control over and/or integrity of Māori or other traditional knowledge or other culturally sensitive material” or “jeopardize the economic or other potential to Māori or other indigenous groups of Māori or other traditional knowledge or other culturally sensitive material” (at para. 29).

132 New Zealand, “Exposing Non-Personal Government Data in New Ways,” <http://www.e.govt.nz/policy/information-and-data/exposing-nonpersonal-government-data-in-new-ways>.

between the website of the relevant department and the data in the centralized portal. Public sector information in the centralized portal should be licensed under an open Crown Commons license, which should be interoperable with Creative Commons licensing. Through uniform licensing and branded symbols, Crown Commons licenses will enable the public to readily identify material as public sector information and will encourage the public to access and reuse it.

As the American Library Association stated in its principles, “government information is a public resource collected at public expense” and the public should have “knowledge of and access to this resource.”¹³³ Many countries, including the United Kingdom, Australia, New Zealand, and the United States, have recently engaged the public in national consultations on opening up public sector information and have launched significant open government data initiatives. Canada’s recent consultation paper on a digital economy strategy disappointingly was a missed opportunity to address open government data. But, there are exciting initiatives already in Canada both for specific categories of open data at the federal level, such as GeoConnections’ open licensing and data portal for geospatial information, and at the municipal level, such as Vancouver’s open data project, which can help provide a framework for a federal open government data plan that would include both an open government data portal and open licensing of public sector information.

Canada should take steps now to develop a comprehensive open government data strategy with the goals of indexing and publishing digital public sector information online in open formats on a centralized open government data portal under open Crown Commons licensing, digitizing and publishing archival public sector information, and seeking new opportunities to distribute public sector information through new technologies and media as they are developed to ensure public access to this important public resource of public sector information.

133 American Library Association, “Key Principles of Government Information,” above note 2 at principle 10.

