



## **The CRTC and 21st century expectations of openness, transparency and accountability: a month of comments on how Parliament's delegate performs its responsibilities**

### **22: Accountability means more access without the Access to Information Act**

22 March 2023

*This is the twenty-second of a series of comments by FRPC about the openness, transparency and accountability of the Canadian Radio-television and Telecommunications Commission (CRTC). Parliament established the CRTC on 1 April 1968 and delegated responsibility to it for implementing Parliament's broadcasting and telecommunications policies for Canada.*

*The Ministers of Canadian Heritage and Innovation, Science and Economic Development wrote Chairperson Eatrides in early February 2023 to offer congratulations on her appointment to the Commission<sup>1</sup> and also to "inform her of the Government's vision and priorities with respect to Canada's broadcasting and telecommunications system".<sup>2</sup> The Ministers said they sensed "that public confidence and trust in the CRTC has waned in recent years", pointing to undue delays in its decision-making, unequal access to its processes and the insufficient reasoning, evidence and data in the CRTC's determinations ("decisions").*

The 21<sup>st</sup> to 30<sup>th</sup> commentaries in this series consider the 'accountability' of the CRTC. As noted above, the Heritage and ISED Ministers think that public trust and confidence in the CRTC has been decreasing. At the same time the Ministers emphasize the CRTC's independence: it was referred to nine times in [their recent letter to Chairperson Eatrides](#). Of course, the CRTC is not entirely independent: the statutes that set out its mandate and powers also empower Cabinet to direct the CRTC to exercise its [telecommunications](#) and [broadcasting](#) duties in specific ways.

What the Ministers' letter elides, however, is the degree to which the CRTC is accountable for its performance, and whether it should be more accountable as it (to quote the Ministers) "implements the laws and regulations set forth by Parliament in the public interest".

One way in which the CRTC can be held to account is by evaluating the performance of its responsibilities. The Supreme Court of Canada affirmed [more than a decade ago](#) that access-to-information "legislation creates and safeguards certain values – transparency, accountability and governance – that are essential to making democracy workable". While seeking to balance the right of access to information and efficient governance, the Court has presumed "a right of access – as opposed to a presumption that access should be refused – to all records, subject to exceptions that are specified in the legislation."

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<sup>1</sup> CRTC, "[Meet Vicky](#)" (accessed 1 March 2023).

<sup>2</sup> Department of Canadian Heritage, "[New CRTC Chair's Leadership Will Help Shape the Future of Canada's Communication System](#)", News release (Gatineau, 6 February 2023).



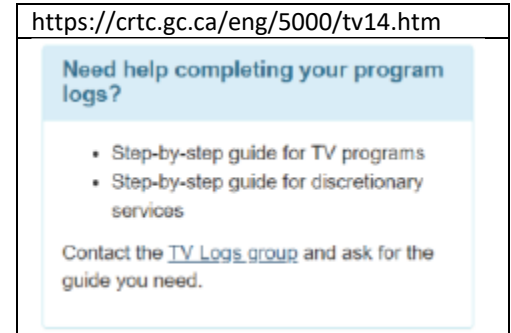
The three main laws that now govern the CRTC are the *CRTC Act* (which establishes the Commission and empowers it to enact bylaws governing its activities), the *Broadcasting Act* and the *Telecommunications Act*.

Despite the CRTC's [extensive website](#), [many reports](#), [financial snapshots of different broadcast sectors and ownership groups](#), and [CRTC datasets available through Canada's open government site](#) it is difficult to know whether Parliament's policies are being implemented or, indeed, how the CRTC itself operates. In theory, access-to-information requests help to illuminate the CRTC's work.

In the case of [Parliament's broadcasting policy](#), for instance, while it is long – 20 separate subsections, from 3(1)(a) to (t) – some of its objectives are measurable. This includes dimensions of effective Canadian ownership and control (3(1)(a)), employment levels (and consequently, the employment opportunities noted in 3(1)(d)(iii)), programming services' broadcast of information about Canada and other countries (3(1)(d)(ii)), the availability of local programming (3(1)(i)(ii)) and the affordability of TV distribution services like cable and satellite (3(1)(t)(ii)).

The following point-form summaries of CRTC answers to roughly 15 years' worth of access-to-information requests shows that obtaining relevant information from the CRTC in a timely manner about these issues is rarely successful. This is because the CRTC keeps some documents from public scrutiny, denies access when it should not, destroys its own records and, based on the amount of information it does not have, does not appear to have an interest in evaluating broadcasters' actual implementation of Parliament's broadcasting policy.

For example, while the CRTC now posts its by-laws – under 'Statutes and regulations' (though not 'B' [for by-laws]) in its [A-Z Index](#), it did not always do so and an access-to-information request was required to obtain them (A-2008-00053).



Other documents that are key to the CRTC's supervisory responsibilities – such as the coding manuals it has developed for TV and radio programming services' broadcast logs – remain hidden from public view (although FRPC did obtain copies of the relevant information through access-to-information requests A-2008-00072 and A-2009-00009).

Other information that the CRTC has chosen not to disclose involves the meetings it has with

broadcasters before they seek the CRTC's approval of an application. In [May 2018](#) Professor Michael Geist highlighted concerns about the CRTC's private meetings with the parties backing the 'Fairplay' application seeking

<b>A-2010-00054 (3 November 2010) response to 7 September 2010 request</b>	
<b>Date</b>	<b>CRTC</b>
29 March 2010 – meeting	Chairperson & Vice-Chair Broadcasting
29 March 2010 – meeting	Commissioners (2)
23 April 2010 – conference call	Commissioner
23 April 2010 – conference call	Commissioner
28 April 2010 – conference call	Commissioner
4 May 2010 – conference call	Commissioner
7 May 2010 – conference call	Senior staff



to block Canadians' access to websites.

The Fairplay 'pre-briefing', pre-application is not the first time that broadcasters have had private meetings with CRTC Commissioners before the latter make a decision about their applications. In spring 2010 Québecor held a licence for the SUN-TV television station, and from 29 March 2010 to 7 May 2010 representatives from Québecor had seven meetings or conference calls with the CRTC's Chairperson, Vice-Chair and other CRTC Commissioners. The CRTC's Vice-Chairperson broadcasting described the meetings and Québecor's purpose to two other Commissioners in a 30 March 2010 e-mail:

...

They [Pierre Dion & Edouard Trépanier] were in Gatineau yesterday morning to meet [the Chair and Vice-Chair Broadcasting]. They also met with [two other Commissioners].

What they want to discuss with you is what [a Commissioner told a CRTC meeting the day before].

In a nutshell, TVA Group wants to transform SUN-TV ... into a category A specialty service that will offer a news service. What they are asking the Commission is access to BDU's [sic] for a 3 year period. After 3 years they want to be consider alike [sic] the other news and sports channels.

.... Except in Halifax, Sun Media owns daily newspapers in Vancouver, Calgary, Edmonton, Winnipeg, Toronto, and Montreal. In Saskatoon they own a weekly. In Halifax, they have no newspaper at all. We told them that they [[sic]] were numerous hurdles to go over, since we just totally de-regulate [sic] news and sports. They were arguing that NewsWorld and CTVNewNet were covering news in a linear fashion while their programming plan will be model [sic] on Fox News with more opinion. They also mention [sic] that NewsWorld is running the British version of Antique Roadshow, something they will never do. ...

TVA paid \$43 million for SUN-TV at the time Toronoto-One, they have lost since they own [sic] the station some \$37 million.

...

Québecor [subsequently applied to the CRTC on 26 July 2010](#) for a licence for a national discretionary television service with mandatory access to BDU subscribers for 3 years. [It later dropped the mandatory-access request](#) on 8 October 2010, leading the CRTC to shift from hearing the application in a public hearing on [19 November 2010](#) to considering it at a [non-appearing hearing on the same day in its offices](#). [The CRTC granted Québecor's application on 26 November 2010](#).

Leaving aside the merits of the application, the pattern in the 2010 Sun-TV matter resembles that of the approach used by the Fairplay parties in 2017 – when they also had private meetings with CRTC Commissioners and staff which were not disclosed in the CRTC's subsequent publications about the applications.

Overall, reviewing the CRTC's answers to access-to-information requests tends to leave the impression that the CRTC's default setting is non-disclosure. Since this is not how Canadian courts have interpreted this statute, such a position would be surprising. But it would be even more surprising, as the Office of the Information Commissioner has explained to the CRTC several times that it has misinterpreted the *Access to Information Act*.



- In 2012 the Office of the Information Commissioner confirmed that while the CRTC was correct to exempt some records requested from disclosure, it was incorrect regarding other records as these had “already been made public”
- In 2012 the Office of the Information Commissioner concluded that the CRTC “erred” by withholding information about the Local Programming Improvement Fund requested from the CRTC in 2010 (OIC 3211-00070/0001; A-2010-00081)
- In 2012 the Office of the Information Commissioner concluded that the CRTC was incorrect when it said it needed an extension of deadline because the request would ‘unreasonably interference’ with its operations since, for one thing, the CRTC found 284 pages which, in the OIC’s view, did not “constitute a large number of records” and because the extension resulted in a “deemed refusal”, the CRTC breached subsection 4.2.1 of the *Access to Information Act* (“duty to assist”) (OIC 3211-00904; A-2011-00038)
- In 2015/16 the Office of the Information Commissioner confirmed that the CRTC’s was mistaken when it decided not to disclose information about a telecommunications non-compliance matter in 2011:

[Information must meet requirements of exemptions to be withheld](#)

Complaint: The Canadian Radio-television and Telecommunications Commission (CRTC) cited both section 16 and section 23 to withhold almost all of a four-page agreement between itself and a company involved in the 2011 robocalls scandal that set out the terms for resolving various concerns.

Investigation: The CRTC told the OIC that releasing the agreement in full could jeopardize outstanding investigations related to the robocalls scandal (section 16). The CRTC also alleged that, since the process that led to the agreement was subject to the legal advice privilege (section 23), the agreement itself should be, too.

Outcome: The CRTC agreed to review the exemptions and released almost all the information it had previously withheld.

Information Commissioner’s position

Most of the information in the agreement was already in the public domain and, thus, disclosing it would not harm any outstanding investigations.

The agreement did not contain any legal advice between a solicitor and client; therefore, it could not be exempted under section 23.

Another problem with relying on access-to-information requests to establish a level of accountability is that, while the Supreme Court appears to have assumed in 2011 that government will retain records (perhaps because retaining information in digital formats is less expensive than it was with paper-only records), the CRTC destroys its records.

- In 1999 the CRTC confirmed in response to an access-to-information request that “[o]ur licensee broadcasting files are maintained for a period of 15 years, following which they are destroyed. This is the retention and disposal period approved for the CRTC in conjunction with the National Archives. While the National Archivist may identify some records for selective retention because of their archival and historical value, it has determined that licensee files have no such historical value” (File 1120-4 (15 July 1999))



- Asked in 2009 for any records about the stakeholder consultations it held more than once to develop its 3-year workplan for 2007-2010, the CRTC said “[a] thorough search of [its] files has revealed there are no documents pertaining” to these requests (A-2009-00043):

This 3-year work plan follows a series of stakeholder consultations held to identify the major issues that will emerge over the next few years. It is our goal to anticipate the environmental, social, economic and technical issues that will have an impact on all of our stakeholders. The Commission will also endeavour to ensure its regulatory frameworks keep pace and to provide the industry with the most room possible to respond to changing market conditions.

- In early 2008 the CRTC “moved to a 10 year retention period for most records (paper and electronic)” and “all information you were asking for before 1990 was destroyed following Retention and Disposal standards” (A-2008-00074)
- In 2005 the CRTC prepared to review its *Commercial Radio Policy* and asked 73 radio stations in 12 “markets to provide a summary of their local programming [*sic*] for the week of 17-23 April 2005 to gauge the amount of local programming being broadcast by Canadian radio stations” – when asked in February 2009 for a copy of the data submitted by the radio stations, the Commission could find “no documents” about the information (A-2008-00066). The CRTC also removed the summary chart on “Local Programming” that was based on its 2005 research from its website
- Asked in 2011 for a website address where the CRTC keeps the radio logs it collects from broadcasters, the CRTC said it

... does not have a website which holds electronic logs filed by radio broadcasters. The CRTC on occasion has logs from some radio stations kept temporarily onsite in order to assess compliance before the licence renewal of radio stations. These logs are destroyed or returned to the radio station once the Analysis Report has been issued and placed on the station’s public file. (A-2011-00035)

Finally, there is the matter of what the CRTC chooses to know – and what it is apparently content not to know. FRPC’ research interests have found 12 aspects of Parliament’s Broadcasting Policy for Canada about which the CRTC chooses not to know:

### **1. Effective Canadian ownership and control**

- In 2010 the CRTC did not keep records of the level and percentage of debt, voting shares held by non-Canadians in broadcasting undertakings or in the broadcasting system, the impact of increased foreign investment in Canadian broadcasting or telecommunications (A-2010-00010, -00011, -00015)
- In 2010 the CRTC had no research on the impact of cross-media ownership in broadcasting or telecommunications (A-2010-00017), or on the impact of concentrated media ownership in Canadian broadcasting (A-2010-00018)



- In 2015 the CRTC had no information about or research studies on foreign investment in Canadian telecommunications for broadcasting, from May 2010 to September 30, 2015 (A-2015-00036; A-2015-00039)

## **2. Diverse programming broadcast by radio stations**

- No studies undertaken or commissioned by CRTC analyzing types and amounts of programming broadcast by public and private radio stations in Canada, from 2014 to December 2020 (A-2020-00065)

## **3. Employment opportunities**

- No studies from January 2014 to January 2021 on commercial radio stations' employment opportunities (A2020-00067)

## **4. News**

- No research about local news broadcast by Canadian radio or television undertakings (A-2008-00065)
- No research about the broadcast of original local news by radio stations owned or controlled by large ownership groups (A-2020-00066)
- No information about news bureaus operated by radio or TV stations in 1989, 1996, 1999, 2006 and 2009 (A-2010-00014)
- No information about the number of full-time or equivalent journalists employed by public, private, radio, television and discretionary programming services, from 2000 to 2010 (A-2010-00016), from 2011 to 2014 (A-2015-00040) or from 2014/15 to 2018/19 (A-2020-00024)
- No documents since 1999 on the profitability of local news and of local programming for private conventional television broadcasters (A-2010-00049)
- From 2005 to 2010 no studies or research on the level of balance in news and information programming in over-the-air radio, television or discretionary television programming services (A-2010-00071)

## **5. Local service**

- No information about the number of automated radio stations operating in Canada in 2009/10 or their call signs (A-2011-00015)
- As of March 2009, no research undertaken or commissioned by the CRTC dealing with local news programming broadcast by conventional radio or TV stations (A-2008-00065)



## 6. Indigenous broadcasting policy

- Following the CRTC's announcements in its *2008 3-Year Work Plan 2008-2011* (Ottawa, 30 April 2008) that it would "complete studies on [Indigenous] policies" in 2009/10 and "initiate and complete review of [Indigenous] and ethnic broadcasting policies" in 2010/11, the CRTC by 12 April 2012 had no reports, studies, research, analyses, briefing materials or memos undertaken by or commissioned by the CRTC about the implementation of its 1990 [Indigenous] broadcasting policy (A-2012-00002)

## 7. Affordable rates

- When the CRTC was asked in October 2009 for information about basic cable rates and non-basic cable rates from 1996 to 2009, the CRTC said it stopped collecting separate information for basic and non-basic cable rates after 2005 (A-2009-00046 & -00047)
- When asked for "[a]ny records from 2000 on which contain statistics describing, analyses of, research about, and/or surveys asking about" the affordability of BDU rates for basic, extended basic and/or discretionary TV services, the CRTC provided a briefing document from 3 December 2009 which included the average basic service rate from 2002 to 2008 (A-2014-00007)
- When asked for "records containing analyses of, studies on, research about and/or surveys investigating the rates charged to BDU subscribers to obtain basic or extended basic service, the CRTC withheld all information due to the 21(1)(b) exception of the *Access to Information Act* ("financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party")

## 8. Annual lists of radio stations in compliance or non-compliance published due to Broadcasting Regulatory Policy CRTC 2014-554 (paragraph 67)

- No longer available (A-2021-00007)

## 9. Regulatory flexibility and the regulatory burden

- After a CRTC Commissioner told the Ontario Association of Broadcasters in October 2009 that the industry wants more flexibility to allocate Canadian programming expenditures among the undertakings controlled by groups so that they could achieve business efficiencies, the CRTC confirmed it had no specific records showing this request, and that the Commissioner's statement was "the result of CRTC interpretation of comments made over the years by licensees at various public proceedings" (A-2009-00069)
- The CRTC's *Departmental Performance Reports* in 2001, 2002, 2004 and 2009 set specific goals to reduce the regulatory burden for broadcasters, but when asked in August 2010 for any studies, research, briefings, memoranda or reports since 1999 about its achievement of this reduction the CRTC had no documents (A-2010-00041)



## 10. Impact of partial deregulation of advertising limits on conventional television

- As of October 2010, no research or studies on the impact of partial deregulation of advertising limits on conventional television (A-2010-00057)

## 11. Impact of ownership

- After the CRTC shifted from renewing individual broadcasting licences to renewing licences held by ownership groups, the CRTC said it was unable to provide any information about the ownership groups from before 2008 because “[f]or previous years, no data exists for ownership group, [sic] only disaggregated data exists.” (A-2009-00033)
- No documents as of September 2010 on the impact on Canadian programming investment of efficiencies and synergies from ownership consolidation (A-2010-00047)
- No studies or research from 2000 to 2010 on the impact of BDU licensees’ ownership on radio or television programming services (A-2010-00072)
- By October 2010 no studies undertaken or commissioned by the CRTC to assess the impact of its 2008 *Diversity of Voices* regulatory policy (A-2010-00073)
- No research undertaken or commissioned by the CRTC since 2007 to 31 August 2020 on the impact of concentrated media ownership on radio or television news in Canada (A-2020-00041)
- No documents written or commissioned by the CRTC since January 2010 to October 2020 about the broadcast of radio programming by television programming services, or the broadcast of television programming by radio programming services (A-2020-00048)

A review of the information available from the CRTC’s website and its answers to access-to-information requests shows that the CRTC treats information inconsistently. It keeps some documents from public scrutiny, denies access when it should not, destroys its own records and, based on the amount of information it does not have, does not consistently evaluate broadcasters’ implementation of Parliament’s broadcasting policy.

### Recommendations:

The CRTC should revise its internal approach to disclosure by considering whether it would be required to disclose information relevant to a proceeding under the *Access to Information Act*. Ideally, the CRTC would establish a CRTC Consultative Committee on Data Disclosure comprised of academic scholars and representatives of civil-society organizations with a focus on quantitative policy evaluation of Canada’s broadcasting and telecommunications policies.

Maintaining the *status quo* – in which the CRTC’s decisions to destroy, ignore or hide information that is relevant to the performance of its responsibilities under the *Broadcasting Act* and the *Telecommunications Act* – has the potential to bring the CRTC’s administration of its responsibilities into disrepute.

~ Forum for Research and Policy in Communications (FRPC)





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