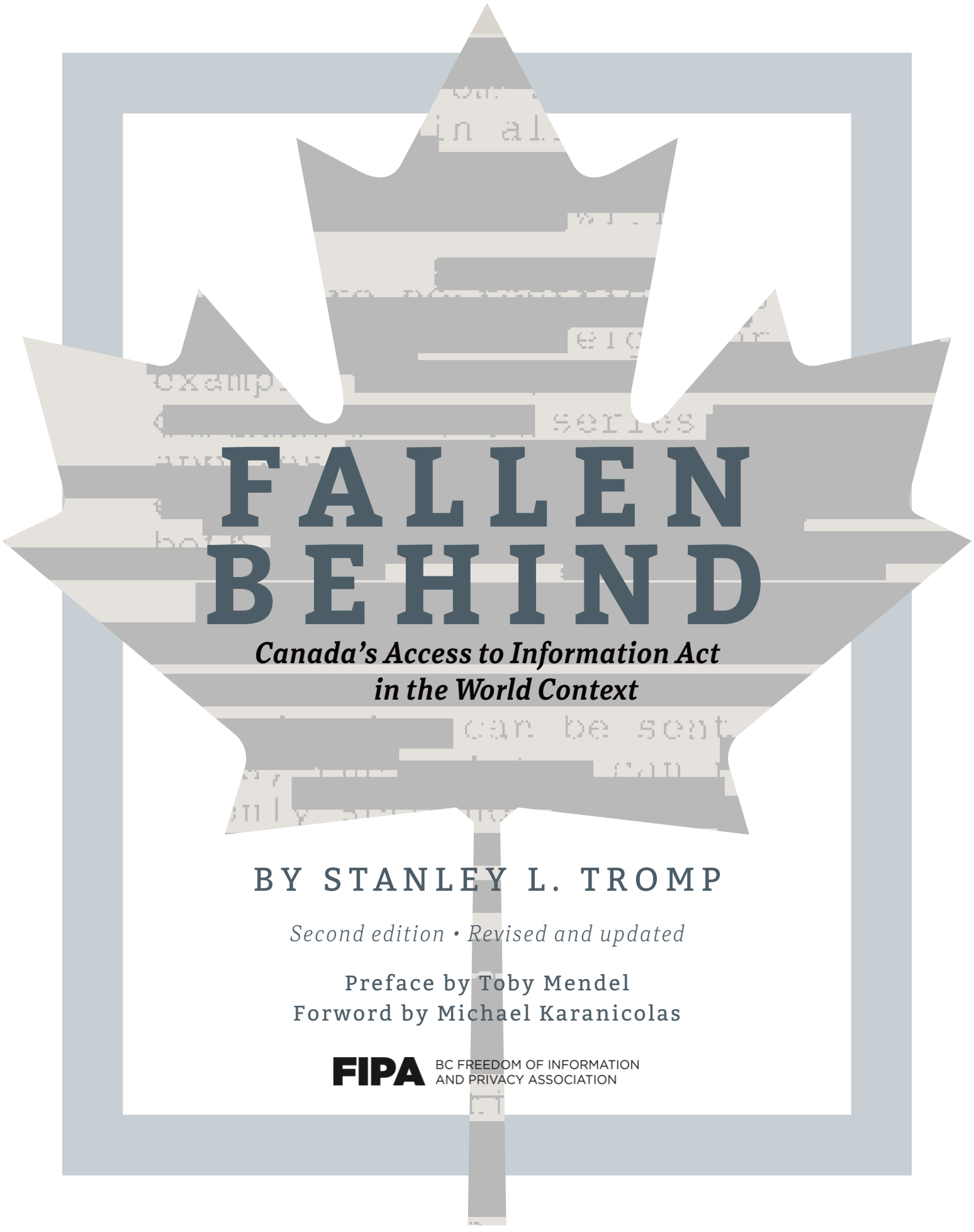

FALLEN BEHIND

Canada's Access to Information Act in the World Context

BY STANLEY L. TROMP

Second edition • Revised and updated

Preface by Toby Mendel
Forword by Michael Karanicolas

FIPA BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

This report is dedicated with gratitude to all the Freedom of Information scholars and advocates throughout the world.

Published by

FIPA BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

#103-1093 West Broadway
Vancouver B.C. V6H 1E2

p: 604.739.9788
e: fipa@fipa.bc.ca
w: fipa.bc.ca
tw: @bcfipa

ISBN 978-1-7772225-0-5

Designed by Nelson Agustín

CONTENTS

ACKNOWLEDGMENTS

The author wishes to thank Toby Mendel of the Centre for Law and Democracy and Michael Karanicolas of the Right to Know Coalition for their invaluable assistance and commentaries for this report. All responsibility for judgments and errors remain mine

FIPA is grateful to the B.C. Law Foundation for its funding support that made this report possible

FORWARD TO THE FIRST EDITION

by Murray Rankin

In every sense of the word, this book is a labour of love. It is certainly a book of passion. Stanley Tromp has done us all a great service in compiling this thoughtful analysis of freedom of information law and policy around the world. Its remarkable scope and its detailed analysis of the key issues are staggering. His spread sheet, *World FOI Chart*, alone is worth the price of admission.

It seems almost trite now to observe that information is the lifeblood of a democracy. Freedom of information legislation, which as Mr. Tromp describes is also entrenched in constitutions around the world, is a right worth fighting for.

Perhaps sadly, this book places Canada in the global context and demonstrates just how far behind other countries Canadians are in providing a meaningful right of access to their government's public records. Reading this book will no doubt make you angry: why do Canadians tolerate this state of affairs?

Mr. Tromp helpfully sets out the provisions in the statutes and constitutions of most of the countries in the world. Critics will be quick to argue that it would be naïve in the extreme to think that simply entrenching a right to information in a constitution or even a statute will somehow make it so. Mr. Tromp is far from naïve. His purpose is to show just how woefully far Canada has fallen – not only with respect to the letter of the law, but also, sadly, with the spirit of open government.

The former Information Commissioner of Canada, John Reid noted that the "culture of secrecy" has not been significantly altered in this country, despite a generation of experience with the *Access to Information Act*. Politicians become ministers, and they become easily seduced by the attractions of secrecy. Mr. Reid also expressed the view that that to maintain our legal and democratic rights of access to government information, citizens must take an active role in preserving and pressing for improvements. I agree. Stanley Tromp is one of those citizens. The tone of righteous indignation that permeates his book is truly infectious.

One thing is abundantly clear: the *ATIA* is now in desperate need of reform. Even if there had not been serious teething problems resulting from the grafting of a statutory right to records onto a previously secretive parliamentary system of government, the breathtaking strides in information technology since 1982 have caused fundamental and ongoing changes in government's record management practices. Significant and thoughtful proposals for reform have been made almost continuously over the last two decades, most of them

dutifully recorded in this book, but very few have attracted parliamentary attention.

For legislation like the *ATIA*, which the courts have affirmed is quasi-constitutional in nature, its continuing vitality now hinges upon meaningful reform efforts. It is now time to squarely face the perennial issue of commitment: is there a political will and a bureaucratic willingness to live up to the quasi-constitutional rights now enshrined in the *ATIA*? Is there a similar will to amend the law now, as is urgently required, to make it responsive to some of the serious and pressing issues canvassed in this book?

Mr. Tromp is a watchdog and a fierce one at that. In the tradition of I. F. Stone, he is a citizen advocate for open government both at the provincial and federal levels. In a sense, he has become our conscience in this crucial policy field.

After some 25 years into our marriage to freedom of information, Canadians need to rekindle the passion in what has become a very stale relationship. Without a meaningful right to information, our democracy atrophies. Freedom of information is a right worth fighting for. Stanley Tromp has been a real champion of this right: he leads the way for the rest of us to follow.

- Murray Rankin, Victoria, British Columbia, 2008

Murray Rankin*, Q.C., (LL.M., Harvard University, 1977) is a partner in Heenan Blaikie LLP, and was Adjunct Professor of Law the University of Victoria. He is the author of the influential 1977 report* Freedom of Information in Canada: Will the Doors Stay Shut? *(Ottawa: Canadian Bar Association), and co-author with Heather Mitchell of* Using the Access to Information Act *(International Self-Counsel Press, Ltd., Vancouver, 1984).*

In the 1980s, he translated a leading French language text by René Dussault and Louis Borgeat, Administrative Law: A Treatise*. He also served as consultant to the House of Commons committee that conducted the review of the* Access to Information Act and Privacy Act *in 1987, and in 1992, was appointed as special advisor responsible for the policy formation and drafting of British Columbia's first* Freedom of Information and Protection of Privacy Act*.*

He was the Member of Parliament for Victoria from 2012 to 2019, and is now chair of the National Security and Intelligence Review Agency (NSIRA), overseeing all national security and intelligence activities carried out by the government of Canada.

PREFACE TO THE SECOND EDITION

by Toby Mendel

My foreword to the 2008 edition of *Fallen Behind* highlighted recent developments in the area of access to information, including its nascent recognition as a human right under international law. It also concluded that the *Canadian Access to Information Act*, first adopted in 1982, had not kept up with international developments and that while the Act had, in 1982, represented a progressive development in terms of giving citizens a right to access information held by government, by 2008 it had, as the title of the book accurately claimed, "fallen behind" progressive developments in the rest of the world.

Much has happened globally since then. Today, access to government-held information is nearly universally recognised as a human right. In 2008, the Inter-American Court of Human Rights was the only international court to have recognised a human right to information whereas today authoritative actors in all of the leading human rights systems have done so.

In 2008, the right to information (RTI), as this right has now widely come to be called, was just beginning to be recognised as a core development need. Today, its widespread recognition as central to development is reflected in its inclusion in the United Nations Sustainable Development Goals, specifically in Target 16.10, "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements," and Indicator 16.10.2, "Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information".

The number of countries which have adopted right to information laws has increased steadily since 2008, growing from 83 by the end of that year to 129 today, an increase of 46 countries or an average of just over four per year.

28 September, International Right to Know Day, was first recognised by civil society in 2002. It was formally recognised by UNESCO as International Day for Universal Access to Information in 2016 and it is now being considered as a formal United Nations day.

In 2008, despite widespread claims by civil society, academics, journalists, other users and even Information Commissioners that the Canadian law was weak, we had no scientific system for measuring this. That too has changed with the launch in 2011 of the RTI Ranking developed by my own organisation, the Centre for Law and Democracy (CLD), and Access Info Europe. The RTI Ranking

is a sophisticated tool for assessing the quality of the legal framework for the right to information that is widely recognised as the gold standard in this area.

Unfortunately, amidst all of these global developments, in Canada, *plus ça change, plus c'est la même chose*. When the RTI Rating was launched in 2011, Canada obtained a score of 85 out of a possible 150 points, putting it in 40th position from among the 89 countries assessed on the Rating at that time, or in 45th percentile. Today, while the Canadian score has crept up marginally, to 91 points, it is in 58th position from among the 128 countries on the Rating, remaining perfectly stagnant at 45th percentile.

The increase in Canada's score since 2011 is due mainly to the May 2016 Interim Directive on the Administration of the Act, although some of those changes have been enshrined in Bill C-58, passed in June 2019 but yet to come fully into force.[1] However, an assessment of the Bill by CLD in June 2017 showed that it would only add two points to Canada's RTI Rating score. This comes from giving the Information Commissioner binding order making powers, something CLD has long called for. However, even this change has been criticised by some and only time will tell how significant a development it really is.

The evidence also suggests that implementation of the law in Canada largely reflects the weaknesses in the Act. Particular problems are the limited scope of the Act, the unlimited delays that public authorities are allowed to claim and the vastly overbroad regime of exceptions. Certainly my own fairly extensive use of the Act bears this out. Just as a random example, earlier this year I asked Canada Post about the number of privacy breaches they had formally recorded in 2018 and for any official rules they had for dealing with them. After claiming a 90-day delay, Canada Post finally responded that there had been 35 breaches and sent me their official (off-the-shelf) policy on handling such breaches! Unfortunately, this is hardly an exceptional case.

The right to information has been hailed by leading development, democracy and human rights thinkers around the world for the many benefits it provides, including more sustainable development, better participatory democracy and more robust public accountability. As someone who travels around the world promoting the right to information, it is frankly a source of profound embarrassment to me how poorly Canada does on this human right. Given that everyone who uses this system regularly is aware that it is profoundly broken, it is inexplicable that it does not get fixed.

- Toby Mendel, Halifax, Nova Scotia, September, 2008

[1] Canada's RTI Rating score has not yet been adjusted to take into account Bill C-58.

Toby Mendel *is the founder and has for ten years been the Executive Director of the Centre for Law and Democracy, an international human rights organisation based in Halifax, Canada that focuses on foundational rights for democracy including freedom of expression, the right to information, the freedoms of association and assembly, and the right to participate. Prior to that, he was for over 12 years the Senior Director for Law at Article 19, a London-based human rights organisation with a mandate to promote and protect freedom of expression.*

In those capacities, he has provided legal advice to governments in dozens of countries on how to draft strong right to information laws working with, among others, UNESCO, the World Bank and the Inter-Parliamentary Union. Toby has published extensively on the right to information and a wide range of freedom of expression themes. Prior to joining Article 19, Toby worked as a senior human rights consultant with Oxfam Canada and as a human rights policy analyst at the Canadian International Development Agency (CIDA).

FORWARD TO THE SECOND EDITION

by Michael Karanicolas

In the original edition of this book, the central thesis was that Canada had fallen behind the rest of the world in its framework for enabling the right to information. Over a decade later, it seems jarring to think that this narrative was established so long ago, given that Canadians are still waiting for major structural reforms to the *Access to Information Act*.

Where the first edition included unfavourable comparisons with various other laws, particularly newer ones passed in the global south, over the intervening period many of these laws have been further overhauled and improved. Mexico's *General Act of Transparency and Access to Public Information*,[2] which was first passed in 2002, and which served as a reference point for robust legislation in the first edition, was revised in 2015, strengthening it still further.

A similar story can be told about Afghanistan, which enacted its *Access to Information Law* in 2014 and then reformed it in 2018,[3] and Tunisia, which passed its first law in 2011, and introduced a new framework in 2016.[4] In all three cases, while the original versions were already stronger than Canada's *Access to Information Act*, the revised laws are miles ahead of us. If it were actually a race, at this point we would be getting lapped.

None of this is to suggest that the intervening years were uneventful for Canada. In 2015, it appeared that the *Access to Information Act*'s white knight had finally arrived, in the form of a candidate for Prime Minister who not only included access to information reform prominently in his campaign,[5] but he even had a track record of championing fundamental reforms dating back to his time as an opposition MP.[6]

---

[2] *General Act of Transparency and Access to Public Information* (Mexico), 2015, online: *RTI Rating* <https://www.rti-rating.org/wp-content/uploads/Mexico.pdf>.

[3] *Access to Information Law* (Afghanistan), 2015, online (pdf): *RTI Rating* <https://www.rti-rating.org/wp-content/uploads/2018/09/Afghan.RTI_.Decree.May2018.pdf>.

[4] *Loi organique n° 2016-22 du 24 mars 2016, relative au droit d'accès à l'information* (Tunisia), 2016, online (pdf): *National Portal of Legal Information* <http://www.legislation.tn/en/detailtexte/Loi-num-2016-22-du-24-03-2016-jort-2016-026__2016026000221>.

[5] Liberal Party of Canada, "Real Change: A Fair and Open Government" (Aug 2015), at 4, online (pdf): *Liberal Party of Canada* <https://www.liberal.ca/wp-content/uploads/2015/08/a-fair-and-open-government.pdf>.

[6] Bill C-613, *An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency)*, 2nd Sess, 41st Parl, 2014 (first reading 11 June 2014).

Alas, this too turned into a false dawn. The promised changes were first delayed, and then when they were finally unveiled they included only a few minor tweaks to the law, rather than the root-and-branch reform which civil society and other stakeholders had been calling for.[7] Indeed, the reforms even fell short of the specific campaign promises that were made. Candidate Justin Trudeau pledged that, under his watch, the *Act* would be expanded to cover the prime minister's and ministers' offices.

But instead of enabling a right of access among these bodies, as his platform language implied, the reform package merely expanded their proactive publication.[8] Instead of empowering the Information Commissioner with full order-making power, another campaign promise, they implemented a fuzzy middle ground solution which made her decisions legally binding, but which failed to grant her office any effective mechanism for enforcement.[9] In other words, under the new system, requesters are still essentially reliant on public bodies' good faith adherence to the law.

The United States' experience under the Trump administration has provided an ample demonstration of the dangers of systems of accountability which rely on custom and convention. The reformed system is further undercut by the fact that public bodies retain an ability to demand a *de novo* judicial review of the Information Commissioner's decisions, yet another tool for governments to potentially leverage against disclosure decisions that they do not like.

While Canada has seen a few bright spots at the provincial level, most notably the much vaunted 2015 reforms to Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*,[10] even these have come under assault. After a change in government, the new administration began first to flout the law's timelines,[11] before launching a formal legal challenge aimed at curtailing the powers of the Information and Privacy Commissioner.[12]

None of this should be too surprising. Veteran advocates all over the globe will tell you that, while politicians love to wax poetic

---

[7]Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2017.

[8]Bill C-58, ibid at cls 36-38.

[9]Bill C-58, ibid at cl 16.

[10]Access to Information and Protection of Privacy Act, SNL 2015, c A-1.2.

[11]"N.L. government breaking its own laws on access to info requests: commissioner", CBC News (17 July 2018), online: <https://www.cbc.ca/news/canada/newfoundland-labrador/privacy-commissioner-donovan-molloy-1.4748389>.

[12]Rob Antle, "Alison Coffin calls out Liberal 'hypocrisy' in clash over transparency watchdog's powers", CBC News (29 August 2019), online: <https://www.cbc.ca/news/canada/newfoundland-labrador/ndp-leader-alison-coffin-info-commissioner-authority-1.5264540>.

about their commitment to transparency and openness,[13] getting them to actually support meaningful progress on this key democratic indicator is like pulling teeth. And yet, it is this very resistance which makes sustained advocacy, and books like *Fallen Behind*, such an important contribution to the national dialogue around the right to information.

Public accountability is not pleasant for those in power. Governments will never willingly prioritize progress in this area, they will always have to be pushed. And the only way to do that is to keep the conversation going, and remind Canadians of why this right is important, and that, all around the world, there are governments who do this far better and more efficiently than Canada does.

At this point, Canada's *Access to Information Act* is more than just outdated. It is an anachronism, a time capsule for a 1980's version of the right to information which is wholly incongruent with the realities of the digital age, and the evolution in expectations around transparency and access to information that has taken place over the intervening 36 years. My hope is that this latest edition of *Fallen Behind* finds an audience among Canada's policy-makers, and that Canadians will not have to wait another 36 years to finally bring the *Access to Information Act* into the 21st century.

Michael Karanicolas *is the President of the Right to Know Coalition, a Halifax-based NGO which works to promote government transparency. As of 2019-2020, he is also employed as the Wikimedia Fellow at Yale Law School, where he leads the Initiative on Intermediaries and Information. Prior to joining the faculty at Yale, Michael worked at the Centre for Law and Democracy from 2010-2017, where among his core duties were carrying out the assessments which constitute the Global RTI Rating.*

He also served as Canada's Independent Review Mechanism with the Open Government Partnership, where he was responsible for assessing the 2016-2018 Canadian Action Plan on Open Government, which included the latest round of reforms to the Access to Information Act*. Michael has a B.A. (Hons.) from Queen's University, an LL.B. from the Schulich School of Law at Dalhousie University, and an LL.M. from the University of Toronto.*

[13] See e.g. Louis Jacobson, "Is Donald Trump the most transparent president ever? No" (4 June 2019), online: PolitiFact <https://www.politifact.com/truth-o-meter/statements/2019/jun/04/donald-trump/trump-administration-most-transparent-ever-no/>.

SUMMARY OF FINDINGS

Fallen Behind: Canada's Access to Information Act in the World Context.
Report by Stanley Tromp. 2nd edition, 2020.

The first edition of this book in 2008 detailed how Canada's *Access to Information Act* had fallen behind the rest of the world's FOI laws. Since then, the problem has only grown far worse - enough so that the revised book could well be entitled *Fallen Further Behind*.

In the authoritative Global Right to Information Rating system of the world's 128 national laws, Afghanistan ranks number 1, while Canada - which ironically has so worked hard to transform the top-ranked nation into a modern democracy - ranks 58. Mexico ranks second, followed by (in order) Serbia, Sri Lanka, Slovenia, Albania, India, Croatia, and Liberia.

In his preface to the new edition, human rights lawyer Toby Mendel writes, "As someone who travels around the world promoting the right to information, it is frankly a source of profound embarrassment to me how poorly Canada does on this human right."

Bill C-58 (which is now law) granted the Information Commissioner a barely adequate power to order the government to release records, and some call this merely a baby step forward. When will the situation ever improve?

• ***Chapter 1*** **- The Constitutional status of FOI**

In 2019, of the 128 nations with freedom of information laws, 78 of these grant citizens some kind of right to access state-held information in their Constitutions or Bill of Rights; 63 of those are explicit and general, while the others are implied or topic limited. Some such right is present in Afghanistan, India, Pakistan, Israel, South Korea, Mexico, New Zealand, South Africa, and many Eastern European nations. Such guarantees date back to 1766 in Sweden, 1789 in France, and 1795 for the Netherlands. Canada's Constitution does not include this right, although several Canadian court rulings have described the right as "quasi-constitutional."

• ***Chapter 2*** **- Cabinet records**

The records of cabinet discussions are excluded completely from the scope of the FOI law only in Canada and South Africa. Here, the Information Commissioner does not even have the legal right to review such records. Yet cabinet confidences were subject to a mandatory exemption in Canada's original *Freedom of Information Act* of 1979.

The other Commonwealth and provincial FOI laws have mandatory exemptions for

cabinet records, and more than half have general public interest overrides than can permit their release, with a freer status for factual background papers, none of which are present in Canada. The latest Commonwealth FOI law, that of Ghana (2019), contains an exemplary harm test for cabinet records, whereby they can be withheld if they would "undermine the deliberative process." Cabinet records can be withheld for 20 years in the *ATIA*, but only for 10 years in Nova Scotia's FOI law.

• ***Chapter 3*** **- Policy advice**

The *ATIA* exemption for policy advice (Section 21) is far broader than in most of the world, and it is being vastly overapplied to withhold countless records of the public interest. Unlike with the *ATIA*, the FOI laws of South Africa, the United Kingdom, Scotland, and others include a harms test for their policy advice exemptions, which can also be overridden by public interest overrides.

The FOI laws of eight provinces and territories have shorter time limits for withholding records in their policy advice exemption than the 20 years in the *ATIA* (e.g., five years in Nova Scotia). In some non-Commonwealth countries, the use of the exemption ends when the policy topic is decided. Many nations and provinces have a much longer list of factual background papers that may be released notwithstanding this exemption than is found in the *ATIA*.

• ***Chapter 4*** **- Scope of coverage**

Canada has created many wholly owned and controlled entities to perform public functions and spend billions of taxpayer's dollars while excluding these from the scope of FOI laws, under the pretense that they are private and "independent." Today more than 100 such quasi-governmental entities are still not covered by the *ATIA*. The exclusion of some of these such as the Canadian Blood Services, the nuclear Waste Management Organization and air traffic controllers could result in harm to public health and safety.

On this topic, Canada has fallen farthest behind the world FOI community. Unlike the *ATIA*, the FOI laws of most nations cover all such legal entities that manage public services, or are even 50 percent publicly owned or funded, or have boards appointed by government, or are vested with public powers. Good models are found in India, New Zealand, Kenya and South Africa. Most provinces (notably Quebec) contain much broader definitions of what is a "public body."

• ***Chapter 5*** **- Duty to document, and record retention**

The greatest single threat to the FOI system today may be "oral government." This occurs when officials no longer commit their thoughts to paper, and convey them verbally instead, to avert the chance of the information emerging in response to FOI requests. For the past three decades, Canadian information commissioners have protested that some officials have no hesitation in admitting, even advocating this practice.

To counter this grievous harm, Canada urgently needs a comprehensive law to create and preserve records, with penalties for non-compliance. The United States,

some Australian states and New Zealand have broad legal requirements to create full and accurate records. In the FOI laws of several nations, agencies must ensure all their records are catalogued in a way that facilitates access, and in some of these, records may not be destroyed after an FOI request for them has been received, even if they had already been scheduled for destruction.

• *Chapter 6* - The public interest override

The Conservative Party pledged in 2006 to "provide a general public interest override for all exemptions," yet this promise was not fulfilled. Yet the FOI laws of 92 other nations – and all the Canadian provinces and territories - contain much broader public interest overrides than are found in the Canadian *ATIA*. These include Mexico, New Zealand, South Africa, Ireland, the United Kingdom, India and most Eastern European nations. Many of the laws state that the override should apply to all the FOI exemptions and be mandatory, not only apply to two exemptions and be discretionary, as is the case in the *ATIA*.

• *Chapter 7* - Harms tests and time limits

The Conservative party pledged in 2006 to subject all *ATIA* exemptions to a "harms test," yet this promise was not fulfilled. Several *ATIA* exemptions – such as policy advice, solicitor-client privilege, information received from other governments - still lack explicitly-stated harms tests and so are known as "class exemptions," a situation that falls seriously short of world FOI standards. Worse, in 2006 the government amended the *ATIA* to enable it to withhold draft internal audits, in Sec. 22.1(1).

• *Chapter 8* - The Commissioner and order power

The Liberal party kept its 2015 pledge to grant the information commissioner the power to order the release of government information in *Bill C-58* (now law). Yet the commissioner has strongly objected that this Bill is in fact a "regression" of existing FOI rights, and the new power is not "a true order-making model" due to serious failings with it.

There are 82 countries that allow the public to file appeals with an external oversight body, and in around half of these countries, the oversight body is able to issue legally binding orders. These include Mexico, Pakistan, India, New Zealand, Scotland, and the United Kingdom. The same power is held by the information commissioners of five Canadian provinces. The five criticized features in Canada's new order model are mostly absent in the rest of the world. The *ATIA* still needs amendment allow the Information Commissioner to review the decision to invoke the Cabinet confidences to exclusion to a review, as most nations permit.

• *Chapter 9* – Response times

ATI Act response delays have truly reached a crisis level. The most common initial FOI response time in other nations' FOI laws is two weeks – *half* the 30 day period allowed for the initial response in the *ATIA*. Of 128 nations, 92 set an initial response time ranging from 3 to 21 days.

For the extension limit, 58 nations set from three to 21 days, whereas 29 countries say 30 days – all while the 1982 Canadian Act can extend a reply for an unspecified "reasonable period of time," which in practice is sometimes delayed for years - a widely-abused free rein that most nations would never accept. Some laws also have penalties for delays, which Canadian statutes lack. In several countries, the public body must provide information within 48 hours for "emergencies" or "to safeguard the life or liberty of a person."

• *Chapter 10* – Conflicts of law

Today there are more than 60 other statutory provisions in other laws that override the *ATIA*, per Section 24. The Conservative Party pledged in 2006 to remedy this problem, and so render the *ATIA* supreme on disclosure questions, but this promise was not fulfilled.

Unchecked, the number of overrides could grow still further, a trend that former Information Commissioner John Reid has well described as "secrecy creep," while his predecessor John Grace called Section 24 "the nasty little secret of our access legislation." Both advised that Section 24 be deleted, as did Justice John Gomery. Several Commonwealth nations - including India, Pakistan and South Africa - establish that the FOI law will override secrecy provisions in other laws.

• *Chapter 11* – Routine release and duty to publish

The centrepiece of the Liberals' electoral commitment on transparency was to "ensure that *Access to Information* applies to the prime minister's and ministers' offices." Instead, through Bill C-58 in 2019, the Liberals only prescribed the proactive publication of ministerial mandate letters, briefing note titles, contracts, and the travel and hotel expenses of ministers (but not the Prime Minister).

This amounts to a broken promise. Such documents offer little insight into government, beyond what it already wishes to be made public. Moreover the Information Commissioner has protested that those new *ATIA* "rights" are so heavily undermined by conditions that they amount to "regressions." In this bait-and-switch form of faux transparency, a new deluge of self-selected government internet filler is no substitute for urgently needed structural *ATIA* law reform.

• *Chapter 12* – Whistleblower protection

Within the *ATIA*, there is only protection for the commissioner and his/her staff and others from legal proceedings related to their work. This protection is welcome but too limited.

In 2005, Parliament passed Bill C-11, the *Public Servants Disclosure Protection Act*. It was studied in depth by a House of Commons committee in 2017, and its report gave many recommendations to protect federal public servants - most of which were never implemented. These included giving departments a duty to protect whistleblowers, reversing the burden of proof from the whistleblower onto the employer in cases of reprisals, and allowing private sector participants to be investigated.

Canada's integrity commissioner has said he suspected "thousands" of wrongdoings are going unreported among the 375,000 federal workers covered by this Act. Overall, Canada is decades behind other jurisdictions such as the United States, Britain and Australia in regards to whistleblower protection law.

• *Chapter 13* – Penalties

In the *ATIA*, there are good penalties for obstructing the Information Commissioner, and for destroying, falsifying or concealing records - but other nations go much further.

The breadth of subjects for sanctions is more important than the penalties' severity, per se. The law imposes fines for generally "obstructing" the FOI process in the FOI statutes of 57 nations (23 of these Commonwealth), and prison terms for this offense in the FOI statutes of 31 nations (18 of these Commonwealth).

More specifically, the law imposes penalties for delaying replies to FOI requests in the FOI statutes of 26 nations (11 of these Commonwealth, such as India, Bangladesh, Kenya and Sierra Leone) – an advisable feature for the *ATIA*. Amongst provinces, Quebec's statute has the widest general definition of wrongdoing, and those who "impede access to a document" can be fined.

• *Chapter 14* – Newfoundland's best FOI law in Canada

In amending our *Access to Information Act*, we should heed the example of Newfoundland, which passed the best FOI law in Canada in 2015. Unlike the *ATIA*, the Newfoundland law has a proactive, mandatory, and general public interest override, covering all exemptions – plus a broader coverage of public bodies. In the *ATIA* the initial request response time is 30 days and can be freely extended for an unspecified "reasonable period of time," whereas Newfoundland FOI officials must reply within 20 days, and must ask the Information Commissioner for permission to extend the time limit.

• *Chapter 15* – FOI in British Columbia

The three most urgently required reforms for British Columbia's *FOIPP Act* today are the same basic ones needed for the *ATIA*: the gross overuse of the policy advice exemption, FOI-excluded quasi-governmental entities, and oral government. B.C. premier John Horgan broke his 2017 electoral promise to fix these three problems.

Yet the B.C. law still has many advantages over the *ATIA*, such as a proactive, mandatory, and general public interest override, covering all exemptions. There are also shorter time limits for the policy advice and cabinet records exemptions (with a long list of factual records that can override the former), a 30 day response extension limit, and an order making power missing many of the negative features found in *Bill C-58*.

• *Chapter 16* – Foreign requesters

The right of all people regardless of their citizenship to make access requests is the most common international practice, included in the FOI laws of 94 of 128 nations, including that of Canada's parliamentary model, the United Kingdom, and all Canadian provinces. But for now, non-citizens who

are not present in Canada may not file *ATIA* requests. This is surely an unjustifiable situation, for actions in one nation often impact the people of other nations.

In sum, the best examples for Canada to generally follow for overall inspiration are, the access laws of India and Mexico. Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners - and then, hopefully, look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present.

QUOTES ON THE ATI ACT REFORM

The Need for Reform

There is wide recognition that the [*Canadian ATI*] Act, which is largely unchanged since its adoption, is in drastic need of updating.

- David Banisar, *The Global FOI survey of 2006*

The Government of Canada agrees that the *Act* must be modernized. Considering the importance of the *Access to Information Act*, we must come together as Parliamentarians to discuss it, we must hear from expert witnesses, we must consider all elements, all angles, all people.

- Irwin Cotler, Justice Minister of Canada, 2005 discussion paper on *ATIA*

The *Access to Information Act* has been crying out for an overhaul for years.

- Jeffrey Simpson, *The Friendly Dictatorship*. McClelland and Stewart, 2001

Twenty-two years ago, when the *Access to Information Act* was introduced, Canada was a global pioneer in freedom of information. Today, our access law has been outpaced by social, economic and technological change. More than 50 countries have adopted freedom of information laws in the past ten years - and many go much farther than ours.

- Leonard Asper, lawyer, president of CanWest Global Communications Corp., CNA Superconference, Vancouver, June 3, 2004

A number of elements of the stronger international models considered here, especially the UK legislation, can be found among the suggestions for reform of the *ATIA* that have been proposed for consideration in recent years in Canada. This fact suggests that the legislation and experiences of these countries may be useful in developing an updated *ATIA* for Canada.

- Kristen Douglas, *Access to Information Legislation in Canada and Four Other Countries*. Ottawa, Library of Parliament, 2006

This Committee believes that after almost 20 years of pressure for its reform, there can be no further delay in the modernization and overhaul of the *Access to Information Act*.

- *Report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics*, November 15, 2005

Open government will be the watchword of the Liberal program.

- Liberal Party of Canada *Red Book*, 1993

Our objective is nothing less than making transparency a fundamental principle across the Government of Canada.

- Liberal Party of Canada election platform statement, 2015

A message from Stephen Harper [2006]

The time for accountability has arrived.

Canadians will soon be able to finally hold the Liberals accountable. After 12 years in power, the Liberals must be held accountable for the stolen money; accountable for the broken trust; and accountable for all that they failed to accomplish because of this government's total preoccupation with scandal and damage control.

For those Canadians seeking accountability the question is clear: which party can deliver the change of government that's needed to ensure political accountability in Ottawa?

We need a change of government to replace old style politics with a new vision. We need to replace a culture of entitlement and corruption with a culture of accountability [....]

Only one party can deliver the change of government that's needed to bring political accountability to Ottawa.

Join me and stand up for Canada.

- **Stephen Harper**,
Leader of the Conservative Party of Canada

[From *Stand Up For Canada. Conservative Party of Canada federal election platform*. 2006 http://www.conservative.ca/media/20060113-Platform.pdf]

Eight Conservative Party Pledges on ATIA Reform, 2006

The Plan. A Conservative government will:

1. Implement the Information Commissioner's recommendations for reform of the *Access to Information Act*.*

2. Give the Information Commissioner the power to order the release of information.

3. Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.

4. Subject the exclusion of Cabinet confidences to review by the Information Commissioner.

5. Oblige public officials to create the records necessary to document their actions and decisions.

6. Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.

7. Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.

8. Ensure that the disclosure requirements of the *Access to Information Act* cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.

[From *Stand Up For Canada. Conservative Party of Canada federal election platform*. 2006 http://www.conservative.ca/media/20060113-Platform.pdf]

(* Mr. Reid's bill contained 40 recommendations which, when added to Stand Up for Canada, raised the overall number of Conservative *ATIA* reform promises to nearly 50.)

Information is the lifeblood of a democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians cannot make informed decisions, and incompetent or corrupt governance can be hidden under a cloak of secrecy.

- Stephen Harper, 2005 opinion article. (Cited in the Globe and Mail, Nov. 2, 2007)

INTRODUCTION

(1) The Right to Know

For the past several decades, most democratic governments in the world have paid homage to the principle of the public's right to know.

Governments are vast storehouses of information that we pay for with our tax dollars to have created, stored and shared. These records are a vital part of our public property, our history, and our intellectual heritage. This public wealth of information must be freely shared so that citizens are informed on public matters, are able to engage in public debate, and able to assess the performance of their governments.

The alternative – a populace that is ill-informed, or even worse, misinformed about its government - poses a great danger to our democracy. The people will be unable to participate effectively as citizens, unable to hold their government to account, and may stop trusting elected officials. Some degree of public accountability should form an integral consideration of each branch and program of government from the start, and not regarded later - if at all - as an afterthought.

These principles were endorsed by the Organization of American States, as the OAS Special Rapporteur for Freedom of Expression expressed in his 1999 Annual Report:

> The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information, information that the State uses and produces with taxpayer money. [14]

The Supreme Court of India has stated, in finding a right to information as part of the general guarantee of freedom of expression: "Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing."[15] In a 1985 Advisory Opinion, the Inter-American Court of Human Rights went further, concluding that "a society that is not well-informed is not a society that is truly free."[16]

---

[14]Cited in Toby Mendel, *Freedom of Information: A Comparative Legal Survey*. Second Edition. Revised and Updated. UNESCO: Paris, 2008

[15]*S.P. Gupta v. President of India* [1982] AIR (SC) 149

[16]*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985. Cited in Mendel 2008

To enshrine and guarantee the right to know, 128 legislatures in the world have passed freedom of information or "FOI" laws. In Canada, the equivalent is the 1982 *Access to Information Act* (*ATIA*), whose purpose was described in this much-quoted ruling from the Supreme Court of Canada:

> The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.[17]

This ruling also described Canadians' access to information as a "quasi-constitutional" right. At least 75 other nations have gone further, to explicitly grant the public a right to obtain government information in their constitutions or bill of rights. (See Chapter 1.)

As well, the Supreme Court of Canada ruled unanimously in 2010 that the right to access government records is protected by the *Charter of Rights*. The Court decided that if the information is needed to promote a "meaningful public discussion on matters of public interest," Canadians have an access right to that information, guaranteed by Section 2(b) of *Charter* under the heading "Fundamental Freedoms."[18]

In the *ATIA*, ideally, the right to know would be limited by few and narrowly defined exemptions (not exclusions) for records whose release could likely cause substantial harm to a legitimate interest, judged on a balance of probabilities. Unfortunately, the *ATIA* falls far short of this ideal, as we shall see. The broad principle of the public's right to know has been accepted in most nations by now. The challenge remains how to realize this principle in practical reality, a goal that cannot reached without political will.

(2) The Global Picture

Throughout the world, the freedom of information movement has been spurred on by the internet, the end of the Cold War, to at least advance such gestures of transparency, and other factors – so that by the end of 2019, a total of 128 nations had passed FOI laws (60 more countries than were examined in the 2008 version of this book), and several more are considering draft FOI bills.[19] The concept of global FOI legal "standards" have also become more clear and agreed-upon over the past decade.

For nations such as those in Africa and Eastern Europe, moving from authoritarianism to democracy and struggling to establish an FOI system, it seemed as through the concepts of transparency and democracy are inextricably

---

[17]Mr. Justice La Forest, speaking for the entire Supreme Court of Canada, *Dagg v. Canada (Minister of Finance)*, 1997

[18]*Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] S.C.J. No. 23. From a summary by Milad Hagani, July 31, 2010. https://lawiscool.com/2010/07/31/2818/

[19]Aside from the 128 nations, I have also considered the FOI laws or regulations of several non-nation entities: Hong Kong (1995), Scotland (2002), Wales (2004), Washington State (2005), and the Chinese municipalities of Shanghai (2004) and Guangzhou (2002). I no longer analyze draft FOI bills as I did in 2008 because the majority of these nations have passed FOI laws by now.

bound, rising or falling together, cause and effect indistinguishable. Moreover, there is a growing body of authoritative statements by international human rights bodies, including international human rights courts, to the effect that access to information is a fundamental human right.

Some readers may be surprised to learn that FOI statutes have been passed in the Russian Federation (2009), the People's Republic of China (2007), and the Islamic Republic of Iran (2009). I am well aware that such laws may turn out to be futile, or worse, in implementation and practice. The point is that global FOI expectations have generally risen to the level that these states felt impelled to at least venture such gestures of transparency, displays that seemed unthinkable years ago.

In some cases an FOI law can be used in opposition to its stated purpose and become a negative force in society. In Zimbabwe, the *Access to Information and Privacy Protection Act* was signed by then-President Robert Mugabe in 2002. The Act's main purpose is to suppress free speech by requiring journalists to register and prohibiting the "abuse of free expression," with 20 year jail terms prescribed. These powers have been widely misused. On paper at least, the *AIPPA* sets out rights for access similar to other FOI laws around the world; disturbingly, the Zimbabwe government told the African Commission on Human Rights that its FOI procedures were "moulded along the lines of Canada's laws on the same subject." (It is indeed the only nation to ever cite Canada as an FOI model.).[20]

As though by an unstoppable wave, the spirit of transparency is spreading across the globe. In his important book *Blacked Out: Government Secrecy in the Information Age*,[21] Canadian law professor Alasdair Roberts recounts how transparency laws and usage by citizens around the world have led to power reversals that are genuinely profound:

• In the Indian state of Maharashtra, villagers found that government-supplied low-cost rations were being sold at a profit by corrupt local ration dealers. When citizens groups rose up and obtained the registers through FOI that proved their suspicions, their action that led to tighter inspections and more public postings of key information. "This [FOI law] is the most powerful right ordinary Indians have at their disposal after the right to vote," said one civilian activist.

• In Thailand, parents whose children were denied entry to prestigious universities used the FOI law through the courts to open up the admissions records, and found that many successful applicants came from privileged families. The government ordered the schools to change their procedures, and *Asiaweek* called the FOI decision "an historic ruling that undercut nepotism and cronyism."

[20] http://www.freedominfo.org/countries/zimbabwe.htm

[21] Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006

• Japan's health ministry was ordered to release the names of 500 hospitals that had received hepatitis-C tainted blood.

• Britain's FOI law took effect in 2005, and the media - brilliantly *The Guardian*[22] - used it to expose sordid corners of British history, such as torture in 1950s Kenya and bribes to foreign officials by British arms dealers. It also revealed that the British Royal family had received one million pounds in farm subsidies from the European Union.

• In China, the municipalities of Guangzhou and Shanghai passed robust FOI laws years before the federal government; some citizens are launching lawsuits to force records open.

• Throughout the world, peoples are discovering their heritage through new FOI laws. Mexico opened up 60,000 files on the army's 70 year campaign of killings and torture against dissidents, and a similar process occurred in South Africa and several Latin American nations. The files of the East German Stasi secret police were disclosed and the names of 173,000 East German informants revealed.

SACRIFICES FOR OPEN GOVERNMENT

It is to the FOI advocates around the world that I dedicate this report. Some are prepared to make the ultimate sacrifice for the transparency cause, all to secure a democratic right that Canadians take for granted and rarely use; it may stir one to read reports of their struggles. For example, the Indian state of Maharashtra adopted a Right to Information Act in 2003, prodded by the hunger strike of an activist, Anna Hazare; he resumed his hunger strike the next year to push for better enforcement of the act.

Alasdair Roberts reports that in India, some applicants have received death threats for filing FOI requests, and one has been killed for doing so. The risks faced by FOI champions in less democratic nations often make the barriers encountered by advocates here seem comparatively picayune.

In Moscow on May 31, 2006, the men who attacked Ivan Pavlov waited beside his car outside his home. They knocked him over from behind and stomped and kicked his head. None of them spoke. They stole nothing. As Pavlov curled

[20] *The Guardian*'s page of its FOI stories - http://www.guardian.co.uk/politics/freedomofinformation

defensively on the street, they trotted away. Then they tried to run him over with their car. Pavlov rolled clear, he said. The car sped off.

Pavlov, a lawyer who advocates freedom of information in Russia, was hospitalized for a week. The police later told him that the attack appeared to be related to his work, a mission to pry open stores of government information that he says are essential to Russian public life and by law should be in the public domain, but are kept from view by corruption and a lack of interest.

As director of the Institute for Information Freedom Development, a private organization he founded in 2004, Pavlov strives to teach government agencies that stores of information in their possession should be available for all to view. His work is necessary, he and his supporters say, because much of the basic information of governance in Russia has never been made public, even after the Constitution codified the public's right to nonsecret information in 1993.

At the time he was attacked, Pavlov was trying to a push a state agency to publish, free of charge, the standards used to regulate services and products manufactured in Russian factories. He returned to court upon being discharged from the hospital; a judge eventually ordered the government to post new standards on the Internet. A government commission then passed a decision requiring all standards to be posted free of charge on the government website.

Pavlov said he had more lawsuits in store. His goals included the release of a database of Russian pollution sources in the air and water, the filings and registry of Russian corporations and organizations, product certifications, all information at the federal statistics service and a database of decrees issued by ministers in the federal and regional governments.

"Our job is not to win all of the cases, or to force the government to publish all of the information, but to show people that they have rights," he said. "Civil rights are like a muscle. If you don't use them, they will atrophy."

- From *Russian fights for people's 'right to know'*, by C. J. Chivers, The New York Times Media Group, October 27, 2007. See - https://en.wikipedia.org/wiki/Ivan_Pavlov_(lawyer)

Roberts uses the term "soft states" to refer to poorer countries that have acceded to foreign pressure (sometimes as a conditions for receiving aid packages) to pass their own FOI laws, to prove they could be "modern" states, to cleanse corruption, and to join global economic unions.

Several passed FOI laws merely for window dressing and resisted access in practice; others with simpler administrations can barely manage it or afford to train FOI officials. Many nations' archives are in chaos and even advanced democracies have cut back on recordkeeping funds. Some nations with no FOI laws or draft bills, apart from lacking political will, may be barely able to feed their own people, much less afford to set up a full administrative infrastructure to support an FOI system.

In these soft states, FOI applicants are usually not average citizens, but lawyers and the educated elite. A study of Bulgaria, Peru and South Africa found that many government staffers (who were often ignorant of the law) simply refused to accept FOI requests, especially from "vulnerable or excluded groups."[23]

Domestic FOI laws do not affect international organizations. Perhaps the most onerous new struggle in the global FOI movement will be achieving transparency in such entities such as NATO and the World Bank, highly secretive networks that can hold as much or more power than some national governments, and whose information management rules override national FOI statutes, not visa versa.

The importance of a transparency law to an emerging democracy was rarely better summarized than by Richard Calland writing for the Carter Center:

> Thus, an access to information law can offer a new beginning in the relationship between government and its citizens. Transparency and the freer flow of information that comes with it provides a chance to build confidence and to craft a new covenant of trust between the governed and the governing.
>
> With it come an array of other possibilities – of enhanced international business confidence and, therefore, a more conducive environment for investment and of strengthening the fight against corruption. For citizens, especially the poor, it is a chance to reclaim ground in their struggle for a more just existence. With greater knowledge, people can participate more meaningfully and can contribute to the policymaking process. Moreover, they can use access to information law to gain the information with which comes greater power. In this sense, the Right to Know is the Right to Live.[24]

---

[23] Roberts, *op.cit.*

[24] *Access to Information, a Key to Democracy*, edited by Laura Neuman (Chapter: 'Access to Information: How is it Useful and How is it Used? Key Principles for a Useable and User-Friendly Access to Information Law' by Dr. Richard Calland), Atlanta, Georgia, November 2002

THE RIGHT TO KNOW AS THE RIGHT TO LIVE

FOI activists in India have adapted the slogan "the Right to Know is the Right to Live." They invoked the term in the broad human rights sense, but it could be applied in a literal manner as well, as suggested by the FOI-based Canadian new articles below.

• An *ATIA* request in the late 1990s by CBC reporters David McKie and Mike Gordon made public a key database inside Health Canada chronicling cases of adverse drug reactions. The data allowed the CBC to report a major rise in such reactions among youth taking certain antidepressants, yet no public warning had been issued. A second story using the same database showed that thousands of seniors were dying each year from the drugs prescribed to them by doctors.

"We've heard from countless Canadians about the usefulness of this," McKie said. "Canadians have used this information to go to their doctor to ask questions about the drugs they're taking."[25] In 2005, Health Canada made this searchable database permanently available to the public, on a matter that could conceivably affect any Canadian, and this might have saved lives. (It is the best utilization of the law I have yet seen; in fact, if the *ATI Act* had resulted in nothing else, this event would have been enough to justify its passage.)

• Canadian's premier FOI applicant Ken Rubin has struggled for years in the courts, successfully, to obtain records on meat inspections and airline safety.

• When the media applied through the *ATIA* for notes on conference calls during the 2008 meat listeriosis outbreak which led to 20 deaths (mainly among the elderly in care homes), Ottawa illegally delayed the records' release for months. As well, the Canadian government strongly opposed tougher U.S. rules to prevent listeria and lobbied the United States to accept Canada's more lenient standards, internal documents revealed.[26]

---

[25] *There's a good reason why David fights Goliath; Big stories, from the sponsorship scandal to illegal daycares, began with a single request*, by Bill Curry. The Globe and Mail, Sept. 22, 2007

[26] *Ottawa wanted U.S. to accept more lenient meat inspection regime*, by Bill Curry, The Globe and Mail. Aug. 29, 2008

• More than half of the 60 school districts in British Columbia had unsafe levels of lead in drinking water sources in 2016.[27]

• An audit by the B.C. Ministry of Finance highlighted many safety violations - including major fire hazards, potential carbon monoxide poisoning and natural gas leaks - at Vancouver Community College.[28]

• British Columbia Coroners Service statistics obtained by FOI note that at least 54 people have died on SkyTrain tracks and platforms since 1985, with no plans to erect barriers such as other cities have.[29]

• The Harper government was urged when it took office in 2006 by its own experts to embrace new targets to protect children from environmental threats, says a document obtained through the *ATIA*. One official said a suspected carcinogen banned in pesticides was still available in some bottles of shampoo used to treat lice, and the shampoo was mostly used by children.[30]

• Many B.C. doctors are not reporting on the children they immunize, and children could be at risk of an "outbreak of vaccine preventable diseases" if immunization rates drop too low due to health workers who disparage vaccinations to parents, a government audit said.[31]

I could cite many dozens of such articles, all of which belie the most pernicious myth of all: "What the people don't know won't hurt them." Government supporters have always assailed the price tag of access laws. Yet from the examples above, the question phrased as "can we afford to have an FOI system?" could be reversed to "can we afford to not have it?"

---

[27] *Schools taking action on unsafe lead levels*, Gordon Hoekstra, L.Culbert. Vancouver Sun. Sept. 16, 2017

[28] *Violations* 101, by Stanley Tromp, Vancouver Courier, June 24, 2011

[29] *SkyTrain's Mounting Death Toll*, by Bob Mackin, The Tyee, Nov. 18, 2008

[30] *Tories ignored own advice to do more to protect children's health*, by Mike De Souza. The Vancouver Sun, March 24, 2008

[31] *Doctors fail to report on vaccines*, by Stanley Tromp, Vancouver Sun, Aug. 14, 2006

(3) New global scholarship and advocacy

Since this book first appeared in 2008, one can happily report that nearly 60 more nations have passed FOI laws, and all this has been accompanied by a booming growth in FOI scholarship and advocacy.

This movement was incalculably aided by new communication technologies (partially compensating for the decline of traditional media). Awareness of FOI issues amongst young people has been globally energized by interactive websites, Facebook, Twitter, e-newsletters, podcasts, blogs, YouTube, teleconferencing, and so forth.

Another boon was the launch of the FOIANet online listserve (which one can join at https://foiadvocates.net/), where individuals from around the world and more than 200 civil society organizations post FOI-related messages daily. These have been vital new tools to press for better laws and to organize resistance to the (eternal) governmental efforts to expand secrecy.

For the comparative study of national FOI statutes, my main source in 2008 was the website www.freedominfo.org of the National Security Archive in Washington DC (which regrettably ceased new postings in 2017). Since then, a splendid new resource has emerged - the Centre for Law and Democracy in Halifax, an indispensible link between Canada and the FOI world.

The CLD was founded in 2010 by Canadian human rights lawyer Toby Mendel, who returned to this country after serving for 12 years as Senior Director for Law at ARTICLE 19 in London. In 2011 the CLD partnered with Access Info Europe to launch an authoritative Global Right to Information Rating system of all the world's FOI laws at www.RTI-Rating.org. (Beyond statutes, in November 2019 the CLD most admirably launched a new Comprehensive Methodology to assess how well global FOI laws are working in actual practice. [32])

Many assessments of nations and Canadian provinces were written by then-CLD lawyer Michael Karanicolas - now president of the Halifax-based NGO the Right to Know Coalition, and a fellow at Yale Law School. The rating system is the foundation for this book's 2nd edition. (For more detail, see *A Note on Sources* at the end of this book.) In these ratings, Afghanistan ranks number 1, while Canada - which ironically has so worked hard to transform that nation from a theocratic dictatorship into a modern democracy - ranks just 58th.

(4) Law vs. Practice

It is at least interesting to observe that, unlike in Canada, the FOI law of China requires information to be released within 15 days; in Iran every institution 50 percent or more owned by the state is covered by the

[32] *Global launch of right to information assessment tool*. Paris Peace Forum. Nov. 13, 2019. http://www.law-democracy.org/live/recent-work/ "CLD has been working on the development of this Methodology for two years with support from GIZ and in collaboration with a range of local actors in Pakistan," said Toby Mendel, Executive Director, CLD. "It is wonderful to be launching the Methodology globally now and we are already working on applying it in different countries."

access law; and that in Turkey, "civil servants who negligently, recklessly or deliberately obstruct the application of this law, shall be subject to disciplinary sanctions."

In response, might not critics laugh and call it absurdly naïve to assume such provisions will be enforced and could affect any reality on the ground? These statutes might be just "paper tigers," they say; recalcitrant officials can, and sadly do, find countless means to sabotage a law, such as by creating harmful regulations, or undermining its spirit by parsing its letter. Moreover, "the most secretive authoritarian regimes may have impeccably democratic constitutions allowing in principle for perfect openness."[33] As Alasdair Roberts put it frankly, "Most of the world's FOI laws are 'dead laws,' because they're just not being followed in practice."[34]

Should these facts discourage us? Yes and no. Although fully aware of such objections, I would reply that statutes are comparatively more important and enduring than actual governmental practices of the day.[35]

A statute is a normative statement of a jurisdiction's professed values and goals, one tested by practice, and shaped by interpretations and rulings. Because freedom-of-information is such a recent historical development in most regions, transparency practices derive from statutes more than common law. The relationship is not reciprocal: i.e., there are many good FOI laws that do not result in good practice, but one very rarely sees admirable transparency practice in nations that do not first have a good FOI law in place.[36]

Even in several less democratic nations, an exemplary access law at least gives FOI applicants the possibility to obtain information to which they are legally entitled, should they succeed in their appeal to court (and several such unexpected victories have been noted globally); but without an effective law, they would most likely have no hope at all.[37]

As the Commonwealth Human Rights Initiative put it, "While a law alone cannot

---

[33]Sissela Bok, *Secrets: on the Ethics of Concealment and Revelation*. New York: Pantheon Books, 1982

[34]Alasdair Roberts, speech to FIPA, Vancouver, Oct. 1, 2008, *op.cit.*

[35]Even a comparative study of actual FOI practices worldwide might not be to Canada's gain, for Canada's access practices are generally still worse than the anemic *ATIA* law itself (as the Information Commissioner details each year in her annual report). A nation's actual FOI practices can fluctuate greatly with the various administrations of the day.

[36]Unfortunately, "Some countries have only very limited administrative code provisions which are inadequate to protect the right to information. In Europe, this is the case with the administrative provisions in Greece, Italy and Spain, which fall well below the standards of full access to information laws (this is also true of some other countries, such as Chile for example)." - *Supplementary Human Dimension Meeting on Freedom of the Media: Protection of Journalists and Access to Information*. Vienna, 2006. Rashid Hajili, Chairman of the Media Rights Institute

[37]Of course, some may object that this statement presumes that the nation in question has an independent judiciary that can be relied upon to render judgments fairly based on the FOI statute (still another topic outside our scope of inquiry); even when the FOI statute does not change, judicial culture and practice can over time, which can influence interpretations and rulings on the law.

always ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won."[38] The point was echoed by two authors writing for the World Bank Institute:

> [I]t is important that the right to access information is guaranteed by law. Even though ministers and officials may recognize the importance of transparency, the political and bureaucratic pressures to control information can be irresistible.
>
> Merely the act of adopting a law can limit certain abuses and can make people aware of their rights. It is also a way of signaling government's commitment to transparency and the first step of institutionalize the right to access information and provide resources to it. Moreover, the law can be an important tool in building democratic attitudes and enhancing trust in institutions.[39]

However, as many observers also note, the enactment of a FOI law is only the beginning. For it to be of any use, it must be well implemented and public agencies must change their internal cultures. Applicants need to exercise their rights by filing requests, while advocates work in the indefinite future to improve the law further and ward off later government amendments to weaken it.

"On its own, an access to information law is no panacea," observed Richard Calland of the Carter Center. "But with political will, it can lay the pivotal foundation stone around which can be built a fairer, modern and more successful society."[40]

In sum, it seems axiomatic that it is far better overall to have a good FOI law on the books rather than not; and to dismiss a comparative study of national FOI statutes mainly on the grounds that the actual practices of the day might not follow their texts is a red herring, beside the point. This is also certainly no reason to cease trying to improve Canada's *ATIA*, despite government supporters who claim that only better enforcement of our existing law is needed, as an adequate substitute for law reform.

---

[38]Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, New Delhi, India, 2003

[39]Kaufmann, Daniel, and Ana Bellver, *Transplanting Transparency: Initial Empirics and Policy Applications*. World Bank Institute, Washington DC, August 2005.

[40]*Access to Information, a Key to Democracy*, edited by Laura Neuman, op.cit.

EMPOWERING THE PUBLIC IN THE NEW SOUTH AFRICA

In the Republic of South Africa, the *Promotion of Access to Information Act No 2 of 2000 (PAIA)* is the only FOI statute in the world that applies to both public and private bodies, and has many exemplary features for Canadian lawmakers to consider for our *ATIA*. In the RSA, the first FOI users' manual in the African continent was published in 2007, and translated into the nation's 11 official languages.

It is important to realize that access laws could be utilized not just to reveal past injuries, but potentially to avert future harms as well. In his memorable foreword to the guidebook, S.A. Information Commissioner Dr. Leon Wessels – a former deputy law and order minister in the apartheid regime, and later a police officer, lawyer, and human rights commissioner - also suggests that, beyond major political topics, average citizens can well use FOI laws to deal with everyday issues they face. Many of his points would be recognizable to Canadian readers.

"To move from a deeply inculcated culture of secrecy and bureaucracy to a culture of transparency and accountability is a mammoth challenge. The prejudice against responsive and open governance is certainly not confined to the previous order. The current hostile and ignorant responses received by the Commission in respect of *PAIA* are proof of this observation.

"It is of critical importance that the citizens be informed about *PAIA* and how the right of access to information can work for their benefit. Participation in democratic processes can only be effective if it is informed participation. Many of the tragedies in South African history could have been prevented had there been an access to information regime in operation. It is however important that *PAIA* reaches far beyond the traditional political civil rights and that it adds a new dimension to public debate on every day issues that citizens have to face.

"Public and private bodies must understand that their responsibilities under *PAIA* are not intended to be a costly burden but an essential mechanism to ensure good governance and the transformation of our society. The right,

as well as the other entrenched rights should not only be approached in an adversarial manner but rather used as a vehicle to change our society and an opportunity to deal with the vestiges of apartheid.

"*PAIA* is central to the transformation of our society. The rule of law and the democratic constitutional state will perish if there is not open and accountable government. The importance and magnitude of the Commission's constitutional role to monitor and report annually on the realization of socioeconomic rights is matched by its obligation under *PAIA*.

"I would be failing in my duty if I don't express my special thanks to the *PAIA* Unit for the countless hours they have given towards the compilation of this Guide. You have through this Guide contributed towards healing the wounds of the past and enhancing our new democracy. We will rejoice if ordinary citizens of our country use this Guide and thereby give more meaning to their freedoms for which they have fought so hard."

- Dr. Leon Wessels, in *Guide on how to use the Promotion of Access to Information Act of 2000*. Pretoria, Republic of South Africa, 2007

(5) CANADA – A Promise Betrayed

In Canada, transparency advocates such as Ken Rubin labored uphill since the 1960s for the passage of a freedom of information law. In 1965, British Columbia journalist and NDP member of parliament Barry Mather introduced the first FOI bill (C-39) as a private member's one page bill. It died on the order paper, yet in each parliamentary session between 1968 and his retirement in 1974, he reintroduced identical legislation. Four times it reached second reading, but went no further.

Gerald William "Ged" Baldwin, a lawyer and Conservative MP from Alberta, who organized a group of FOI advocates and MPs, called ACCESS, was known as the "Father and Grandfather" of the *Access to Information Act*. In 1974 he introduced a private member's bill, C-225. Though it eventually died on the order paper, it received extensive study by a House committee. The original federal *Freedom of Information Act, Bill C-15*, was drafted during the nine month Conservative government of Joe Clark (1979), but his electoral defeat suspended the bill.[41]

[41]Clark's words a year before his assuming power as Prime Minister are still relevant: "We are talking about the reality that real power is limited to those who have facts. In a democracy that power and that information should be shared broadly. In Canada today they are not, and to that degree we are no longer a democracy in any sensible sense of that word." - House of Commons, Ottawa, June 22, 1978

When it finally arrived in 1982, courtesy of Liberal Prime Minister Pierre Elliot Trudeau, many critics objected that Bill *C-43* which formed the current *Access to Information Act* was hopelessly flawed, "is riddled with loopholes, is written in 'legalese,' is too complex, and relies too heavily on 'positive attitudes.'"[42] The CLD echoes this: "Through loopholes, charges, exceptions and extensions, Canada's access to information laws seem custom-designed to enable politicians and bureaucrats to avoid disclosing anything that they would rather keep secret."[43]

Calls for reform began almost immediately after the *Act* took effect on July 1, 1983. Many consultations were held, and studies and commentaries were published, which will be cited throughout this report; however the most needed amendments to the *Act* have never been realized.

The next prime minister to deal with the impact of the new law was Conservative Brian Mulroney (1984-1993). After the PM travelled to New York in 1985 to address the United Nations, a journalist's *ATIA* requests for the trip expenses revealed what many called overly lavish spending by his wife and large entourage.

In his 1993-94 annual report, Information Commissioner John Grace wrote that these events were the turning point in the PM's attitude towards FOI; personally injured by such requests, Mulroney disparaged the *Act* thereafter and this message influenced his ministers and the civil service. Yet despite his personal antipathy to the *Act* on that request topic, many Canadian journalists still regard the 1980s as the Golden Age of *ATIA* openness on most other issues, at least relative to what followed.

Indeed, the autocratic Liberal Prime Minister Jean Chretien (1993-2003) openly belittled the *ATIA*, when speaking in the House, as costly and wasteful, and his office and other departments launched multiple lawsuits against the Information Commissioner to keep records secret. At one point, the Commissioner even complained that staff from the Prime Minister's office had threatened his investigators. *ATIA* improvements were also neglected by his Liberal successor, Paul Martin Jr. (2003-2006) – who as finance minister in 1995 had created several public-purpose foundations that were all exempt from the *ATIA*.

(6) The dark decade

The election of 2006 brought Conservative Stephen Harper to power in Ottawa as Prime Minister. FOI laws are sometimes whimsically termed "sunshine legislation," and if so, what occurred next was akin to a near total eclipse of the sun. A cold, steely blue-grey darkness ensued in the nation, in a sharply reactionary period recalled by most transparency advocates as the dark decade.

The perceived secrecy of the federal bureaucracy was likely one cause of

[42]Catherine Crearar, *Access to information; Bill C-43*, paper presented to CPSA annual meeting, 1981

[43]Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

Western alienation that led to the creation of the Reform Party in Calgary in 1987, and Harper arose from this "outsider" protest movement.[44] For Reform and Conservative opposition Members of Parliament, this long frustration must have been heightened by the heavy censorship of records they had obtained through the *ATIA*, and seeing their many *ATIA* reform bills being automatically voted down without debate by a decade-long Liberal majority.

Conservatives also observed that revelations of the Quebec advertising sponsorship scandal - which were to drive the Liberal party from office - were mainly prompted by an *ATIA* request for an internal audit by the *Globe and Mail*. "After all, it was a lack of transparency that got us into the mess we are in today," noted Anne Kothawala, then-president of the Canadian Newspaper Association. "More treacherous than graft or collusion is the secrecy that provided an environment in which these alleged abuses flourished. Remember one thing about the sponsorship scandal: we were never supposed to find out about it, and very nearly did not."[45]

In response to that scandal, Mr. Harper stated that more transparency was essential to a renewal of democracy, and during the election campaign announced eight major pledges for reform to the *ATIA*. (These are attached prior to this Introduction.) I believed in the sincerity of these *ATIA* reform pledges, and was chided by others as naïve.

The Conservatives were elected in January 2006, and most observers were shocked to see the new Prime Minister abruptly and fully reverse his previous position on transparency. His government soon proudly unveiled *Bill C-2*, the *Accountability Act*, an omnibus collection of provisions designed to "clean up government." The bill prompted Information Commissioner John Reid to issue a rare special report, writing that no previous government "has put forward a more retrograde and dangerous set of proposals to change the *Access to Information Act*." [46]

Among Mr. Reid's concerns was a proposed 15-year ban on releasing draft internal audit reports. This was most troubling because such documents were vital in exposing abuses in the federal advertising program. While in Opposition, Mr. Harper condemned the previous Liberal government for proposing a similar exemption. Also worrisome was the proposed creation of 10 new grounds on which bureaucrats may deny *ATIA* requests; many of these loopholes would have been mandatory and contained no harms tests.[47]

---

[44]Ideally, FOI should transcend political parties and ideologies. The dichotomy is not so much between right or left wing as it is between elitist "insiders" and populist "outsiders," characteristics which might be claimed, accurately or not, by any party. One might expect that most conservative parties would be less inclined towards FOI, insofar as they favour the traditions of past eras, when FOI law were absent. This is indeed often the case but not necessarily so, for ideology is not always tied to governing style. In British Columbia, for example, the worst period for government transparency in many ways occurred in the reign of NDP (quasi-socialist) premier Glen Clark, who openly mocked the FOI concept and never even feigned support for it; one might appreciate only the complete "transparency" of his intentions.

[45]*Test of ethical government comes after vote*, by Anne Kothawala. The Toronto Star, January 13, 2006

[46]*Special Report to Parliament*, Information Commissioner John Reid, April 28, 2006

After the resulting protests, the Prime Minister then pulled amendments to the *ATIA* out of the *Accountability Act* and instead replaced them with a regressive discussion paper by the Justice Department, seemingly to be studied indefinitely by the House of Commons ethics committee. Expectations raised so high are not easily lowered. Access advocates had again underestimated the senior bureaucracy's utter tenacity and skill at blocking transparency reform, which was the likely cause for the Prime Minister's policy reversal. *ATIA* reform was exiled, yet again, to the graveyard of needless study.

Harper did fulfill a portion of one of his promised reforms. In the *Accountability Act*, the government extended *ATIA* coverage to several foundations, officers of parliament, the Canadian Wheat Board and all crown corporations and their subsidiaries. Yet more than 100 quasi-governmental entities remain uncovered, most disturbingly the nuclear Waste Management Organization and Canadian Blood Services.

As a result of those actions, in 2007 when the Governor General gave her royal assent to the set of new laws, the Prime Minister proudly announced that "We promised to stand up for accountability and to change the way government works. Canadians elected this government to deliver on that commitment, and today the federal *Accountability Act* . . . . delivers on the government's promise." These false and widely reported claims did the Canadian transparency movement grave harm, for they enabled the government to mostly win the "spin war" in its effort to push *ATIA* reform off the public radar for the next years.

The media response to all these developments was immediate and withering. On the *Accountability Act*, Geoffrey Stevens, former Globe and Mail managing editor, was unambiguous:

> If there is any lingering doubt about the hollowness, the emptiness, the cynicism - the sheer hypocrisy - of the Harper campaign promises, it is swept away by the devastating report released on Friday by Information Commissioner Reid. . . . Harper is developing into the most secretive, most controlling, least trusting prime minister in Canadian history.
>
> Special reports to Parliament are rare, and Reid's should have set alarm bells ringing in newsrooms across the country. In last week's column, I suggested (to the annoyance of Harper fans) that the Prime Minister's ability to govern is undermined by his inability to trust others. My question today is: Mr. Harper, why should the people trust you if you don't trust them?[48]

In 2007 the Canadian Association of

[47]One of the positive aspects to the Federal Accountability Act was its inclusion of an amendment to the *ATIA* adding a duty to assist access requesters. According to the Information Commissioner's 2007-08 *Annual Report*, "It changes duty to assist from a moral obligation to a statutory one - in fact, a statutory principle under which to interpret the Act."

[48]*Harper turning into Canada's most distrusting PM*, by Geoffrey Stevens. The Record. Kitchener, Ontario, May 1, 2006

Journalists awarded Prime Minister Harper its annual "Code of Silence Award," for which CAJ President Mary Agnes Welch stated:

> Harper's white-knuckled death grip on public information makes this the easiest decision the cabal of judges has ever rendered. He's gone beyond merely gagging cabinet ministers and professional civil servants, stalling access to information requests and blackballing reporters who ask tough questions. He has built a pervasive government apparatus whose sole purpose is to strangle the flow of public information. Canada used to be a global model of openness, and now we're backsliding into the dark ages of government secrecy, obfuscation and denial.[49]

"Both Liberal and Conservative governments have lied about their FOI reform promises, and '"lie" is not too strong a word," concluded Roberts.[50]

Even jaded viewers may be bewildered to observe the utter tenacity of the Canadian government's denial of reality on FOI, and the simple inverse ratio of truth to power (the more of one tied to less of the other). One of the lowest points of the dark decade occurred at a meeting of the House of Commons Ethics Committee on May 4, 2009.

In reply to an opposition MP who noted that Canada's *ATIA* had just been called an "embarrassment" on the world stage, Conservative Justice Minister Rob Nicholson heatedly replied that the original 1982 *ATIA* was still "an excellent piece of legislation" and that:

> I want you to know that I completely disagree with anybody who would suggest that this country has a dismal record on anything related to access to information issues. And when they say "dismal on the world stage," I want to see that list, who they're putting on that list. I want to tell you something – this country has an outstanding record, and if anyone has anything different to say, then I say they are completely wrong.[51]

(If the minister indeed wished to "see that list," he would have been welcome to view it in *Fallen Behind*, online - whose findings had been published in the *Globe and Mail* eight months before he spoke, and which had already been analyzed by his own officials.)

Information Commissioner Robert Marleau offered a witty reality check to the same committee on May 27. To the Justice Minister's high praise of the *ATIA* as a statute that equaled the best in the world, he responded, in words ever more true today:

---

[49] *Psst... Harper Wins CAJ secrecy award*. May 25, 2008. http://www.eagle.ca/caj/ Also see CAJ press release, via CNW, on National Right to Know Day, Oct. 1, 2008

[51] Alasdair Roberts, speech to FIPA event marking Right to Know week, Oct. 1, 2008, SFU Harbour Centre, Vancouver, B.C.

[5] The minister's comments are all the more astonishing for the fact that he had served as the vice-chair of the House of Commons special committee in 1986-87 that had studied the *ATIA* intensively and produced the valuable report *Open and Shut*. This study advised many fine, necessary changes to the *Act*, yet as we know, none of those recommendations came to pass. He stated later in 2009 that no changes were needed for the *ATIA* beyond some "improved training."

> To use a figure of speech, the federal *Access to Information Act* is, if you wish, the grandmother of access to information laws. She's created a steady system based on sound values and has established a number of governing rules to assist in the release of information. However, she's tenacious and stubborn, and despite advice to keep up with the times, she's failed to adapt to an ever-changing environment and remains anchored in a static, paper-based world. She is somewhat technophobic. She has weakened and slowed down over time, and she has not followed a rigorous exercise regime. She now uses a walker and will soon be in a wheelchair. There's no doubt in the extended family's mind that she's in need of a hip replacement to be fully functional again. The cold reality is that Canada's regime has not aged well. It lags behind the next generation of laws.[52]

(7) Justin Trudeau and Bill C-58

> It amuses me to see the profound change in attitude about access to information which occurs when highly placed insiders suddenly find themselves on the outside. And vice versa!
>
> *- Information Commissioner John Reid, 1999 speech*

When Liberal leader Justin Trudeau's party was elected with a majority on October 19, 2015, for many open government advocates it was not unlike awakening from a decade-long nightmare. To their eyes, a pall had lifted over the nation's capital, replaced by some measure of brightness. Hopes had been raised high by the Liberals' electoral promises, and by Trudeau's private member's *Bill C-613* of 2014 (which had included order-making power for the Information Commissioner), a bill that had been defeated by the Tory majority, and by the fact his father as PM had passed the original *ATIA* in 1982.

One early positive signal was the Prime Minister ending the much dreaded and lambasted Tory gag order on federal scientists, who were freed to speak to the media again. "Now," asked advocates, "what about *ATIA* reform?"

No substantial changes had been made to the *ATIA* since the 2006 *Accountability Act*, despite swift technological changes each year. In March 2015, Information Commissioner Suzanne Legault had tabled a special report, *Striking the Right Balance for Transparency*, with 85 recommendations to modernize the *ATIA*,[53] and this seemed a strong blueprint for progress. Amongst the activity that ensued next:

• In November, the Prime Minister published the mandate letter for the President of the Treasury Board, which stated:

> Work with the Minister of Justice to enhance the openness of government, including leading a review of the *Access to*

[52]https://www.ourcommons.ca/DocumentViewer/en/40-2/ETHI/meeting-23/evidence

[53]We have not space to recount all the recommendations from this and the other reports cited here, but many of these are quoted throughout this study *Fallen Behind*, in the topic-specific chapters.

Information Act to ensure that Canadians have easier access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.

• On March 31, 2016, at the Canadian Open Dialogue Forum, Treasury Board President Scott Brison announced public consultations on "the development of a new strategy on Open Government" and "the best way to both improve and strengthen Canada's access-to-information framework." (These consultations ended on 30 June 2016 and a report presenting the main findings was released.)

He also stated that improving the access to information regime would be a two-phase process. The first would involve implementing the government's election platform commitments, as well as other improvements to be identified through consultations and the House ethics committee's recommendations, leading to the tabling of legislation. The second phase would be the first five-year review of the *ATIA* in 2018.

• In February 2016, the House ethics committee began a study on modernizing the *ATIA*, and heard witnesses. Its final report was presented to the House in June, with 32 recommendations, some of which pertained to the first phase of the reform of the FOI regime, with others to the second.

• After his appearance before the committee on May 1, 2016, Minister Brison released the *Interim Directive on the Administration of the Access to Information Act*. This directive eliminates the fees set out in the *ATIA* and the Act's *Regulations* for access to information requests, except for the $5 application fee. It also directs federal officials to "release information in user-friendly formats (e.g., spreadsheets), whenever possible."

• Bill C-58 was introduced in the House of Commons on June 19, 2017. This granted the Information Commissioner the power to order government to release records against its will. Yet the Liberals broke their promise to cover the prime minister's and ministers' offices under the *ATIA*, instead prescribing only some proactive release of some self-selected records, which is a form of faux transparency. (See Chapters 8 and 11 for more detail.)

There were complaints about the lack of consultations. "No requestors like me were asked about how to draft *Bill C-58*," longtime FOI journalist Dean Beeby said. "Even Canada's information commissioner was kept out of the loop. There were only pro-forma 'consultations' ahead of the drafting that were really just a box to tick rather than an attempt at real dialogue."[54]

[54]Dean Beeby, speech to annual CAPA conference, Ottawa, Nov. 25, 2019. As well, "*Bill C-58* was created unilaterally, without consultation or meaningful engagement with Indigenous Nations or their representative organizations, contrary to Canada's commitment to a Nation-to-Nation relationship, to work in equal partnership with Indigenous Nations, to uphold the honour of the Crown, and implement the UNDRIP." - *Submission to the Senate on the Review of Bill C-58*. Submitted by the British Columbia Specific Claims Working Group. Nov. 30, 2018

• In September 2017, Commissioner Legault tabled a special report in Parliament entitled *Failing to Strike the Right Balance for Transparency – Recommendations to Improve Bill C-58*. It protests that the bill "fails to deliver" on the government's promises and that, rather than advancing access rights, Bill C-58 "would instead result in a regression of existing rights." (Others consider these claims too drastic.)

• *Bill C-58* contains 63 clauses. Clause 2 amends Section 2, the purpose of the *ATIA*, by inserting the following new first paragraph:

> The purpose of this *Act* is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

Although a very mild statement in the global FOI context, it apparently improved upon the *ATIA*'s old purpose clause, which is retained elsewhere in the law.[55] Yet in her 2017 special report, the Information Commissioner argues that amending the purpose clause is unnecessary and in fact "could lead to a more restrictive interpretation of the entire *Act*, and could result in less disclosure of information to requesters."

However, the Commissioner did support a new clause that allows an agency - with the Commissioner's approval - to refuse to accept an *ATIA* request that is "trivial, frivolous or vexatious or is made in bad faith."

• Finally, the Senate Standing Committee on Legal and Constitutional Affairs also held hearings and heard witnesses. It issued a helpful report on April 30, 2019, and recommended many changes, some of which the House agreed upon. Two of the best, however, were unwisely rejected by the House.

The Senate advised Section 9 of the *ATIA* be amended to - "Limit time extensions taken under s. 9(1)(a) or (b) to 30 days, with longer extensions available with the prior written consent of the Information Commissioner." This would have been a major game changer, because as it stands now, the *ATIA* allows an agency to extend a response for an unspecified "reasonable period of time" (a free rein that sometimes extends for years in practice).

It also wished to amend Section 36.1(6) to - "Allow orders of the Information Commissioner to be filed with the Registry of the Federal Court for the purposes of enforcement." This may have gone some way to respond to the Commissioner's complaint that its office's new enforcement power granted is too weak. After the Senate study *Bill C-58* received Royal Assent in June 2019.

(8) Creative inertia

Because it entails the ceding of power, no other federal political reform topic has been more masterfully deferred than *ATIA* reform, through a process that Sir Humphrey Appleby of the BBC TV series *Yes Minister*

[55] *ATI Act*, 1982 - "2 (1) The purpose of this Act is to extend the present laws of Canada to provide a 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."

has knowingly recommended as "creative inertia."

When the *Access to Information Act* was passed in 1982, it was generally assumed that strong improvements would be forthcoming. Five years later a textbook on Canadian public administration sounded a hopeful note, which may be amusing or sad to read in retrospect:

> Most commentators optimistically predict that the parliamentary review of the *ATIA* begun in 1986 will lead to amendments to bring cabinet confidences within the scope of the *ATIA*, to tighten up the wording of the exemptions, and to fine-tune the procedures so as to reduce bureaucratic foot-dragging. It is conceivable, though, that the changes could go in the opposite direction . . . . [56]

As we know, no such buoyant predictions were realized. That parliamentary committee produced a report called *Open and Shut*. One can extract it from a storage box, literally blow the dust off, and read on its yellowed pages that the *ATIA* response time should be reduced to 20 days, that all government funded and controlled entities should be covered by the *Act*, that a harms test should be added to many sections, that the public interest override should be greatly expanded, that the policy advice records should be open in 10 years instead of 20, and so on. None of this occurred.

Many studies and recommendations for ATIA reform have followed since then, which are cited throughout this report – proposals recurrently washed away like sandcastles by the eternal tides of power, leaving us frozen in a circuitous time warp, reinventing the wheel over and over.

In a *Yes Minister* episode, the subject of an "Open Government" policy comes up, and Sir Humphrey remarks that they will have to steer the minister away from it, using more studies: "It is the Law of Inverse Relevance: The less you intend to do about something, the more you keep talking about it." As late as 2005 a Justice Department's discussion began:

> There is nothing seriously wrong with the *Access to Information Act* as it is today. Indeed, the Government believes that the Act is basically sound in concept, structure and balance, and the Information Commissioner himself has stated that it is "a very good law."[57]

Canadian politicians and bureaucrats instead have chosen a simple bait-and-switch game of offering the proactive release of travel expenses and datasets, plus a wider social media presence (such as a "Twitter town hall" to make government more responsive). The purpose, of course, is to pacify the public with an illusion of transparency and empowerment, while its legal rights to obtain records through FOI laws are quietly regressing *at the same time*. Yet a new deluge of self-selected and self-serving

[56] Adie and Thomas, *op. cit*

[57] Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*. Ottawa, 2005

government internet filler is no substitute for urgently needed FOI law reform. (See "The dangerous diversion of faux transparency" in Chapter 11)

The Primary Obstacle

To begin, one can hardly generalize accurately about "the bureaucracy" as regards to the FOI system. Rather than a single uniform entity, it seems to be composed of six distinct but related subgroups working together in a complex network; each subgroup can have subtly different values, mandates and purposes.

1) The designers of FOI law and policy. The most senior civil servants, deputy ministers, and crown lawyers. These provide advice and draft legislation to ministers, and the struggles that can ensue for the paramountcy of one vision would be familiar to TV viewers of Sir Humphrey Appelby at work.[58]

2) The central coordinating and support office for FOI practice. This implements policy, advises access coordinators and organizes regular meetings of these; may manage a cross-government tracking FOI database, collects overall statistics, etc. In Canada, this duty falls to the Treasury Board Secretariat.

3) The "head of the public body," e.g., a deputy minister, who must approve (or "sign off" on) the release of information to FOI applicants, and a common bottleneck for delays. Ultimately responsible for the access function in each agency, he or she provides data to the Information Commissioner, for use in that office's 'report card on delays.

4) The agency's FOI directors and their staff, the amiable public face of the access system, usually the only ones who deal directly with FOI applicants, and who are sometimes thus erroneously blamed by applicants for dysfunctional access laws and processes.

5) Governmental non-FOI staff, who nonetheless work on FOI tasks. These may be employees in program areas who must search for records in response to requests; sometimes, because of their expertise in a topic, they advise access directors on what topics should be legally withheld as sensitive, and are sometimes too heavily influential in that regard.

6) Internal or external legal counsel, who advise and litigate on FOI cases.

It may be inaccurate even to generalize about a single subgroup, for each can include individuals with very different attitudes toward their FOI-related tasks. Various members of these subgroups in turn interact with politicians, their aides, government

[58]The cultural influence of this charming fictional character is significant. In his final annual report, David Flaherty, British Columbia's information and privacy commissioner, wrote: "Senior government officials have complained that they were no longer free to give candid advice to their political masters, because of the risks of disclosure of what they write in briefing notes. It was almost as if democracy was being undermined by too much democracy. I was actually told by a senior public servant that the public's right to know was limited to what they could ask for through their elected representatives. When I countered that this sounded too much like the BBC-TV series, *Yes Minister*, there was unabashed acclaim for Sir Humphrey as an outstanding public servant." – David Flaherty, Annual report 1996-97

public relations staff, members of parliament of all parties, FOI applicants, other governments, the commissioner's office, the courts, FOI and privacy advocacy groups, the media, and third party corporate entities. Often in small agencies, several roles are handled by the same person, who might be a part-time employee or a private contractor.

THE FREEDOM OF INFORMATION PROCESS FORUM

Over my past 25 years of filing FOI requests for news stories in Canada and being so often frustrated by obstacles, I have come to believe that a more cooperative approach should be tried. So I propose the creation of a national Canadian "Freedom of Information Process Forum," to candidly and respectfully discuss systemic FOI problems, and pragmatically attempt to resolve these.

This would be a council of *ATIA* applicants (such as journalists, lawyers, FOI advocates, academics) and senior government officials (such as access coordinators, deputy ministers, and chief information officers), which would meet semi-formally once a year to begin and then perhaps more often, by teleconferencing if convenient.

It could be organized by a university department (e.g. sociology, political science), journalism school, or association of FOI professionals such as CAPA, and it might be chaired by a neutral third party such as a professor, retired judge or ombudsperson. (The United States has such an entity: the FOIA Advisory Committee chaired by OGIS.)

I envision a figurative round table, signifying equality, and discussion topics could include: just how FOI "harms" are calculated and discretionary exemptions are applied, how to narrow requests, staged releases, how to balance competing rights and needs, why media requests are flagged and delayed, record formats, if some requests should be prioritized, and how to clear impasses and backlogs.

The worthy new power granted the Information Commissioner to order the release of records makes applicant - government cooperation no less valuable, for good will across all processes cannot be commanded. In fact, it may be all the more necessary now that the *ATIA* has been amended in *Bill C-58* to bar

"frivolous or vexatious" applicants. The *Act* was also revised to add a new "duty to assist" applicants, and Forum members could discuss how such terms are to be defined. (One very bright recent event was the elimination of *ATIA* processing fees, upon a court ruling.)

Some disputes are based not necessarily on ill-will, but on misunderstandings that could be cleared up; and perhaps one could locate a bit of common ground, and then build upon it. The parties might never agree on some points, but it is surely worth trying, and to listen and learn about another's point-of-view, for a more realistic and comprehensive outlook. (It may also respond to some of the concerns raised by Lt. Col. Boudreau noted below.)

In time, the Forum's mandate might be broadened beyond FOI law to discuss government transparency generally, such as proactive publication, improved public relations service to the media, archival declassification, open meetings, etc. Such a Forum could be a model for any city, province or nation. It would itself be covered by FOI law, of course, because it performs "a public function."

One of the central principles of a democracy is a separation of powers between the legislative and bureaucratic branches, hence there should be no political influence on the day-to-day processing of FOI requests, which is within the bureaucracy's mandate. "Let the politicians create policy and let the civil servants carry it out" is the stated norm; however, this standard is not always followed.[59]

Most operational-level FOI public servants are well meaning and hardworking professionals who are proud of their work, try with limited resources to comply with the letter and spirit of the access law (as they interpret it), and hope to avoid political influence. But in this report, we are mainly concerned with the senior level, the policy creation subgroup – by far the most powerful obstacle to *ATIA* reform. This may be indicated by Senator Francis Fox, the cabinet minister responsible for shepherding the *ATIA* bill into law in the early 1980s:

> Initially, I thought that it would be easy to get a bill like this through the legislative process. It turned out to be

[59]Similarly, Stephen Brown, who for 15 years was head of the legal services branch of Australia's Defence Department, said ministers and their staff were always an obstacle, despite ministers' claims that FOI decisions refusing access to material were made at arm's length. - *Department permanently on defence*, by Matthew Moore. Sydney Morning Herald (Australia), June 7, 2008

> quite the opposite. The longer the work of the parliamentary committee went on, the greater the bureaucratic pressures became to change and even withdraw the legislation. . . . In the final analysis, had it not been for Prime Minister Trudeau's support, the bill probably would not have passed.[60]

Generally the higher the level of governance, the more privacy; information is power, and the more power one holds, the more one has to lose. The attractions of confidentiality are not hard to perceive:

> Max Weber noted that every bureaucracy tries to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Concealment insulates administrators from criticism and interference; it allows them to correct mistakes and to reverse direction without costly, often embarrassing explanations; and it permits them to cut corners with no questions asked.[61]

Such a privilege will not be readily yielded.[62] Journalism professor Sean Holman had perhaps the most apt metaphor: "An FOI law is like an artificial organ transplanted into the governmental body, one that body rejects."

From experience, longtime FOI advocates have learned not to expect the bureaucracy to budge an inch on any significant aspect of transparency reform, although it could sometimes occur as a surprise. Yet in recent governmental *ATIA* discussion papers, to some eyes, the old resistance appeared to be melting slightly, as though the reports' authors sensed that times have changed since 1982.

In Canada and elsewhere, many senior civil servants still persuasively warn politicians of the grievous dangers of open government. This cannot help but remind one of the words of the supremely suave British bureaucrat Sir Humphery Appelby, lecturing a naïve junior named Bernard in *Yes Minister*.

> Bernard then said: "The Minister wants Open Government." Years of training seem to have had no effect on Bernard sometimes. I remarked that one does not just give people what they want, if it's not good for them. One does not, for instance, give whiskey to an alcoholic.
>
> Arnold rightly added that if the people do not know what you're doing, they don't know what you're doing *wrong*.
>
> This is not just a defense mechanism for officials, of course. Bernard must understand that he would not be serving his Minister by helping him make a fool of himself. Every Minister we have would have been a laughing stock within his first

---

[60]Senator Francis Fox, preamble to Colonel Michel W. Drapeau and Marc-Aurele Racicot, *Federal Access to Information and Privacy Legislation*, Annotated 2009. Toronto: Thomson Carswell, 2008

[61]Sissela Bok, *Secrets: on the Ethics of Concealment and Revelatio*n. New York: Pantheon Books, 1982

[62]This problem is not new. Bureaucratic resistance is surely one reason why it took 17 years of continuous lobbying to finally pass the *Access to Information Act*. Canada's first information commissioner Inger Hansen noted in 1984 that "Many public servants must experience a 180-degree turn before requested records will be examined with a view to finding ways to release information rather than searching for ways to keep it secret." The access act, she warned, was in danger of becoming the "unwanted offspring in Ottawa." (Information Commissioner Inger Hansen, *Annual Report*, 1984-85) *Plus ca change . . .*

> three weeks in office if it had not been for the most rigid and impenetrable secrecy about what he was up to.[63]

But what can be amusing up on the screen is often far less so in real life. Politicians resist the letter and spirit of FOI laws not so often with the goal of gaining or consolidating power, but from the fear of losing it (a concern that one can, if not share, at least understand). By conveying such politically irresistible arguments - all in private, of course - the unelected Canadian bureaucracy has ever thwarted *ATIA* reform attempts by elected officials such as justice ministers, treasury board presidents, and at least two prime ministers. One is sadly at a loss on how to resolve this dilemma. Elected politicians come and go; bureaucracy endures forever.[64]

In a 2006 discussion paper by the Justice Department, ironically titled *Strengthening the Access to Information Act*, the bureaucratic outlook seems expressed in a nutshell in a note on *ATIA* discretionary exemptions:

> Part of the exercise of the discretion in the Act comprises an assessment of whether the public interest would clearly be in favour of disclosing the information. A possible approach, therefore, could be to include a provision that when the head of the institution exercises discretion in applying an exemption, the head must weigh the interest of the government institution against public interest.[65]

Here the government interest is positioned against the public interest, as if they were separable and opposable; may we hope the government could someday regard the two concepts as mainly one and the same?

The possible consequences should be considered. "It is an unfortunate fact of life that many Canadians are extremely suspicious if not downright cynical about the federal bureaucracy. In part, as we have argued, this suspicion stems from fear of the unknown or, at least, the inadequately understood."[66] Needless or excessive secrecy in regard to FOI can only make the problem worse, and if this approach enables the spread of falsehoods and conspiracy theories, the government would have only itself to blame.

---

[63]*Yes Minister*. From the private diary of Sir Humphery Appelby. Espisode titled *Open Government. London*: BBC publications, 1981

[64]Indeed, secrecy is so pervasive that it even occurs *within* government, in forms that might have amused Franz Kafka. I have a list of the topics of hundreds of FOI requests that were made from one level of Canadian government to another level, e.g. from federal to provincial ministries. A former information commissioner told me that a cabinet minister once made an FOI request to his own department (anonymously, using an intermediary) to learn more about its activities.

[65]Government of Canada, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*. Ottawa, 2006

[66]Robert L. Jackson and Doreen Jackson, *Politics in Canada: Culture, Institutions, and Behaviour in Public Policy*, second edition. Scarborough, Ontario: Prentice Hall Canada, 1990. The authors also noted there may be solutions to this dilemma: "Nor is there an absence of mechanisms through which control or accountability might be imposed on the bureaucracy by elected institutions. Rather, if there is a problem, it might well be described as a lack of political will to make use of these control mechanisms. . . Ultimately, as with governments, it may be argued that societies get the bureaucracies they deserve."

For those who still regard sweeping secrecy as an unqualified value, there are many counterarguments. For one, the concept of *legitimate*, truly necessary secrets is devalued. Another point is raised in this perceptive Australian newspaper editorial:

> When you look at the cases cited by the audit and other cases of whistleblowers and journalists being hounded, or access to information being denied, a theme emerges. In virtually every case, the public would have been better off if the information had been made public earlier.
>
> And ironically, the politician would have been better off, at least in the long term. This is because if the information or advice had been public from the beginning, the politician would not have dared make a decision for short-term gain when the long-term effects would be so obviously bad.[67]

It is well known that FOI applicants are generally outresourced and outsmarted by governments able to access nearly bottomless reserves of public funds[68] to hire the best legal minds in the nation to quash FOI requests. As James Travers noted:

> Twenty-three years after access to information was born, politicians and bureaucrats continue to kill its spirit by arguing endlessly over the letter of the law. So determined is that resistance that a cottage industry now thrives counseling ministers, their staff and the civil service on how not to share public information with the public.[69]

Besides existing political needs being met, new ones can be generated, as fears of supposedly grave new political "harms" that could result from FOI disclosures are discovered and conveyed to ever-attentive governmental ears. Yet do bureaucrats and crown lawyers still expect us to believe that all the other nations of the world and our provinces have got it wrong with their FOI laws, and that Ottawa, alone, with its 37-year-old *ATIA*, has got it right? Some of these even argue that Canada's current *ATIA*, although so meager in the global context, is already too open and needs further curtailment.

For now, the Ottawa Liberals still yield to their obstructionist officials' eternal script with its vacuous three C's: "These are very *complex* issues, which require more *consultations*, because of the risk of unintended *consequences*." Incorrect. The reforms are simple, they have been studied to death for decades, and other nations have not been harmed by passing them (as per the global norms). As longtime FOI journalist Dean Beeby put it:

> I firmly believe an old guard of federal bureaucrats hijacked the reform process that resulted in the travesty of *Bill C-58*.

---

[67] *FOI process needs urgent overhaul to halt needless secrecy*, Canberra Times (Australia), Nov. 10, 2007

[68] For example, by an *ATIA* request, I discovered in 2002 that the Prime Minister's office and a department had paid more than $500,000 to their legal counsel to sue the Information Commissioner in an unsuccessful court case to assert that the *ATIA* did not apply to the PMO or the minister's office.

[69] *Harper: Do as I say, not as I do, ibid.*

> They snowed the politicians, worked in secret, and helped ease the passage of a bad law. But I also know from personal experience that there is a cadre of ATIP officers and policymakers that is much more committed to genuine transparency. Many want to release far more information but feel hogtied by current rules, policies, regulations and laws.[70]

Canada's most prolific FOI requestor Ken Rubin[71] asserts that Canadian freedom of information laws are misnamed, for their main undeclared purpose is not to grant the public access to records, but to *codify secrecy*. Our FOI laws are so top-heavy with overbroad exemptions, which are in turn so heavily overapplied in practice, he says, that it seems as though the statute is in effect another *Official Secrets Act* by another name.

Even if this is not so, it appears that it is too often interpreted and applied by many Canadian officials as though it was, *i.e.*, almost as if the exemptions portion of the statute was lifted up and inserted into the law's purpose clause, or if donuts and Swiss cheese were valued less for their substances than for their iconic cavities.

After new politicians are sworn into power, they and the bureaucracy may be grateful to find at least one common purpose: the desire to keep records of their activities and plans private. Their interests often merge into one, for they share and defend the same fortress, and yet the public is locked out in the cold and the darkness.

THE EMPIRE STRIKES BACK

Considering that news journalists are obliged to present both sides of a story, and most political scientists value a good debate, it is important we do not evade challenges to any of the assumptions in this book. It is also a basic principle of justice, voiced as *audi alteram partem* (Latin for "hear the other side").

Unlike FOI advocates, bureaucrats very seldom speak out publicly on access laws, so this article by Brett Boudreau, a defense department public relations officer, in the pages of the *Canadian Military Journal*, is a helpful window into a radically different perspective on the *ATI Act*.[72]

---

[70]Dean Beeby, Speech to annual CAPA conference, Ottawa, Nov. 25, 2019

[71]Rubin's columns for years on the *ATIA* and open government in Ottawa's The Hill Times are, even when debatable, consistently interesting. His website – http://kenrubin.ca/

[72]Lt. Col. Brett Boudreau, *Force for Change or Agent of Malevolence? The Effect of the Access to Information Act in the Department of National Defense*. Canadian Military Journal, Vol. 1, No. 2, Summer 2000. http://www.journal.forces.gc.ca/vol1/no2/doc/25-42-eng.pdf Significantly, this was written shortly after the raw, heated time of the mid-1990s Somalia-Airborne Regiment scandal of racist murders and the public inquiry, when DND's *ATIA* practices were nationally spotlighted and flayed for serious wrongdoing. Media *ATIA* applicants were then viewed almost as a hostile army; the relationship has somewhat improved since then.

While two decades old, the piece, worth reading in full, is all the more notable for how persistent this outlook remains within pockets of politicians and officials at all levels (albeit voiced - if at all - in a more bland, nuanced manner).

With military directness, Lt. Col. Boudreau portrays public servants as under siege by frivolous, malicious and commercially-driven ATI requestors, harassed by a tough and unaccountable Information Commissioner, having to spend "shocking" amounts of precious time and taxpayers' money to process requests (some of which may harm national security), and even being menaced by a few requestors who - via the *ATIA*'s new Section 67.1 on record destruction - might "set them up" for prison terms "with frightening ease." Several verbatim quotes:

• Paradoxically, an *Act* whose intent is to promote freedom of information and thereby foster public interest and involvement in the affairs of state is instead alienating the public service and public alike.

• Complex issues of public policy are reduced to context-less "scandal-bites" or are ignored altogether in favour of news items that are fast and inexpensive to produce and cater mainly to political expediency, public titillation and "infotainment."

• All access requests are created equal and the law does not differentiate between a Hell's Angel, a public interest researcher, an aggrieved employee, an academic, a terrorist, a competitive businessperson, a curious citizen or a muckraker.

• Parliamentarians and bureaucrats who dared raise a critical voice about ATI would be publicly condemned as being "for secrecy" and "against openness." For media, since nothing less than 100 per cent access to information 100 per cent of the time is their desired standard, we would expect their coverage to be deferential to the OIC, strident in its support for greater access to documents irrespective of the effects, highly critical of bureaucracy for delay regardless of the circumstances at play, and bereft of any assessment on ATI's effect on public policy.

• Finally, there is a concern that records are exiting the department that are not adequately nor consistently severed, leading to the prospect that personal

information and, potentially, material detrimental to national security as defined by the *Act* is being released.

This is a result of the sheer volume of requests and pages released in DND, and the general unfamiliarity with ATI rules of those offices charged with preparing records for release (legal interpretations of what is severable are constantly evolving), combined with departmental pressures to expedite records processing and avoid negative criticism or subpoena by the OIC.

- [From an interview with a senior Canadian Forces officer, March 1998.] "Put it this way. I can fill sandbags for homes in danger of being flooded. I can train soldiers to go to Bosnia. I can do tests on equipment we are thinking of buying. I can try and catch up on the paperwork my secretary used to do before she was laid off. Or, I can forget all about that and spend 20 hours photocopying documents for [a frequent requester] so he can publish libelous crap about us in the paper and make money off us doing it. That's an easy decision for me to make."[73]

(9) Why this report

Most of the arguments regarding *Access to Information Act* reform are by now familiar. *ATIA* discussion, as the Act itself, had long ago grown too narrowly-focused, stale, and circuitous. So in 2007, I wished to consider an alternative perspective on the issue, one not fully explored yet: we instead need to continuously (and not at 10 year intervals) re-conceptualize the *ATIA* in the light of rapidly-changing international and historical contexts. This could profoundly and positively alter what Canadians come to expect – perhaps even demand - for their own rights to information.

Although this process may initially cause the Canadian government discomfort, its long-term value will become evident; innovative concepts that we accept as routine today, and even express pride in, were considered impossible in their day, and even many conservatives know that everything was once done for the first time.

The idea for this report occurred to me as I read the helpful annual guidebook to the *ATIA* by Colonel Michel Drapeau and Marc-

[73]Here an official tellingly frames *ATIA* request processing as a "decision" that one can follow or not, as one chooses (a choice enabled by an absence of enforcement mechanisms and penalties for noncompliance with the *ATIA* - an Act of Parliament). By contrast, imagine the governmental response if any citizen had scoffed that his or her choice to not pay taxes or comply with driving rules is "an easy decision for me to make."

Aurele Racicot.[74] Included therein was a 1999 document entitled *The Public's Right to Know: Principles of Freedom of Information Legislation*, which describes the generally accepted international FOI standards. These principles were drafted by the London-based human rights organization Article 19, and then endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression.

Perusing the document, I was startled and then dismayed to discover that Canada's *Access to Information Act* failed the *Principles* on 12 points. Ironically and inexplicably, as the FOI world moves forward, Canada appeared to be marching in the opposite direction.

Searching elsewhere, I found other organizations with similar views, such as the Commonwealth Secretariat and the Council of Europe. This project then expanded, as I thought to compile and cross-reference every relevant document I could find – *i.e.*, the texts of all national FOI laws and draft FOI bills, Canadian provincial FOI laws, the commentaries of global and Canadian non-governmental organizations – and compare these to the *ATIA*. Their key topics I entered into a comparative FOI Excel spreadsheet – to create the *World FOI Chart*, this report's foundation.

I have sought a wide diversity of sources and approaches, for one of the hopes of the report is to encourage more real dialogue between sectors that have hitherto been mainly segregated in FOI discussions - journalists, lawyers, academics, politicians, the bureaucracy, the private sector, applicants and the general public – both in this nation and around the world. I hope you will find this tour of statutes to be a useful and interesting window on the vast world of FOI.

As will be shown in the following chapters, it is clear that Canada has fallen far behind in the global FOI community, for many reasons: it has not followed the FOI principles of most global and Canadian commentators, nor the FOI laws of many other nations, some of them recently established as democracies. This fact cannot be disputed even by the strongest opponents of *ATIA* reform.

The problem has grown so much worse that, indeed, the second edition of this book could well be entitled *Fallen Further Behind*. It is probable that if the government of any democratic nation tried to pass an equivalent of the 1982 *Canadian Access to Information Act* today (even in its amended 2019 form), the public and parliamentarians there would vigorously reject the effort, even presuming they would take it seriously.

The report and chart were prepared for both Canadian and global readers, in a manner that hopefully makes legal topics accessible to all, and to move FOI out of the sole realm of experts. We have been regularly informed by senior bureaucrats and crown lawyers – erroneously in my view - that FOI law reform is "too complex" for the general public to understand, and so it had best not even try. Such paternalistic and self-serving nonsense, of course, contradicts the guiding purpose

[74]Colonel Michel W. Drapeau and Marc-Aurele Racicot, Federal Access to Information and Privacy Legislation, Annotated 2009. Toronto: Thomson Carswell, 2008. Updated 2019

of FOI laws. Democracy is about choice, and the essence of choice is informed choice, and without it our leaders cannot truly claim to govern with the consent of the governed.

I do not have all the answers, nor does any single individual or institution, yet in this report I hope to have raised the right questions; ultimately, readers will make up their own minds. Most FOI advocates never expect to get everything they want, but we can, and must, do far better. MPs serve the public in their way as the news media do in ours. Here they have an opportunity to create a fine historical legacy for their constituents that will endure long after they depart office.

(10) Canada in the World Context

Some observers believe that because each nation's freedom of information law derives from its unique political history, culture and legal system, its main features cannot or should not be transplanted from one nation to another. This commonplace requires closer examination.

It seems less persuasive when applied to laws within a region - such as South America or Eastern Europe – or within a special political grouping such as that of the nations in the Commonwealth (formerly known as the British Commonwealth). Still, in consideration of this claim, I structured this report throughout in two levels, so that the Canadian *ATIA* could be compared first to the FOI laws of Commonwealth nations, and then to non-Commonwealth states.

Yet if the Canadian government insists upon confining itself within the political comfort zone of the Commonwealth box as regards FOI laws, this choice would still not justify retaining the status quo of the Canadian *Access to Information Act*; because most of the Commonwealth has, unsurprisingly, moved far ahead of Canada since 1982 (as will be seen throughout this report). This is partly due to the process of "leap frog" by which, as times change, countries learn from the experiences and mistakes of others, all, and consider new theories and realities, all to forge new statutes that surpass existing ones.[75]

Thus even the United Kingdom – Canada's model for parliamentary secrecy, which passed an FOI law nearly two decades after we did – has well outpaced Canada on many critical points (although frankly it still lags behind us on a few others). Canadian officials, to deter *ATIA* reform, still invoke the reportedly great tradition of Westminster-style confidentiality; if so, how do they explain why the UK *Freedom of Information Act* contains a broader public interest override, and a harms test for policy advice, and covers a vastly wider range of quasi-governmental entities – all features lacking in our *ATIA*?

[75]It is worth remembering that comparative study as we do here can also be utilized for the opposite goal, i.e., for secrecy, not openness. Hence FOI advocates worry about FOI statutory regressions occurring anywhere, for they may be cited by secrecy proponents as new models to pull the laws downward. For example, in 2012 during the legislative battle in Newfoundland over an appallingly FOI reform bill, the opposition house leader said the government had "cherry picked" some of the most restrictive aspects of information laws in provinces such as Alberta and was calling it "jurisdictional alignment." (*Record filibuster on N.L. access-to-info restrictions ends on sour note*, by Sue Bailey, Canadian Press, June 14, 2012) Similarly, years earlier, a woeful amendment added to Alberta's FOI statute to exclude ministerial briefing books from the law's scope was later copied by Prince Edward Island (i.e., the same type of record that must now be published proactively in Ottawa under the *ATIA*).

In fact, the British experience has many lessons for Canada. Its House of Commons Justice Committee held hearings on its *FOI Act* and produced a fine report in 2013[76], which concluded:

> We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service.... Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy.[77]

The best Commonwealth examples for Canada to generally follow for inspiration are, I believe, the access laws of India,[78] Kenya and South Africa (in most but not all their respects). Even in a world growing ever more integrated, I would still never suggest that the domestic FOI statutes of every nation should be harmonized. Yet Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners, and then hopefully look beyond the Commonwealth to the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present.

In regards to the Commonwealth box, two Canadian political scientists issued a caution, one that would likely be echoed by the federal government:

> Access to information is a new, experimental field of public law. There are constitutional and practical limits to how far and how fast we can move toward greater openness in government. The experiences of countries like Sweden and the United States may not provide clear lessons for Canada because their political systems and traditions are different. Some measure of secrecy appears to be inherent in a cabinet-parliamentary system with a neutral, career public service.[79]

---

[76]House of Commons Justice Committee Post-legislative scrutiny of the UK Freedom of Information Act 2000. First Report of Session 2012–13 https://publications.parliament.uk/pa/cm201213/cmselect/ cmjust/96/96.pdf

[77]Not all Britons agree. e.g., "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it." These are the words of former UK prime minister Tony Blair addressed to himself in his memoirs while reflecting on his government's introduction of the FOI Act in 2000. - *Why Tony Blair thinks he was an idiot*, by Martin Rosenbaum, BBC News. Sept. 1, 2010

[78]In their internal reviews of this book in 2008, Justice Department analysts had the keenest interest in the FOI law of India, producing many pages of notes upon this. If that is any indicator they view it as a model for Canada to follow, this would be hopeful indeed.

[79]Robert F. Adie and Paul G. Thomas, *Canadian Public Administration: Problematical Perspectives*. Scarborough: Prentice-Hall, 1987. The authors added that "The Swedish and American political systems are structured in such a way that more government decision-making takes place in the open and public consultation over policy-making has been more widely practiced. If these qualities were the ultimate aims of the advocates of reform to the Canadian traditions of secrecy, they probably exaggerated what could be accomplished through legislation alone; fundamental changes to the constitutional arrangements would probably be required." This is a worthy question for debate.

Hence some Canadian bureaucrats and politicians are horrified by the thought of changing the *ATIA* cabinet records exclusion to a mandatory exemption, and permitting the courts to make a so-called "political" decision on whether the exemptions were properly applied (despite this being the norm in most Commonwealth statutes.)

Yet as we embark upon this tour through the FOI world, I ask Canadians to consider that a positive and workable idea could be welcomed whatever its source. For example, in Mexico's FOI statute, "information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake." In Serbia's law, agencies must respond to FOI requests in 15 days (the global standard), except in cases where there is a threat to the person's life or freedom, protection of the public health or environment, in which case the reply must be made within 48 hours.

Should we spurn helpful concepts for *ATIA* amendments solely because they originated in non-Commonwealth nations? Are the adjustment difficulties, and the harms that would supposedly result from their broader provisions, often overstated here? As the Justice Minister wrote in 2005, "Considering the importance of the *Access to Information Act*... we must consider all elements, all angles, all people."[80]

Such decisions are not always black or white, because features from others' FOI statutes need not be transplanted verbatim to Canada but many could, with the exercise of political imagination, be adopted and modified to suit our context.

Some writers will likely divide foreign FOI provisions into two categories: those that could well fit the existing Canadian political structure (e.g. some procedural matters), and those (e.g., perhaps on cabinet records and policy advice) that they assert could not.

In FOI matters, Canada, much like our geographic position, stands on a political middle ground between the United States and Great Britain. Much of the political incentive to enact the *ATIA* in Canada was prompted by the passage of the American *Freedom of Information Act* 16 years earlier,[81] but that text did not influence ours.[82]

The political and other impacts of FOI law and practices abroad represent a fascinating and critical subject, yet beyond our present scope. Canadian politicians and bureaucrats plead successfully - though without evidence

---

[80]Justice Minister Irwin Cotler, in *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*. Ottawa, April 2005

[81]The earliest North American FOI law I have found is that of the *Wisconsin Revised Statutes* of 1849; here, Chapter 10 requires every sheriff, circuit court clerk, and county treasurer to "open for the examination of any person" all of their books and papers. Any officer who neglected to comply "shall forfeit for each day he shall so neglect, the sum of five dollars" (about $200 today with inflation).

[82]On this issue, I have heard visiting American journalists deride Canada's FOI laws as "pathetic" in comparison to their own, and the process of trying to obtain information from Canada on cross-border issues as "shockingly bureaucratic," and I was unable to contradict them. On such grounds, in fact, Canadian journalists sometimes find information through the American *FOIA* about Canadian affairs that they could not obtain in this country.

- that grievous "harms" would likely occur if wider disclosures were prescribed in the *ATIA* (e.g., regarding public interest overrides, order power for the commissioner, coverage of all quasi-governmental entities).

From the experience of other nations, we can see if these speculative injuries actually came to pass, or not. Very rarely do we hear complaints from foreign governments that such harms ensued, nor urgent calls to amend their FOI to bring them down to the Canadian level; if such proposals were put forth, the public reaction could be well imagined. In the world context, the Canadian government's bald assertions that a more open feature of another nation's FOI law "would just not work here" with no explanation whatever are no longer adequate today.

Before studying the world context, we should first consider the *ATI Act* within the Canadian political setting. It remains rather a mystery how the Canadian state plumes itself as a shining beacon of democracy for the rest of the world to follow, when one considers some of its intransigent features.

These include a whistleblower protection system decades behind the United States' and United Kingdom's; a decrepit first-past-the-post electoral system (whereby a party gains a majority of seats by a minority of the popular vote), one that the Prime Minister in 2015 pledged to end but never did; a Parliament with strictly vote-whipped and censored backbench MPs, one in which, as Jeffrey Simpson noted in his book well-titled *The Friendly Dictatorship*, "Canada's prime minister exerts more direct, unchecked power than the leader of any other parliamentary democracy." Can our *ATI Act* break free from this overall culture?

The truly astonishing irony today is that Afghanistan, a nation for Canada has laboured at such high cost to transform from a theocratic dictatorship to a modern democracy now has an FOI law rated #1 in the world in the CLD-AIE ranking, while Canada is rated #58.[83] I am well aware that a good FOI law is not the sole measure of a democracy. Nonetheless, why do we keep supplying critics with such abundant and obvious material to chastise Canadians as global hypocrites?

Most Canadians view their country's human rights record as a source of pride, notes the Centre for Law and Democracy (Halifax). From the *Charter of Rights and Freedoms*, which has been used to model constitutional protections around the world, to Canada's multicultural values, Canadians like to believe that the world could learn something from Canada. Our government sends election observers and democracy builders abroad. The CLD continues:

> In many areas of human rights and democracy, this belief is well-founded. But when it comes to the right to information

[83] The second ranked FOI law is found in Mexico, followed by (in descending order) Serbia, Sri Lanka, Slovenia, Albania, India, Croatia, Liberia and El Salvador.

> the opposite is true. It is tempting to say that, when it comes to the right to information, Canada is a third world country. Unfortunately, this phrasing is far too kind since, as the Global RTI Rating shows, when it comes to the right to information, many third world countries have a lot to teach Canada. . . . The standards in the RTI Rating are not in any way unrealistic or unachievable.
>
> It should be abhorrent to Canadians to know that their country rates 55th [in 2012] in the world in a vital human rights indicator. But there is little of this sense regarding the right to information. One conclusion seems unavoidable. Canadians still do not regard this as the fundamental right in the same way that citizens of other countries do.[84]

On this last point, in his preface to first edition of this book, Murray Rankin raised the most vital question: "Reading this book will no doubt make you angry: why do Canadians tolerate this state of affairs?" Why indeed. Public apathy here may, in the end, pose a larger obstacle to FOI progress even than bureaucratic obstructionism, and so we need to pause for a minute to seek an answer.

Open government is simply an un-Canadian concept, and it has never been a part of our political character. This may arise partly from the origins of the nation. Consider our southern neighbor, born of revolution; Canada, from evolution. The former values "life, liberty and the pursuit of happiness"; the latter, "peace, order and good government." Perhaps our conferred democracy came too easily, unlike in Eastern Europe or Africa; those who have long struggled to gain their rights are likely to value them more.

Surveys regularly reveal that, next to Americans and some other nationals (even in the Commonwealth), Canadians have a higher degree of trust in their government and the British Crown, with more deference to authority. Who is likely to less perceive a need to press hard for access to information?[85]

Canadian politicians have long calculated correctly on a fairly passive, affluent, contented (or at least unaware) population to act as their enablers, one that will forget or excuse their broken FOI electoral promises. That is where the FOI problem begins, and could end. Political trust and docility are luxuries we can no longer afford; an attitude of robust, involved, healthy skepticism is the one Canadians most urgently need.

That is where Newfoundland arises as an inspiration.

In June 2012, the Newfoundland Conservative government shocked FOI observers by inexplicably and boldly eviscerating its *Access to Information and Protection of Privacy Act*. Its *Bill 29* would to

---

[84]Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

[85]Some claim that a closely related issue to FOI is a rather anemic tradition of investigative reporting in this nation; and American, British and Australian journalists have at times expressed surprise at the quiescence of the Canadian news media, comparatively speaking.

keep cabinet and companies' records secret, block the information commissioner from viewing documents, raise FOI fees, and allow ministers on their own to bar any FOI request they called "frivolous." (See Chapter 14)

An uproar of protest ensued, with public rallies on the Legislature lawn in St. John's – an unprecedented public response in Canada to an FOI issue. A marathon three day opposition filibuster followed in the House, yet the bill passed anyways. In response to the public, a new premier appointed a panel to review the law, which produced a report with 90 recommendations on how to improve the *Act*. In a new Act that came into force on June 1, 2015, the government repealed all the worst features of *Bill 29* and adopted the commission's draft law directly.

The people had rebelled against a plan to convert their FOI law into the worst in Canada, and instead pushed to make it the best (as top-rated by the CLD). Why could the same not be done in every province, and nationally?

How much longer should Canadians need to launch five-year FOI legal battles to obtain the same kinds of records that American state governments post freely on their websites? In the end, most FOI misfortunes occur mainly because we permit them to occur. Every public will have the FOI system it deserves, and the choice is ours whether we wish to live in the light of information or in the darkness of ignorance.

To the Canadian people I would say: Do you believe that you should have the right to view records on health and education, or crime and the environment, or official spending and public safety - records whose production you paid for with your tax dollars, and which were presumably created for your benefit? If so then speak out now (as Newfoundlanders did), lest the government interpret the silence, rightly or wrongly, as consent or indifference. The hour is late.

(11) The Road Forward

I defy anyone to come up with a law that will force good access to information on a public body that doesn't want to do it.
- Frank Work, Alberta Information and Privacy Commissioner, 2005

In the newly established democracies of the 1990s, some citizens preparing to file their first request under a new freedom of information law may have initially wondered: Is this a mere administrative privilege granted by the state, or a basic human right that one can demand?

The answer was soon apparent. "Modern FOI principles constitute a Copernican revolution for the development of the free press," noted the Organization for Security and Co-operation in Europe in 2007.[86] Not unlike astronomers who discovered with some surprise that the earth revolves around the sun and not visa versa, citizens perceived that an onus had been reversed: government had to now justify why it could withhold

[87]Access to information by the media in the OSCE region: trends and recommendations. Miklós Haraszti, Representative on Freedom of the Media, Organization for Security and Co-operation in Europe. Vienna, April 30, 2007

records instead of the people needing to state why they should have access to them.

Yet the view of many officials is summed up by Sir Humphrey Appelby in the 1981 Yes Minister episode titled Open Government. He and his ally Arnold rebuke a naïve junior named Bernard who supports more transparency:

> Arnold pointed, out with great clarity, that Open Government is a contradiction in terms. You can be open – or you can have government. Bernard claims that the citizens of a democracy have the right to know. We explained that, in fact, they have the right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity.

Alasdair Roberts concludes his book *Blacked Out* with these words: "Transparency itself is not enough. . . Do we have a right to information? Certainly. But we also have a responsibility to act on it." Sir Humphrey's point seems to be that if, say, FOI-based news stories reveal dreadful mistreatment of the most vulnerable groups, this prompts societal guilt and an inescapable obligation to fix the problems. And who wishes all that? If out of sight is out of mind and ignorance is indeed bliss, then some bureaucrats are attempting, benignly in their view, and with Orwellian doublespeak, to grant the public freedom *from* information.

In fact how much does the public need to know, care to know, dare to know? I generally work from the presumption that faith in the public's ability to "handle reality" is preferable to the alternative course, to be decided by others, and that government should not patronize adults like children.

U.S. Senator Daniel Patrick Moynihan's book, *Secrecy: The American Experience*, was released in 1998 with a succinct conclusion: "Secrecy is for losers."

> Why? First, he wrote, because it shields internal analyses from the scrutiny of outside experts and dissenters. As a result, some very poor advice is used to inform many government decisions. Second, secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments. As George F. Will wrote in a review of Sen. Moynihan's book: "Government secrecy breeds stupidity, in government decision making and in the thinking of some citizens."[87]

Might one ask political leaders to seriously consider not just the liabilities but also the benefits of transparency and that, conversely, "Open government is for winners"? Rather than have secrecy project weakness, suspicion and insecurity, transparency projects honest and competent administration, confidence in one's own vision, and trust in the people.

In his 2006 book, global FOI expert Alasdair Roberts – who writes with what he terms "a measured skepticism of authority" – said the remarkable growth of international FOI

[87] *Newsweek*, October 12, 1998, in Information Commissioner John Reid's *Annual Report 1999-2000*

coalitions augers well for the future, and yet:

> On the other hand, there are dangers.... The popular media, distracted by other news, may stop paying attention to the problem of government secrecy. Debates over openness may seem to become more complicated and technical. Activists will have to devise clever ways of overcoming these problems, to build a robust and durable alliance. Pressure to restore the walls of secrecy will persist - and so, therefore, must we.[88]

(12) The future of FOI?

We might pause for a minute to consider what the future may hold for freedom of information laws in the world. The reality a decade from now (for a possible third edition of this book) could present quite a different picture; and as the rest of the world progresses, will Canada fall even further behind? I prefer to hope for the best, and believe FOI to be moving in these directions overall (while being unsure of the breadth or pace of the change, in my crystal ball):

• Several more of the 69 nations that have not yet passed FOI laws (e.g., Egypt, Malaysia, Namibia, Zambia, Cameroon, Kuwait, Venezuela) will take the plunge.

• Most importantly, the concept of "FOI as a human right" is by now so unequivocally a legal norm in global court rulings and Constitutions that even the most recalcitrant nations will give up resisting the concept

• The idea of Constitutional guarantees for the public's right to know will also become more accepted (via court rulings and/or statutory changes), and those guarantees are likely to become stronger as well

• Even if not revised, the FOI exemptions for cabinet records and policy advice may be interpreted a bit less strictly over time, perhaps based in part on the constitutional recognition of this right. Officials may also yield to pressure to act more in the spirit of the law's public interest override (perhaps in response to court rulings), and there will likely be stronger and more detailed purpose clauses placed in FOI laws

• There may be a modest push to widen the scope of FOI laws to cover more private entities, such as unions, political parties, foundations, charities (prompting fierce pushbacks), along with more countries recognizing the broad scope already mandated by international law which covers all three branches of government as well as private bodies operating with public funding or pursuing a public function

• The need to reduce the number of override clauses in other acts, so as to render the FOI law supreme on all disclosure questions, may finally be raised to the higher profile it needs

• Time limits set for many FOI exemptions will grow ever shorter, and vast amounts of historical records declassified

• There will surely be far more mandated proactive release, on records such as

[88] Alasdair Roberts, Blacked Out: Government Secrecy in the Information Age. New York: Cambridge University Press, 2006.

statistics, meeting minutes, inspection reports and internal audits (and governments will try to sell this as an adequate substitute for FOI law reform). The massive transition from paper to digital records is obvious, which will help to lower FOI request search costs and enable faster replies

• We will likely see laws amended with stronger enforcement and penalties (often in response to scandals), and – less surely - better duty to document and whistleblower protection laws. Some nations that have not yet done so may grant oversight bodies the power to order record disclosure (as Canada did in 2019).

• There may be calls in other regions to introduce an equivalent of the European 1998 Aarhus treaty on environmental information disclosure. Especially on the hottest-button topic of climate change, people may demand: if international trade agreements should be able to override national environmental protections, as many investors urge, then why should the same principle not apply for the positive purpose of environmental transparency?

• Mendel also expects to see more effort being put into implementation over the next 10 years, in part driven by the fact that adoption and implementation of FOI laws is formally recognised in Sustainable Development Goals (SDGs) Indicator 16.10.2 and in part due to rapidly improving methodologies for assessing implementation in practice.

• A sorry development will be decline of traditional news media, and it is very doubtful that most of the loss of reporters' serious public interest FOI requests will be made up by other applicants

• A rise in the public awareness of FOI, plus youth education on the topic, and online activism will make it ever harder for governments to resist the calls for progress, and to expand secrecy

• A large unknown remains the public service's attitude towards such openness developments. I expect the newer generation may be more at ease with the concept, while the older one, while never liking it, may grow resigned over time.

In Canada, the Information Commissioner complained about flaws in the power newly granted in *Bill C-58* for her office to order information release; yet the fact remains that this power – the most urgently needed reform to the *ATIA* – has indeed been added, a move that some FOI advocates never expected to see happen in our lifetimes, and this may bring good results.

In sum, I believe there is little cause to despair over the occasional FOI reactionary anomaly or exception, for it seems as though every one step backward occurs at about the same time as two steps forward. Time will tell.

For now, the Prime Minister should fulfill his party's electoral reform promises, so as not to confirm the old maxim of Charles De Gaulle: "Since a politician never believes what he says, he is always astonished when other people do." Freedom of information ideally transcends political parties and ideologies, and any party in government today could be in opposition again tomorrow, itself trying to

use the Act effectively, as its research branch has so often done before. In the meantime, MPs and senators from any party can propose *ATIA* amendments in private members bills, thus creating a lasting legacy for their constituents.

I still retain a fond hope: That one day I can attend a global FOI conference, and people are comparing their national laws. One attendee is asked "where are you from?" She replies, "I'm from Finland." One man replies, "I'm from India." Then they inquire of me, "And what country are you from?" Today, my response would be one of dejected hesitation, for Canada ranks 58th out of 128 nations on the CLD-AIE's world FOI rating chart. But my wish is someday (only after our needed law reforms) that I might be not embarrassed anymore but proud to say . . . "I am from Canada."

The public may fairly ask, "Why should we care if we have a good FOI law? As a kind of answer, in 2019 I created a database, the B.C. FOI News Story Index, of about 2,000 news stories based on B.C. FOI and *ATI Act* requests, and posted these to my website. (See http://www3.telus.net/index100/intro2019 *ATI Act* stories are found on the red tab at bottom, as are B.C. stories based on foreign FOI requests.)

One of these might not be easily forgotten: The *Vancouver Sun* reported in 1997 that pimps, rapists and other convicts had been cleared to work with children by the B.C.'s government's $1 million criminal records screening panel. It deemed 127 people with records for serious sexual offences and/or violent crimes to be "no risk." Some of these had criminal records for sexual assault, living off the avails of child prostitution, indecent acts, assault, kidnapping and drug trafficking. The story was based on data obtained by FOI from the Ministry of the Attorney General. The next day, the Attorney General ordered an investigation of the program.[89]

The sheer range of FOI topics in the *Index* is daunting, spanning the whole spectrum of society, from the Victoria cabinet office to Vancouver's destitute Downtown Eastside, from farms to coal mines, from nursing homes to logging roads. Most powerful are the sections on the distressing mistreatment of children, seniors and animals. The old adage of journalism's mission being "to afflict the comfortable and comfort the afflicted" has been well realized here.

This catalogue is also a necessary corrective to a ruling party's zealous loyalists and the bureaucracy's obstructionists. These often try to trivialize and discredit the FOI law by fixating on what they call the "frivolous and vexatious" usage of it. Such requests might indeed occur, but at the same time such critics always remain *silent* upon the many creditable revelations - of human abuse, wasteful spending, environmental damage, the personal cases, and other grievous public harms – which were only made possible through FOI.

Here we can see politicians contradicted by policy experts, warnings not heeded, the hypocrisy of preaching one course in public

[89]Rapists, pimps allowed to keep jobs working with children. Stewart Bell. Vancouver Sun, Oct. 23, 1997

and doing the opposite in private, draft reports watered down for their final public versions, and more (particularly for those adept at reading between the lines). In stark contrast to the bland, vague reassurances of government public relations, we encounter the sharp bite of reality as we read in graphic detail inspectors' reports from the trenches.

Such articles require a second look, for when they appear in daily media they may be forgotten within days, but many should not be, because we could be living continuously with the unresolved or recurring problems that they have raised. Moreover, not every FOI story necessarily reveals a scandal, but can still be valuable in educating the public on the scope of a little-known issue, and on how government operates.

Earlier, South African Commissioner Dr. Leon Wessels said it is important an FOI law "reaches far beyond the traditional political civil rights and that it adds a new dimension to public debate on everyday issues that citizens have to face." In this regard, the most interesting and moving summaries may be found in the *Index*'s category 6 – Personal Requests. These 70 stories are based on FOI requests that were filed not by journalists but by individuals or their family members, often in some form of distress.

Working to improve their own lives, these FOI applicants obtained records that helped some to clear their names of false allegations; or aided adoptees to find their true parents; or enabled others to obtain redress for their workplace injuries, childhood abuse, police beatings, botched surgeries, hepatitis C infections, unsafe roads, land flooding, house fires, military accidents, privacy invasions, schoolyard bullying, land appropriations and rental evictions.

It affirms that obtaining records is not solely within the purview of experts, and their usage best demonstrates the professed goal of an FOI law – to empower the average citizen. In fact, freedom of information is a rising tide across the globe, bringing some degree of justice to the powerless, and voice to the voiceless, everywhere. It was noted earlier how some citizens had well utilized their FOI laws, such as villagers in India who thwarted profiteering by corrupt local ration dealers, and parents in Thailand who compelled universities to admit applicants based on merit rather than nepotism.

From such instances, one may realize that while here debating esoteric points of Canadian FOI law (such as the competing definitions of cabinet *memorandum* versus *background paper*, or whether the *ATIA*'s intergovernmental records exemption should be limited to *affairs* or just *negotiations*), there is a fact that one can easily lose sight of, but what would ideally remain the primary focus: how often freedom of information is not just about documents in filing cabinets nor data in digital storage, but about real issues impacting everyday people.

- Stanley Tromp, Vancouver, British Columbia, January 1, 2020

The Best Guarantee

CHAPTER 1 - THE CONSTITUTIONAL STATUS OF FOI

Should the national Constitution include the public's right to know?

I have argued for a number of years that the right to privacy should be specifically articulated in the *Canadian Charter of Rights and Freedoms*. So should the public's fundamental right of access to all government information. Only the establishment of such explicit Constitutional rights to these basic democratic and human values will make possible legal challenges to governmental practices that threaten our fundamental interests as citizens. What is considered essential for Hungarians in a free society should be *de rigueur* for Canadians as well, federally and provincially.

- David Flaherty, British Columbia Information and Privacy Commissioner, annual report 1996-97

The year 1982 was historically a banner one for Canada, for it marked two essential steps forward in the political maturity of this nation. The British Parliament passed the *Canada Act 1982*, granting Canada the authority to amend its own Constitution, a key measure of political independence. Later that year, also in the term of Liberal Prime Minister Pierre Elliot Trudeau, the Canadian Parliament passed the *Access to Information Act*, which gave Canadians the legal right to obtain government records.

Should these two vital concepts be joined more explicitly in law? Section 2 of the *Canadian Charter of Rights and Freedoms* - which forms the first part of the *Constitution Act, 1982* - guarantees freedom of expression, but not an explicit right to seek and obtain government information, a right granted in the Constitutions of many other nations.

Still, several Canadian court rulings have described the right as "quasi-Constitutional." This term is sometimes claimed to apply to the *Access to Information Act* insofar as its text states that the *ATIA*[90] operates "notwithstanding any other Act of Parliament."

The Supreme Court of Canada ruled in 2010 that the right to access government records is protected by the *Charter of Rights*. In a unanimous 7-0 ruling in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] S.C.J. No. 23, the SCC decided that if the information is needed to promote a "meaningful public discussion on matters of public interest," Canadians have an access right to that information, guaranteed

[90]The *Access to Information Act* or *"ATIA"* is Canada's version of a national "FOI" law; throughout this report, I use the terms *ATIA* and FOI interchangeably.

by s. 2(b) of *Charter* under the heading "Fundamental Freedoms."[91]

The Criminal Lawyers Association (CLA) had fought for a decade for access to a 300-page review conducted by the Ontario Provincial Police with regards to how the Hamilton and Halton police handled the investigation of the 1983 murder of Toronto mobster Dominic Racco. After the CLA had won the case earlier at the Ontario Court of Appeal, its lawyer Lawyer Frank Addario had said, "This is the first time that a secrecy provision in FOI legislation has been successfully attacked in North America." (See more details below.)

Yet for many observers, "quasi-Constitutional" is inadequate. Although Constitutions may be written or unwritten, and may depend on explicit rules or unspoken conventions, a written Constitution tries to protect rights by entrenched clauses (although this, of course, depends on judicial interpretations). One of these rights should be the right to know.

At least two objections might be raised to this proposal.

Firstly, critics might say they do not oppose transparency rights in principle, but argue that such a Constitutional amendment is redundant and unnecessary, since these rights are already enshrined in the *Access to Information Act*.

FOI advocates might counter that the *ATIA* is both a woefully ineffective statute and regularly breached in practice. Moreover, a solid Constitutional underpinning is essential because future administrations could amend the *ATIA* to weaken it far more easily than they could ever amend a Constitution (requiring the provinces' consent), the supreme law that overrides all others. Such a broad overriding principle is also necessary if an agency undermines the spirit of a freedom of information statute in practice by parsing its letter.

Secondly, critics might assert that such a Constitutional amendment may be too powerful, granting citizens a right that might override other rights of equal or greater importance.

FOI advocates might counter that the public's right to know would not be absolute and unlimited; courts would weigh this new *Charter* right against other values and needs. If government worries that the right could in certain cases grant a citizen too much information - for instance, when record disclosure might harm national security or personal privacy - it could invoke the *Charter's* limitations clause.[92]

This clause has already been used successfully by government to override citizens' rights to voice racist and obscene speech. It is also similar to South Africa's *Bill of Rights* Section 36, which can override

[91]From summary by Milad Hagani, July 31, 2010. https://lawiscool.com/2010/07/31/2818/

[92]"The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Yet one should be rather careful here. The use of the notwithstanding clause is very controversial, and meant to be saved for exceptional circumstances. Governments should not be using it as a default whenever *Charter* rights cause practical challenges.

Section 32 of that nation's Constitution of 1996 guaranteeing the right to information.

If Canada had a longstanding tradition of judicial rulings affirming government transparency, or had long practiced the concept according to an unwritten Constitution, the argument for a written Constitutional guarantee might not be as compelling. But such is not the case.

Such a new Constitutional right might enable an applicant to appeal in court – as a last resort - against such obstacles as a systemic over-application of *ATIA* exemptions, the wrongful exclusions of quasi-governmental entities from the Act's scope, or the pernicious trend of clauses in other statutes overriding the Act (per *ATIA* Section 24). It is, in a way, the supreme public interest override, one that would even surmount a limited or ineffectual public interest override in the FOI law itself (such as that in Canada's current *ATIA*).

GLOBAL COMMENTARY[93]

• London based human rights organization Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

Principle 1. Ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right.

• United Nations Development Agency (UNDP), *Right to Information Practical Guidance Note*, 2004:

Key question: Is there any Constitutional guarantee for the right to information?

• The Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

Recommendation: The right to information should be recognized as being fully protected under the Constitution of Canada, subject to restriction only in accordance with the test for restrictions which applies to all rights.

OTHER NATIONS

Several transparency guarantees were enshrined long before Canada was even established as a nation. Sweden enacted the world's first *Freedom of Information Act* in 1766, as one of four fundamental laws that make up the Swedish Constitution. In France, Article 14 of the 1789 *Declaration of the Rights of Man* called for access to information about the budget to be made freely available.

In the Netherlands, the 1795 *Declaration of Rights of Man* stated, "That everyone has the right to concur in requiring, from each functionary of public administration, an account and justification of his conduct." Guarantees of public transparency in Constitutions date back to 1945 for Indonesia, to 1949 for Costa Rica, and the 1970s for Mexico, Portugal and Spain.

[93]Notes on the sources for all Commentaries and FOI statutes – with internet links - will be found at the end of this report.

As noted in a global study by Privacy International, most of the post-1990 Constitutions have such a clause.[94] Even some of the pre-1990 Constitutions that did not previously have such a clause were later amended to protect the right to information, such as in Panama and Mexico.

The specifics of the guarantees vary widely amongst nations, providing one with a range of possible models. Most of the guarantees contain some qualifiers, such as that of the Columbia Constitution, Article 74: "Every person has a right to access to public documents except in cases established by law."[95] Several Constitutions detail what exceptions there are to the general transparency right (e.g., privacy, national security), while others do not.

Of the 128 nations with FOI laws in 2019, 76 of these grant citizens some kind of Constitutional right to access state-held information.[96] What is the nature and power of these rights? As the matter is rather complex, I have divided it into three categories for convenience.

(1) A general right, explicitly stated

It appears that 64 nations have a general right to obtain government information explicitly granted in their Constitution or Bill of Rights.[97]

These 64 include Afghanistan, Albania, Azerbaijan, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Chile, Columbia, Croatia, Czech Republic, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Greece, Hungary, Indonesia, Japan, Kazakhstan, Latvia, Liechtenstein, Lithuania, Macedonia, Maldives, Mexico, Moldova, Mongolia, Montenegro, Nepal, Netherlands, Niger, Norway, Palau, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, South Sudan, Sweden, Thailand, Tunisia, Ukraine, Uzbekistan, Vietnam.

Ten are in the (British) Commonwealth: South Africa, Kenya, Pakistan, Ghana, Fiji, Malawi, Mozambique, Seychelles, Sri Lanka, Uganda. The three below should surely point the way for Canada and other Commonwealth nations:

---

[94]One article 12 years ago said that about 80 Constitutions in the world then had a freedom of information clause. "This is important as many Constitutional clauses do not ordinarily specify the content of freedom of information. Legislation is usually needed to give content to the right." *Anti-Graft War Elusive Without Freedom of Information Law*. The Nation. Sept. 20, 2007.

[95]In Columbia's case, it is also interesting to learn that "Access to information is more common under the Constitutional right of Habeas Data than under the 1985 [FOI] law." This nation has a long history of transparency statements: Colombia's 1888 *Code of Political and Municipal Organization* allowed individuals to request documents held by government agencies or in government archives.

[96]Do any of the 69 nations today without an FOI law nonetheless have some transparency right granted in its Constitution? I did not track this question, and neither did the CLD, but the group believes there are likely to be a few.

[97]According to Michael Karanicolas, 76 nations recognize this right as a Constitutional right either explicitly or as a matter of judicial interpretation, as is the case in India, Japan, and South Korea. He adds that "internationally, the right of access to information is entrenched in human rights law through decisions of the Inter-American Court of Human Rights and the European Court of Human Rights, as well as the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Canada is a party."

> • South Africa's Constitution, Section 32. "(1) Everyone has the right of access to - (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise or protection of any rights."
>
> • Pakistan's Constitution, 19A. "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."
>
> • Kenya's Constitution, Article 35(1). "Every citizen has the right of access to - (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

Many such Constitutional guarantees regrettably mention only agencies of the state, and not quasi-governmental entities or companies that manage public functions. A good exception is found in Article 61 of the Polish Constitution, which mandates that:

> (1) A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.

It is worth noting that in addition to the general right in their Constitutions, Slovakia, Ukraine and Latvia have included therein an explicit right to obtain environmental information. Latvia's Constitution, Article 115, prescribes: "The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions [....]"

(2) Topic-limited rights, explicitly stated

I noted seven nations (all non-Commonwealth) with an information access right in their Constitutions that are non-general, usually limited to the applicant's own personal data, or sometimes environmental information. These are Argentina, the Dominican Republic, Kyrgyzstan, Guatemala, Honduras, Nicaragua, and Tajikistan.

For example, Article 44 of the Dominican Republic Constitution provides that: "All persons have the right of access to the information and data related to them, or to their property; kept in public or private records, and to be informed of the purpose and use of such information and data, as limited by law." In Argentina's Constitution, besides personal data, Article 41(2) obliges authorities to provide information on the environment.

(3) Implied rights, "quasi-Constitutional" status, and disputed areas

Four Commonwealth nations (Canada, New Zealand, India, Jamaica), and four non-Commonwealth ones (Israel, Ecuador, Kosovo, South Korea) seem to have an implied right to government information, which can be disputed or described as "quasi Constitutional." Some freedom of expression guarantees in Constitutions have been interpreted by courts for this purpose.

(Canada's "quasi-Constitutional" situation is described at the end of this chapter.) Meanwhile some other Constitutions inadequately grant a citizen's right only to "receive" and "distribute" information, but not (explicitly) to *obtain* it.

The Constitution of India does not provide explicit protection for the right to information, and yet this right has been recognized as Constitutional by the Indian Supreme Court several times. This court, for instance, ruled in 1975 that access to government information was an essential part of the fundamental right to freedom of speech and expression, protected by Article 19 of the Constitution.

The Open Society Justice Initiative noted in 2008: "The top courts of seven additional countries [beyond India] have interpreted their Constitutions or other basic laws to protect the right to information implicitly . . . India's Supreme Court concluded that the right to know arises not only from the right to freedom of expression but also, importantly, from the right to life."

New Zealand presents an interesting case. While the nation (like the United Kingdom) has no written Constitution, "a right to information is endorsed, in a weak way, in their quasi-Constitutional bill of rights, but because there is no specific endorsement of a right to access government information this is not worth a point."[98]

Section 14 of the *Bill of Rights Act* (1990) states that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Yet the New Zealand Court of Appeals said in 1988 that "the permeating importance of the Act [NZ *Official Information Act*] is such that it is entitled to be ranked as a Constitutional measure."[99]

Israel does not have a Constitution, however its Supreme Court has recognized that the right to information is found within the right to free expression, which is itself judicially recognized as a fundamental right, one with apparently quasi-Constitutional status.

In South Korea the Constitutional Court ruled in 1989 that the right to information is implicit in the Constitutional right to freedom of speech and press, given that free communication of ideas requires free formation of ideas as a precondition, and that "a [f]ree formation of ideas is in turn made possible by guaranteeing access to sufficient information."[100] It added that "specific implementing legislation to define the contours of the right was not a prerequisite to its enforcement." (Indeed, South Korea did not pass an FOI law until 1996.)

Canada's situation is characteristic of the Commonwealth, in which just a few nations with FOI laws also have an explicit Constitutional guarantee for government

---

[98]From CLD-AIE rating - https://www.rti-rating.org/country-data/New%20Zealand/

[99]*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385

[100]https://www.right2info.org/archived-content/constitutional-protections Jan. 9, 2012

information. There may be several reasons for this scarcity. For instance, 32 years ago two Canadian political scientists issued a caution, one that would likely still be echoed today (and for the distant future) by our federal government:

> Access to information is a new, experimental field of public law. There are Constitutional and practical limits to how far and how fast we can move toward greater openness in government. The experiences of countries like Sweden and the United States may not provide clear lessons for Canada because their political systems and traditions re different. Some measure of secrecy appears to be inherent in a cabinet-parliamentary system with a neutral, career public service.[101]

CANADIAN PROVINCES

Among provinces, only Quebec has granted a kind of Constitutional status for the public's right to know (surely because it is the only province in a position to do so). Quebec's *Charter of Human Rights and Freedoms* states in Section 44: "Every person has a right to information to the extent provided by law."

This *Charter* (*Charte des droits et libertés de la personne*) is a statutory bill of rights and human rights code adopted by the National Assembly of Quebec in 1975. It ranks among other quasi-Constitutional Quebec laws, such as the *Charter of the French Language* and the *Act respecting Access to documents held by public bodies and the Protection of personal information* (1982).

Having precedence over all legislation - including Quebec's FOI statute - the Quebec *Charter* stands at the pinnacle of Quebec's legal system; only the *Canadian Charter of Rights and Freedoms*, as part of Canada's Constitution, enjoys priority over the Quebec *Charter*.[102]

In conclusion, it would be an enlightened move for Ottawa to propose the concept of adding a transparency right in our Constitution (as South Africa, Kenya and Pakistan do) for discussion with premiers at the next federal-provincial ministers' conference.

---

[101] Robert F. Adie and Paul G. Thomas, Canadian Public Administration: Problematical Perspectives. Scarborough: Prentice-Hall, 1987.

[102] The Quebec Charter is termed quasi-Constitutional because, according to Sec. 52, no provision of any other act passed by the Quebec National Assembly may derogate from its provisions, unless such act expressly states that it applies despite the Charter. It does not apply to federally regulated activities in Quebec, for those are subject to the Canadian Charter of Rights and Freedoms and/or the Canadian Human Rights Act.

THE CONSTITUTIONALITY OF FOI – LANDMARK RULINGS

(1) Environmental records in Chile

A ruling in 2006 on a Chilean request was later cited in many other foreign cases. The Inter-American Court of Human Rights ruled that Chile violated the rights to freedom of expression, due process, and judicial protection by refusing the applicants' request to state-held information without legal basis and without providing a justified decision in writing explaining the reasons for the refusal. (*Order of the Inter-American Court of Human Rights Case of Claude-Reyes et al. v. Chile Judgment of September 19, 2006, in the Inter-American Court of Human Rights.*[103])

It also concluded that Chile had failed its obligation to adopt domestic legal provisions to make effective the right to access state-held information. (The nation passed an FOI law two years later.) The claimants had argued that the state had violated their right to freedom of expression guaranteed by article 19(2) of the Chilean Constitution.

Claude Reyes of the environmental organization Fundación Terram had brought the case against the Chilean Foreign Investment Committee on its request to state-held information on the Río Cóndor project, a forestry exploitation project with potential environmental impact.

In 2005, the Inter-American Commission of Human Rights Commission referred the case to the Inter-American Court of Human Rights, after it concluded that Chile had violated articles 13 (freedom of expression) and article 25 (right to judicial protection) in relation to article 1.1 and 2 of the American Convention of Human Rights.

The Court also referred to the societal importance of the right to information noting "for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds."

(2) Canadians have a Constitutional right to government info: SCC

The Supreme Court of Canada ruled in 2010 that the right to access to government records is protected by the Charter of Rights. In a unanimous 7-0

[103]https://globalfreedomofexpression.columbia.edu/cases/claude-reyes-v-chile/

ruling in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] S.C.J. No. 23, the SCC decided that if the information is needed to promote a "meaningful public discussion on matters of public interest," Canadians have an access right to that information, guaranteed by s. 2(b) of *Charter* under the heading "Fundamental Freedoms."[104]

The Criminal Lawyers Association (CLA) had fought for a decade for access to a 300-page review conducted by the Ontario Provincial Police with regards to how the Hamilton and Halton police handled the investigation of the 1983 murder of Toronto mobster Dominic Racco.

Although, the CLA called the ruling "an epic win" it was not granted the right to access the OPP review. For one, the SCC held that the report might contain information about the parties that are protected by the solicitor-client privilege. It also decided the CLA failed to demonstrate that "a meaningful public discussion of shortcomings in the investigation and prosecution could not take place without making the OPP report public."

The Supreme Court sent back the CLA's request to the Ontario information commissioner for a fresh review. Yet the ruling was described as "a baby step" toward recognizing that access to information is a Constitutional right, beyond a statutory one, by Paul Schabas of Blake, Cassels & Graydon LLP. (The *British Freedom of Information Act of 2000* implemented such rights into the country's legal system.) However, the right to information is only recognized as a limited and derivative right, which falls far short of the global standard.

After the CLA had won the case earlier at the Ontario Court of Appeal, its lawyer Lawyer Frank Addario had said, "This is the first time that a secrecy provision in FOI legislation has been successfully attacked in North America." The two judges ruling for the majority said that public debate on this issue must clearly be given protection under the *Charter of Rights and Freedoms*. They rejected government arguments that opening up a so-called "public interest override" provision will lead to a costly and disruptive flood of litigation from individuals and media organizations.

[104]From summary by Milad Hagani, July 31, 2010. https://lawiscool.com/2010/07/31/2818/

However, in a toughly written dissent, the third judge said it was altogether too presumptuous for judges to read Constitutional guarantees into legislation where parliamentarians had specifically refused to do so.[105]

Other precedents are significant as well. See for example, "the *Access to Information Act* is quasi-Constitutional legislation" statement in Mr. Justice McKeown, *AG of Canada and Hartley v. Information Commissioner of Canada*, F.C., February 1, 2002. Also the Federal Court of Canada, relying on the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*, 1997 2 SCR 403, has recognized the ATIA as having "quasi-Constitutional" status: *Canada (Attorney-General) v. Canada (Information Commissioner)* 2004 FC 431 (T.D.)

[105] *Ontario secrecy provision nixed; Ruling by Court of Appeal may lead to release of documents from the Racco murder case*, by Kirk Makin. Globe and Mail, May 26, 2007. Case: CanLII - 2007 ONCA 392 (CanLII

Above the Law

CHAPTER 2 - CABINET RECORDS

Should there remain a complete exclusion for cabinet confidences in the Access to Information Act*?*

Perhaps as a consequence of the power it wields, the documents of a cabinet or a governing council are often the most important, the most sensitive, and the most sought after type of records in any freedom of information system. For centuries, cabinet secrecy in Commonwealth nations has imposed a unique FOI dynamic, one either defended as indispensable to the public interest, or deplored as needless and self-serving.

Unlike exemptions for other record types, most cabinet documents are excluded from the scope of Canada's *Access to Information Act* entirely. In the context of an *ATIA* appeal, the information commissioner's only check on the overuse of the cabinet confidence exclusions is to seek a certificate from the Clerk of the Privy Council that the record or a specific part is in fact a cabinet confidence.

In the *Babcock* case of 2003, the Supreme Court of Canada decided that, under Section 39, the Clerk has a discretion, rather than a mandatory duty, to protect Cabinet confidences. The decision to object to the production of documents, the Court held, could be exercised by the Clerk only after weighing the potential harm of disclosing a Cabinet confidence against the benefit to the administration of justice that would flow from its disclosure. This is what has come to be known as the "public interest balancing."[106]

In Canada, as in other parliamentary governments, even parliament and the government caucus are kept in the dark, for ministers are sworn to secrecy upon joining cabinet.[107] Here even cabinet's procedures were shielded from the public. Alasdair Roberts relates that his first *ATIA* request, in 1989, for the instruction manual for new cabinet ministers, was rejected in full. (Years later, the government posted this record online, perhaps illustrating how estimates of FOI "harms" can diminish over time.)

As well, the cabinet realm is one area where the consequences of poor analysis and factually incorrect background papers are most perilous, and where the analytic ability of outside experts is most badly needed. (The same argument could be made about the cross-government *ATIA* policy advice exemption.) Anyone can err, and an insular "groupthink" policy enclosure in cabinet can lead to grievous mistakes that even a small

[106] *Canada (Minister of Environment) v. Canada (Information Commissioner)*, [2003] F.C.A. 68 [*Ethyl*]

[107] Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006

degree of external scrutiny and feedback might have averted. A fair amount of cabinet confidentiality is necessary and justifiable - but exactly how much?

The more enlightened earlier drafts of the *ATIA* are still very relevant, and legislators would ideally adopt the better parts of these when reforming the *Act* today.

It is noteworthy that the original federal *Freedom of Information Act*, *Bill C-15*, drafted during the short-lived Conservative government of Joe Clark (1979), had included a mandatory exemption for cabinet confidences, which allowed for release of background information, analyses of problems or policy options submitted or prepared for submission by a minister of the crown to council for its consideration after a decision had been made by cabinet with regards to a particular matter if no other exemption applied. This was as open as the federal drafting ever was to be.[108]

The Trudeau Liberal version of the *Access to Information Act, Bill C-45*, eliminated this provision and established a broad, class-based mandatory exemption (with no injury test) for records, including discussion papers presenting background explanation,[109] which could all be withheld for 20 years.

Sharp criticism during hearings of the House Standing Committee on Justice and Solicitor General on *Bill C-45* led the government to adopt an amendment relating to discussion papers. This resulted in the current *ATIA* paragraph 69(3)(*b*) which provides that the exclusion does not apply to:

> . . . discussion papers described in paragraph (1)(b)
>
> (i) if the decisions to which the discussion papers relate have been made public; or
>
> (ii) where the decisions have not been made public, if four years have passed since the decisions were made.

As the *ATIA* was being prepared for passage, on May 1, 1982, Prime Minister Trudeau expressed new reservations about the effect of the bill on the secrecy of cabinet minutes, due to recent court decisions. That month several FOI lobby groups held a press conference to urge the government to get the bill back on track. That day, all three parties agreed to pass the bill by the end of June by limiting all stages of debate to one day.

On May 20, 1982 - at the eleventh hour, as the parliamentary session was closing – a nervous Liberal cabinet approved a new version of *C-43*, with the major amendment that documents of cabinet and its committees would not be covered and the court review power would not extend to these papers.

---

[108] *The Access to Information Act and Cabinet confidences: a discussion of new approaches*. A study prepared by RPG Information Services Inc. for the Information Commissioner of Canada. Ottawa, 1996

[109] Government once endorsed publicity for such records, and ideally would again. "A special rule applies to cabinet discussion papers. These date from 1977. The original intention was to provide information to the public about alternatives the government was considering. Some helpful discussion papers were released in the later 1970s, but since then the idea of public consultation about alternatives has fallen out of favour." - Heather Mitchell and Murray Rankin, *Using the Access to Information Act*. Vancouver: International Self-Counsel Press, Ltd., 1984

Francis Fox, the minister responsible for shepherding the *Act* through parliament, stated specifically that the purpose of excluding cabinet records was to prevent the federal court from reviewing the accessibility of such information. As two legal commentators noted, this reasoning is "extraordinary" because the federal court can, during its hearings of civil lawsuits, review cabinet records or even more sensitive information such as military secrets, for the latter are exempted and not excluded from the *ATIA*.[110]

This exclusion was the price Parliament had to pay for the passage of the rest of the *ATIA* in 1982. Historians could debate whether it was better to have paid this price rather than to have no *ATIA* at all. (I would reluctantly concede that it was.) The opposition parties gave cautious approval, and the *ATIA* was passed and came into force the next year.[111]

However, the conversion of the exemption into an exclusion "served as a lightening rod for criticism which brought the legislation into some disrepute even before it was proclaimed."[112] Dubbed the "Mack Truck" clause by the opposition and media (*i.e.*, the exclusion was so large a gap that that a 16-wheeled Mack truck could supposedly be driven through it), it was invoked as proof that Liberals had really brought forth a secrecy law.

Since then, the need for reform on the cabinet records exclusion has been repeated Sisyphean-style for more than three decades (as can be read in the Canadian Commentary texts below). The pleas might as well have been addressed to a granite wall, and no progressive amendments have appeared in the *ATIA* cabinet records section since the *Act*'s passage. In fact, we may be dispirited again but not surprised if this problem remains perfectly static for decades to come.

For example, just three years after *ATIA* came into force its operation was reviewed by a the Standing Committee on Justice and Solicitor General, which heard more testimony on the need to reform this provision than on any other issue. Its final report quoted Justice Minister John Crosbie, who said that:

> . . . I think that in the past too much information was said to be covered by the principle of Cabinet confidence . . . . A lot of information previously classified as Cabinet confidence can and should be made available.[113]

In 1996, RPG Information Services Inc. produced a report on cabinet records for the federal information commissioner and averred that:

---

[110]Mitchell and Rankin, *ibid*

[111]Treasury Board Secretariat and Justice Department of Canada, *Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force*. Ottawa, 2002. Appended with 29 research reports.

[112]RPG Information Services, *op. cit.*

[113]Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Ottawa: Queen's Printer of Canada, 1987

> There are troubling gaps in the coverage of the *Access to Information Act*. In fact, in terms of the comprehensiveness of its coverage, the *Access to Information Act* is very much behind the times. This report examines what is arguably the major gap in the law's coverage - Cabinet confidences....
>
> Since section 69 is no longer an accurate representation of the Cabinet Papers System, amendments to this section are likely. This study concludes that the approach of excluding Cabinet confidences, which was criticized in 1982 and demonstrated not to be the direction that other jurisdictions were adopting in 1986-87, appears absolutely shop worn in 1996.[114]

As if all this was not enough, even the *ATIA* applicants' limited right to cabinet background papers has been violated in practices too numerous to detail here. The most deleterious is the practice of mislabeling cabinet records to avert their release under the *ATIA*. Combating such mislabeling seems one of the toughest *ATIA* legal nuts to crack; court rulings on these disputes are described in the Commissioner's annual reports.

As two commentators have noted, "Unfortunately, many documents labeled 'discussion paper' are not cabinet discussion papers and therefore will not lose their excluded status," and "the section excluding cabinet records can be abused if, for example, senior officials launder politically sensitive non-cabinet records through the exclusion by labeling them 'cabinet proposal.'"[115]

Before assuming power, both Conservatives and Liberals have promised to cover ministers and their offices under the *Act*, yet after their elections reversed their stance. In 2008, the Federal Court ruled that some records created by ministers' aides are essentially not covered by the *ATIA* if they are in the possession of the office of the Prime Minister or cabinet ministers. Mr. Justice Michael Kelen wrote that if Parliament wishes such documents to be included under the *ATIA*, it must amend the Act itself.

Judge Kelen still ordered the release of some redacted copies of Prime Minister Chrétien's agendas held by the Privy Council Office - the government department that reports to the prime minister - but not those controlled by the PMO itself. NDP MP Pat Martin said the ruling will give government incentive to simply hide controversial documents in ministers' offices: "This is a terrible setback for openness and transparency. It gives them a place to squirrel away any number of things."[116]

An amendment to the *Act* should make it unmistakably clear that the Prime Minister's Office and minister's offices are bodies covered by the *ATIA*'s scope. Access

---

[114]RPG Information Services Inc., *op.cit*

[115]Mitchell and Rankin, *op.cit.* I believe an amendment to the *ATIA* should remove all potential uncertainties in the wording around cabinet documents, and make it clear that they are defined solely by their substance, not by their titles.

[116]*Ministers' offices not subject to access law, court rules*, by Campbell Clark. The Globe and Mail, June 20, 2008

to PMO records is more important than ever, as power becomes more concentrated there, for as Jeffrey Simpson observed in his book aptly titled *The Friendly Dictatorship*: "Canada's prime minister exerts more direct, unchecked power than the leader of any other parliamentary democracy."[117]

Why, then, do we need this exclusion, *per se*, at all? Why not withhold records of cabinet discussions under a mandatory FOI exemption, which other nations do in their FOI laws? In this country, a Treasury Board policy of 1993 provided this explanation:

> The Canadian government is based on a Cabinet system. Thus, responsibility rests not in a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality.
>
> This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.[118]

This rationale is quite similar to those in other reports that have examined the issue, and all articulate three basic justifications to shield cabinet records from publicity:

- **Candid advice from officials:** Related to the first justification is the need for ministers to receive frank advice from their officials. Many assert that is more likely to occur if advice to ministers can be provided in confidence. Others object that this protection could instead mainly be provided by the *ATIA* exemption on policy advice, Section 21. (Yet the titles of ministerial briefing notes must now be published, as per *Bill C-58* of 2019.)

- **Cabinet's agenda:** The reports conclude that cabinet's agenda should be confidential. This will allow cabinet to set its own agenda and carry on discussion without undue political pressures being brought to bear. This type of privacy helps ensure that cabinet decision-making processes are conducted as promptly as possible.

- **Collective ministerial responsibility:** This convention requires that each cabinet member be accountable for government policy. Thus, at the cabinet table, each minister should be free to exchange frank and vigorous views with his or her colleagues and to have those views protected from outside scrutiny.[120] Cabinet generally wishes to show a

[117] Jeffrey Simpson, *The Friendly Dictatorship*. Toronto: McClelland and Stewart, 2001

[118] Treasury Board Secretariat, *Access to Information Act: Policies and Guidelines*, (Ottawa, 1993), Confidences of the Queen's Privy Council for Canada.

[119] Such as the 1987 Open and Shut report, and the Province of Ontario's Report of the Royal Commission on Freedom of Information and Protection of Privacy, 1980 (the "Williams Report")

[120] *Ministers' offices not subject to access law, court rules*, In the early 1970s, Prime Minister Trudeau experimented with the practice of allowing his ministers to disagree publicly over policy options in advance of government stating its official position, although not afterwards. (Adie, Canadian Public Administration, op.cit.) Some transparency advocates might be nostalgic for that practice, and ask "Why not again?" Yet cabinet accountability can take several forms:

unanimous front to the public.[121]

This wish is reflected in the minutes of a cabinet meeting of January 10, 1986 (which I obtained via the *ATIA*): "The Prime Minister [Brian Mulroney] emphasized the need for cabinet to bring its collective creativity and energies to bear on problems in order to broaden the focus and move away from traditional single-portfolio solutions to cooperative ones. It was critical to think like a government, not just from a ministerial perspective. Ministers were not chosen to simply act as megaphones for their departments."

Beyond its own function, the *ATIA* exclusion on cabinet confidences has a broader negative influence than is commonly realized. It sends a chilling message, or more precisely a tone, to the entire public service. For one reason, records prepared by others, such as ministry employees, for cabinet consideration are excluded from the *ATIA*'s scope, even if they were not actually presented to cabinet in the end.[122]

Logically, how can a record "reveal the substance of deliberations" if it was never actually deliberated upon? (At such times one may recall the critic earlier in this report who said: "It is time we had less law and more common sense in deciding what the public has the right to know."[123]) Hence I believe FOI statutes should make it more clear that documents may only be withheld if they were actually discussed by cabinet, not if they were merely prepared for that purpose but never were.

Secrecy is part of the structure of governments, said information commissioner Robert Marleau, particularly those modeled on the parliament of Great Britain. "It starts with cabinet secrecy and flows from there. So anybody who supports the executive - that is, most of the public servants supporting ministers - are cautious about either

---

In 2007 for instance, Australian Prime Minister Kevin Rudd pledged that cabinet would travel the country on a monthly basis to listen to the people, and the press would be briefed on the proceedings of cabinet. In 2003 B.C. premier Gordon Campbell "staged" (the apt term) several televised "open cabinet meetings."

[121]The 141 recommendations from David Solomon - a lawyer, journalist and political scientist - have delivered the revolution in FOI law that Queensland (Australia) Premier Anna Bligh, asked for during her first days in office. One of Dr. Solomon's recommendations was to scrap the automatic exemption for cabinet documents; instead they would be exempt only if their release would adversely affect the principle of collective ministerial responsibility. (A good harms test.) - The way to free up FOI. Editorial. Sydney Morning Herald, Australia, June 12, 2008

[122]In Australia, political commentator Dean Jaensch pointed to the "cunning" use of the Cabinet exemption clause, where a document is not released if it is taken into the Cabinet room. The *Advertiser* newspaper had several FOI applications refused because documents were "prepared for submission to Cabinet (whether or not it has been so submitted)." - *Public's right to know is kept in the dark*, by Michael Owen. *The Advertiser* (Australia), July 22, 2008

[123]This is hardly a singular viewpoint, even in the Commonwealth. One Australian newspaper editor opined that "The notion that every document prepared for cabinet needs to be exempt is ridiculous. Freedom-of-information laws in New Zealand allow cabinet documents to be routinely made public and no one suggests that that is harming the country." - *The law needs fixing, and so does the culture*, by Matthew Moore, Herald Freedom-of-Information Editor. Sydney Morning Herald, Australia, Nov. 30, 2007 (Mr. Moore's role and title, incidentally, would be a welcome addition to any Canadian newspaper.)

inadvertently or expressly revealing cabinet confidences."[124]

Yet as I read cabinet meeting minutes of the 1980s that I had obtained through the *ATIA* (for under the *Act* they may only be seen after 20 years have passed), records of many of the discussions appeared so familiar and innocuous – even when I recalled the historical context - that I tried unsuccessfully to conceive of what actual "harms" could have resulted from most of these being published much sooner than 20 years later.

Diplomats engaged in negotiations have historically warned against the "vice of publicity," which might lead to delegates' posing and grandstanding for their home constituencies, and have insisted that "we should not allow the public to be backseat drivers." This same general caution is invoked regarding cabinet discussions. But does the public not have the right to know to where it is being driven?

From the hardening power of tradition, it is as though the rationale for Canadian cabinet secrecy has come to assume the status of a law of nature, its value so self evident as to require no original explanation in any new century. Yet in sum, we should end the cabinet records exclusion in the *ATIA*, and adopt the freer India or New Zealand model – or one with a harms test, mandatory public interest override and 10 year limit. Precedents may be binding for legal questions, but for some political traditions, one can wonder if there is any more valid reason to permit the past to bind the present than for the dead to bind the living.

• Canada's *Access to Information Act*, 1982:

Confidences of the Queen's Privy Council for Canada

69 (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) memoranda the purpose of which is to present proposals or recommendations to Council;

(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) agenda of Council or records recording deliberations or decisions of Council;

(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

(f) draft legislation; and

(g) records that contain information about the contents of any record within a class of

[124] *How secrecy became part of the bureaucracy*, by Tony Atherton. Calgary Herald. Sept. 23, 2007

records referred to in paragraphs (a) to (f).

Definition of *Council*

(2) For the purposes of subsection (1), ***Council*** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(3) Subsection (1) does not apply to

(a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

(b) discussion papers described in paragraph (1)(b)

(i) if the decisions to which the discussion papers relate have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

GLOBAL COMMENTARY

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

25. (1) A document is an exempt document if it is

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of any deliberation or decision of the Cabinet;

(c) a document that is a draft of copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) Subsection (1) does not apply to a document that contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of Cabinet.

[Sections 3 and 4 refer to certificates that state the records are truly cabinet records.]

• Commonwealth Human Rights Initiative, analysis of St. Kitts and Nevis Freedom of Information Bill 2006[125]:

Section 33(2) which attempts to exempt Cabinet documents should be deleted because Cabinet documents can be protected under other exemptions clauses as necessary, for example, national security or management of the national economy.

At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with section 33(2)(b) protecting even documents simply prepared for the purpose of submission to Cabinet or which was considered by Cabinet and which is related to issues that are or have been before Cabinet. Practically every

government document could be said to be related to issues that have been before Cabinet at some time or the other![126]

It is notable that some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

At the very least therefore, a provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause.

OTHER NATIONS

Commonwealth

Although rigid cabinet secrecy is a tradition in Commonwealth counties, a complete exclusion from the FOI law's scope for records of "cabinet" or a governing "council" occurs only in Canada and South Africa, which Canadians should seriously consider when reforming the *ATIA*.

Of the Commonwealth statutes (that is, 29 of the total 128 national laws studied for this report), most have the cabinet records explicitly stated, with the rest implicitly so. More than half have general public interest overrides that can permit the release of cabinet records, a freer status for factual background papers, and most have 20 year time limits.

The two best Commonwealth FOI national laws for a reformed *ATIA* to follow as models are probably those of India and New Zealand. In the first statute:

> 8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [....]
>
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed.

In this section, the Indian cabinet records may also be released "if public interest in disclosure outweighs the harm to the protected interests."

---

[125] *St. Kitts and Nevis Freedom of Information Bill 2006*, analysis by Cecelia Burgman, Commonwealth Human Rights Initiative, 2007

[126] Journalists tell a story of a provincial minister entering a Cabinet meeting and retrieving an enormous tranche of documents from his briefcase. He places them on the conference table and looks around the room, before packing them back into his briefcase. "Good," he says under his breath, "now I don't have to release them." Although the story may be apocryphal, the official's behavior would be a perfectly legal way to circumvent his disclosure obligations in most Canadian jurisdictions. – Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012, pg. 4

• In New Zealand, the *Official Information Act* 1982 does not contain any blanket exemptions for Cabinet confidences. Ministers are also encouraged to proactively release Cabinet material, which is most often published on the Internet. In practice it is common for cabinet documents and advice to be released. As a previous Secretary of the Cabinet said, "virtually all written work in the government these days is prepared on the assumption that it will be made public in time."[127]

• In the FOI statute of the United Kingdom, policy advice and cabinet confidences appear in Sections 35 and 36. There is a mandatory exemption for cabinet deliberations (which the British call "ministerial communications"), but once a decision has been made, "any statistical information used to provide an informed background to the taking of the decision" is not exempt. In Sec. 36, prejudice to effective conduct of public affairs, there is a harms test.

> 36. [...] (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act (a) would, or would be likely to, prejudice (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown [....]

• Scotland's FOI law expresses similar concepts on cabinet solidarity, but contains a stronger harms test than the UK one (i.e., "substantially").

> 30. Information is exempt information if its disclosure under this Act
>
> (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
>
> (b) would, or would be likely to, inhibit substantially (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation; or
>
> (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

• Australia was the only parliamentary democracy that was working towards FOI legislation at the same time as Canada. Yet while this nation chose to exclude cabinet records, Australia in 1982 chose a mandatory exemption.[128]

The exemption decisions may be reviewed by the Administrative Appeals Tribunal; but

[127]http://www.freedominfo.org/countries/new_zealand.htm

[128]The RPG report notes that this choice arose from a somewhat different political context: "It is important to note at the outset, however, that though the Westminster tradition of Cabinet solidarity forms part of Australian political theory, it is perhaps less strong than in Canada. Cabinet ministers in Australia take an oath of secrecy and decisions in Cabinet are arrived at through consensus not by vote, thus avoiding many splits in the ranks. But ministers have often quoted from the Cabinet documents of predecessor governments and the Cabinet room can leak profusely. Thus a freer system than strict Cabinet solidarity seems to be the rule in Australia." - RPG Information Services, *op. cit*

cabinet notebooks are excluded by definition from the operation of the *Act*.[129] In Australia, there is some discretion for individual ministers and departments to decide whether or not to release draft cabinet submissions and briefing materials for use by ministers in cabinet.

If the agency is able to delete the cabinet references in a document, access must be granted to the remainder of the record (unless that remainder itself is exempt under another section of the law). Internal working documents are not automatically exempt under Section 36; to justify withholding these, the agency must consider if release would be contrary to the public interest and explain why. Background factual papers may be released.

The integrity chief in the Australian state of Queensland's said a public interest test should be undertaken before ministers are allowed to hide documents beneath Cabinet's veil of secrecy. In a submission to an independent review of FOI laws, Gary Crooke, QC, has argued the often-abused Cabinet measure needed significant change.

Under Queensland laws, ministers and their department are allowed to withhold documents from public scrutiny for 30 years if they were related to a Cabinet discussion; the measure was streamlined so documents no longer even have to be taken to Cabinet to attract the protection. However, Mr. Crooke said, "Any category of exemption should be required to pass the public interest test before exclusion is justified."[130]

• The latest Commonwealth statute, that of Ghana (2019), helps to generally point the way for Canada. Here cabinet records are exempt that:

6.(1)(c) contains matters the disclosure of which would reveal information concerning opinion, advice, deliberation, recommendations, minutes or consultation made and is likely to –

[i] prejudice the effective formulation or development of government policy;

[ii] frustrate the success of a policy by the premature disclosure of that policy;

[iii] undermine the deliberative process in Cabinet; or

[iv] prejudice national security.

(2) Information which contains factual or statistical data is not exempt information.

(3) Cabinet may publish or grant access to information that is otherwise exempt under this section.

Non-Commonwealth nations

Regarding records of cabinet deliberations and creation, these are protected virtually

[129]In Australia, "cabinet notebooks" are excluded from the definition of documents provided in the Act, and therefore are excluded from its operation. Cabinet notebook is defined under the Australian FOI law as a notebook or other like record that contains notes of discussions or deliberations taking place in a meeting of the cabinet, being notes made in the course of those discussions or deliberations by, or under the authority of, the Secretary to the Cabinet. - Douglas, Kristen, *Access to Information Legislation in Canada and Four Other Countries*. Ottawa: Parliamentary Information and Research Service, 2006

[130]*Integrity chief urges test to cover Cabinet papers*, by Steven Wardill. The Courier Mail (Australia), March 18, 2008

everywhere, but often in unclear language. In FOI statutes that do not shield these explicitly, they include an exception for "deliberative information", "internally confidential material", or some such term, which is what they utilize to protect this material. Certainly, it would be very hard to locate any nation that truly leaves cabinet records wide open for requests.

So in non-Commonwealth nations, I found more than 50 with no cabinet records exemption written in terms that Canadians are familiar with. Ten others do explicitly exempt records with words such as "cabinet" or governing "council" - Greece, Norway, Iceland, Panama, Lebanon, Denmark, Netherlands, France, and the United States, and Ireland.[131] (Several of these allow for the release of factual background papers.)

One can be pleased to note two Asian FOI laws mandate proactive publication for some cabinet records. I cannot say how well this occurs in practice, but the spirit is positive. In Thailand's FOI law, Section 7.(4), the state must publish resolutions of the Council of Ministers' in the Government Gazette (although this may be more analogous to a decision to publish reglations or decisions than a cabinet papers exemption). It is also interesting to note that although South Korea's FOI statute does not exempt cabinet records per se, the government has resolved to release many of these proactively.[132]

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

3.22. The Committee recommends that the exclusion of Cabinet records found in section 69 of the *Access to Information Act* and section 70 of the Privacy Act be deleted. In its place, an ordinary exemption for Cabinet records should be added to the *Access to Information Act* and the Privacy Act. No injury test should be included in this exemption.

3.23. That section 69(1)(a) [Cabinet memoranda], section 69(l)(b) [discussion papers] and section 69(1)(e) [Ministerial briefing notes], as well as section 69(3)(b) of the *Access to Information Act* [section 70(1)(a), (b) and (e) and section 70(3)(b) of the Privacy Act] be deleted. The amended exemption for Cabinet confidences should be drafted in the following terms:

(1) The head of a government institution may refuse to disclose a record requested under this Act where the disclosure would reveal the substance of deliberations of the Queen's Privy Council for Canada, contained within the following classes of records: (a) agenda of Council or records recording deliberations or decisions of Council; (b) a record used for or reflecting consultation among Ministers of

[131]In some ways, the American's cabinet records exemption could be called an exclusion: The U.S. Justice department advises that the *FOIA* does not apply to the President, to his immediate staff, or to his advisors (sometimes collectively known as the "inner White House" for *FOIA* purposes) – a flaw that mars what is otherwise one of the world's more open FOI statutes.

[132]*Government to Release Portions of Cabinet Meetings*, April 3, 2003: "The Seoul Yonha, a semi-official news agency in the Republic of Korea, reports that the Government Administration and Home Affairs Ministry will begin to make sections of the minutes of Cabinet meetings available to the public. Kim Doo-kwan, the Home Affairs Minister, said in 2003 that 'the general trend will be to move toward giving the public more access to information on the details of Cabinet meetings.'"

the Crown on matters relating to the making of government decisions or the formulation of government policy; (c) draft legislation or regulations; (d) records that contain information about the contents of any records within a class of records referred to in paragraph (a) to (c).

(2) For the purposes of subsection (1) "Council" means the Queen's Privy Council for Canada, committees thereof, Cabinet and committees of Cabinet.

3.24. That the twenty-year exemption status for Cabinet confidences be reduced to fifteen years.

3.25. That the *Access to Information Act* and the Privacy Act be amended to contain a specific framework for the review of Cabinet records

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

Perhaps no single provision brings the *Access to Information Act* into greater disrepute than section 69.... Building on the [1987] committee deliberations, the following recommendations are offered:

- Section 69 of the Act should be amended to convert it into an exemption;

- The current 20-year period during which Cabinet documents are excluded from the Act should be changed to 15 years;

- Paragraph 69(3) should be redrafted to cover analysis portions of Memorandum to Cabinet now made available to the Auditor General. These should be released if a decision has been made public, the decision has been implemented, or five years have passed since the decision was made or considered;

- Appeals of decisions under the Cabinet records exemption should be heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.

• Open Government Canada (OGC), From *Secrecy to Openness*, 2001:

Recommendation 8: The section 69 exclusion that prevents the release of Cabinet confidences for 20 years should be changed to an exemption, as in Ontario, that applies only to defined records that "reveal the substance of deliberations of Cabinet" and ensures all other Cabinet-related records (including many records currently withheld under the section 21 (advice and recommendations) exemption) are explicitly subject to the right of access.

Recommendation 9: The time period during which Cabinet confidences cannot be disclosed should be reduced from 20 years to 15 years, as in B.C. and Alberta, or even further to 10 years, as in Nova Scotia.

• *A Call for Openness*, report by MPs' Committee on Access to Information, chaired by MP John Bryden, 2001:

6. We recommend that section 69 of the *Access to Information Act* excluding Cabinet records from its ambit be repealed. This exclusion should be replaced by an injury-based discretionary exemption to protect the confidentiality of Cabinet deliberations. Recourse to this exemption should only be available for fifteen years after the creation

of the records, after which other exemptions should only be available for the same records for another fifteen years – when the thirty-year 'passage of time' provision would be applicable. Because of the sensitivity of the records involved, both the Information Commissioner and the Federal Court should adopt special procedures where complaints about the Cabinet records exemption are involved.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians*. *ATIA* Review Task Force report, 2002:

4-3. The Task Force recommends that Cabinet confidences no longer be excluded from the Act and that they be protected by a mandatory class exemption.

4-4. That a definition of "Cabinet confidence" be added to the Act, focusing on information that would reveal the substance of matters before Cabinet, and deliberations between or among Ministers.

4-5. That a prescribed format be developed for Cabinet documents that would allow for easy severance of background explanations and analyses from information revealing Cabinet deliberations such as options for consideration and recommendations; and the Act be amended to allow access to this background material once the related decision is announced, or after five years have passed, unless it contains information that should be protected under another exemption.

4-6. That the government consider reducing the protection for Cabinet confidences from 20 to 15 years.

4-7. That a decision to refuse to disclose information on the basis that it is a Cabinet confidence be reviewable by the Federal Court.

• *Bill C-201*, introduced by NDP MP Pat Martin, 2004:

C-201 amends the Act to add mandatory exemption for Cabinet confidences; definition of Cabinet confidences: 'any information that would reveal the substance of deliberations between minister of the Crown in respect of the making of government decisions or the formulation of government policy, including decisions of Council before they are implemented, and includes draft legislation; Cabinet confidence protection limited to 15 years (s. 25)

The enactment [...] (e) brings Cabinet confidences under the Act; [...] (k) specifies what Cabinet records must be disclosed or not disclosed; (l) gives the Prime Minister discretion to release any record of a previous Cabinet if doing so is in the public interest

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005 (underlined parts are Mr. Reid's amendments to the existing Act):

42. Section 69 of the Act is replaced by the following:

69. (1) <u>The head of a government institution shall refuse to disclose any record requested under</u> this Act <u>that contains</u> confidences of

the Queen's Privy Council for Canada.

(2) In this section,

"confidences of the Queen's Privy Council for Canada" means information which, if disclosed, would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers;

"Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to

(a) confidences of the Queen's Privy Council for Canada that have been in existence for fifteen years or more;

(b) background explanations, analyses of problems, or policy options presented to Council for consideration by Council in making decisions, if

(i) the decisions to which the information relates have been made public, or

(ii) four years have passed since the decisions were made; or

(c) decisions of the Queen's Privy Council for Canada if

(i) the decisions or the substance of the decisions have been made public, or

(ii) four years have passed since the decisions were made.'

• Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005:

While the Government strongly believes that the Cabinet decision-making process must continue to be protected, it also recognizes that the current regime is twenty years old and needs to be modernized. In particular, it is important that any new legislative scheme should reflect, in as full and appropriate a manner as possible, the recent court decisions.

In addition, there are other changes that can be made and should be considered to enhance transparency and to ensure that the overall scheme is fair and balanced, in light of all relevant considerations.

The Government is considering the following changes to the Cabinet confidence regime: On the scope of protection, the Government would narrow the ambit of Cabinet confidentiality by focusing on its essence in a manner largely similar to what exists in the provinces and in most other Commonwealth countries. The new – and shortened – definition, which would be in keeping with the Task Force's recommendation, would be applicable to the three *Acts*.

The Government is considering the following changes to the Cabinet confidence regime: On the scope of protection, the Government would narrow the ambit of Cabinet confidentiality by focusing on its essence in a manner largely similar to what exists in the provinces and in most other Commonwealth countries.

The definition of a Cabinet confidence,

more formally referred to as a "Confidence of the Queen's Privy Council for Canada", would essentially focus on information or communications that reveal the substance of Cabinet's deliberations, decisions, and submissions. In addition, the definition should give full effect to the decision of the Federal Court of Appeal in *Ethyl*.

Cabinet confidences are currently excluded from the application of the *Access to Information Act* and the *Privacy Act*, and the Government believes this should continue with one important modification. The Government would enshrine in the legislation the right of the Information Commissioner (and the Privacy Commissioner) to go to court to challenge definitional issues.

• Justice Gomery report, *Restoring Accountability*, 2006:

[There should be a harms test for] the section 69 category of records considered to be confidences of the Privy Council; in addition, there should be a list of records that would not be considered confidences of the Privy Council; the 20-year rule should be shortened to no more than 15 years; the definition of "discussion papers" should be considerably broadened (since the shorter four-year rule applies to such records); and the rule of nondisclosure should not apply where the decision to which the confidence relates has been made public.

• Government of Canada discussion paper, *Strengthening the Access to Information Act*, 2006:

A statutory amendment could be enacted to grant the Information Commissioner a limited right of review of the issuance of certificates by the Clerk of the Privy Council, therefore ensuring the Information Commissioner's review of the Cabinet confidence exclusion.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

44. Section 69 of the Act is replaced by the following:

69. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains confidences of the Queen's Privy Council for Canada.

(2) The following definitions apply in this section. "confidences of the Queen's Privy Council for Canada" means information which, if disclosed, would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers. "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to (a) confidences of the Queen's Privy Council for Canada that have been in existence for 15 years or more; (b) background explanations, analyses of problems, or policy options presented to Council for consideration by Council in making decisions, if (i) the decisions to which the information relates have been made public, or (ii) four years have passed since the decisions were made; or (c) decisions of the Queen's Privy Council for Canada if (i) the decisions or the substance of the decisions have been made public, or (ii) four years have passed since the decisions

were made.

44. Paragraph 69.1(2)(a) of the Act is replaced by the following: (a) all proceedings under this Act in respect of the information, including an investigation, appeal or judicial review, are discontinued

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*. March 2015.

Recommendation 4.2 - The Information Commissioner recommends that all exclusions from the Act should be repealed and replaced with exemptions where necessary.

Recommendation 4.26 - The Information Commissioner recommends a mandatory exemption for Cabinet confidences when disclosure would reveal the substance of deliberations of Cabinet.

Recommendation 4.27 - The Information Commissioner recommends that the exemption for Cabinet confidences should not apply: * to purely factual or background information; * to analyses of problems and policy options to Cabinet's consideration; * to information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act; * to information in a record that has been in existence for 15 or more years; and * where consent is obtained to disclose the information.

Recommendation 4.28 - The Information Commissioner recommends that investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within her office.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

(The Information Commissioner's recommendations 4.2 and 4.26 and 4.28 are duplicated in the ETHI Committee's recommendations 18 and 22 and 24.)

Recommendation 23 –

That the mandatory exemption for Cabinet confidences would not apply to:

- purely factual or background information;
- information in a record of decision made by Cabinet or any of its committees on an appeal under an act;
- where consent is obtained to disclose the information; and
- information in a record that has been in existence for an appropriate period of time as determined by the government and that this period of time be less than the current 20 years.

• B.C. Freedom of Information and Privacy Association (FIPA), *Reform of the Access to Information Act: Past time for Action*, 2016:

Recommendation 5. Make Cabinet records an exemption instead of an exclusion.

Recommendation 4. Ensure that Ministers' offices and Prime Minister's Office are covered by the Act.

CANADIAN PROVINCES

The provincial FOI laws take a very different stance on cabinet records than does the *ATIA*, as noted in the RPG report of 1996:

> Most provincial freedom of information legislation has chosen to include a mandatory exception for cabinet confidences, rather than exclude them from the coverage of their respective acts, and the result has not had any negative impact on the effectiveness of the collective decision-making of these cabinets. The provincial models will be instructive in considering reform at the federal level of section 69.[133]

The provincial FOI laws generally define the exemption in similar language to that found in the Nova Scotia *Act*, that is, the "substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees." As well, therein the exemption usually applies to "information in a record of a decision made by the Cabinet on an appeal under an *Act*."

Yet interestingly, Nova Scotia's FOI law is the only one in which records of cabinet deliberations "may" be released. As Nova Scotia's was the first FOI law passed in Canada (in 1977), it almost appears as if other provinces' lawmakers regarded the discretionary nature of that exemption as some sort of naïve error, which they hastened to "correct" to a mandatory one as they forged their own statutes.

Regarding time limits, cabinet deliberations may be withheld for only 10 years in Nova Scotia; 15 years in the Yukon, British Columbia, Alberta, Prince Edward Island (changed from 20 years in 2008), the Northwest Territories and Nunavut; 20 years in Newfoundland, New Brunswick, Manitoba (changed from 30 years in 2008), Ontario, and the federal *ATI Act*; 25 years in Quebec and Saskatchewan. Why not shorten the *ATIA*'s time restriction to 10 years?

In Ontario, Saskatchewan, Quebec, and Manitoba, cabinet records are covered by mandatory exemptions yet they can be released earlier than their time limits if cabinet explicitly "consents." (I never heard of this occurring in Canada, and would be grateful to hear of any example.) New Brunswick's law, even after its 2017 reform, has by far the weakest disclosure, whereby cabinet records may be released after 15 years only "with the approval of the Executive Council."

On the important exception of factual background papers, in Nova Scotia, the Yukon, B.C. and Alberta, such papers cannot be withheld if the cabinet decision to which they relate is made has been implemented or made public, or else if more than five years have passed since the decision was made or considered. To give credit where due, this is one of the very rare instances where the federal *ATIA* – with its four year limit for background papers – surpasses the provinces'

[133] RPG Information Services, *op.cit*

FOI laws, by one year. Unfortunately, cabinet background papers *per se* are not explicitly mentioned in several other FOI laws (though a few might be implicitly included).

With the Newfoundland law, laudably, such factual material can apparently be freed in any circumstances, for in Section 27. (1), "'cabinet record" means [....] (d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, *excluding* the sections of these records that are factual or background material." (Italics mine.)

In the Ontario law, Section 12(3), records are withheld that "contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented." Yet they could be released afterwards.

(Woefully, Alberta's then premier Ralph Klein amended Alberta's FOI law to block access to the briefing books created for incoming cabinet ministers - the same kind of record that Prime Minister Justin Trudeau ordered to be proactively released in Ottawa via *Bill C-58*.)

Regrettably, as with the *ATIA*, none of the other FOI statutes contain any harms tests for the cabinet records exemption. Seven Canadian provinces and territories do have general public interest overrides, which cover cabinet records, in their FOI laws: Nova Scotia, New Brunswick, the Yukon, Ontario, British Columbia, Alberta and Prince Edward Island. (All these overrides are mandatory, except for Nova Scotia's discretionary one.)

The FOI laws of Manitoba, Saskatchewan, Quebec, the Northwest Territories and Nunavut have public interest overrides for certain other topics, but not for cabinet records. In Newfoundland, although cabinet records are not fully included within the law's general public interest override Section 9, there is some kind of weak override within the cabinet records section itself:

> 27. (3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

NEW INSIGHTS ON CANADIAN HISTORY

Cabinet discussions in Ottawa can be a matter of keen historical interest and importance for Canadians. For one thing, they can ponder alternative courses of "what might have been."

Media stories of 1992 cited cabinet meeting records of 1970 that were obtained through the *ATIA*. During the Quebec separatist FLQ crisis, the discussions revealed that the RCMP Commissioner advised cabinet not to invoke the War Measures Act, this being unnecessary; cabinet disregarded his advice (which is its right) and invoked it anyways – which led to 465 arrests - suggesting this may have occurred more for political reasons than publicly-stated security ones.

I utilized the *ATIA* for such records to produce an article on how Canada could have been a much harsher place for women seeking abortions.[134] After Dr. Henry Morgentaler was acquitted by the Supreme Court of Canada in 1988, Ottawa embarked on an onerous three year quest to produce a new abortion law, which by the end, the minutes say, "The debate was too wrenching and divisive to be allowed to continue much longer."

Some ministers argued at the table in Room 323-S that abortion be outlawed, punishable by up to 10 years in prison for those who performed it. Cabinet considered criminal penalties for women who self-aborted, while one draft resolution (pressed by the one senior minister, a religious fundamentalist who pleaded that life starts at conception) would have banned the abortion of malformed fetuses. Another proposed that the stress caused to a woman by an unwanted pregnancy should not be considered a health danger, and that the social and economic considerations of a woman facing an unwanted pregnancy should not be taken into account.

All those features (not known to the public) were dropped from Bill C-43, which passed the House but was defeated in 1991 by an unprecedented tie vote in the Senate. The result is a nation with no stand-alone abortion law, except for

[134] *Mulroney-era documents reveal detailed debate of Canada's abortion laws*. The Canadian Press, in the Globe and Mail, Nov. 17, 2013. I have scanned all the minutes and background papers to create a 83 page PDF file for the story, posted at my FOI website - http://www3.telus.net/index100/minutes1

provisions in the Canada Health Act, and no administration since then has dared to legislate on the subject.

On another level, the records also evoke an era where ministers and backbenchers had far more freedom to publicly dissent from the Prime Minister. Yet many lines of these fascinating minutes are still being withheld, mostly under *ATIA* Section 23 - solicitor-client privilege - an exemption with no time limit.

For another article, I obtained cabinet minutes on the 1987 death penalty debate and vote.[135] These showed that most ministers privately had no enthusiasm for reinstatement, despite its popularity with the public and Tory caucus.

[135] *How Mulroney buried the move to reinstate capital punishment*. The Globe and Mail. Oct. 13, 2007 -

The Bureaucratic Interest Override

CHAPTER 3 - POLICY ADVICE

Is the exemption for policy advice in the FOI law too broad?

Section 21, permitting the exemption of advice and accounts of consultations and deliberations, is probably the Act's most easily abused provision.

- Inger Hansen, Information Commissioner, Annual Report 1987–88

The advice and recommendations exemption, together with the exclusion of Cabinet confidences, ranks as the most controversial clause in the *Access to Information Act*

- John Grace, Information Commissioner, Annual Report 1992–1993

Every access law in Canada contains a massively overbroad exception for internal government deliberations that fails to conform to international standards.

- Centre for Law and Democracy, Halifax, 2012

Because the provisions for cabinet records and policy advice are both the most overbroadly worded and overapplied sections in the *Access to Information Act*, they require the closest consideration, and most urgently need to be amended, and hence require chapters of their own.

The value of most other *ATIA* exemptions – e.g., for law enforcement, privacy, national defense – is readily apparent to the public, and as a matter of principle I do not dispute their merits. But the value of exemptions for cabinet records and policy advice - at least as they are worded in this *ATIA* - may be far less obvious to the general observer, and sometimes seem more self-interested than public spirited. In fact, these two innocuous-appearing sections too often overlap and work in tandem to sap the vigour of an FOI statute.

Much commentary has been written on this topic by judges, information commissioners and academics. Yet the main questions need to be tackled here: is the policy advice exemption necessary, and why, and if it is indeed necessary, what form should it take?

To begin, whenever legislators raise the prospect of amending an FOI statute, senior officials argue - routinely, reflexively and successfully - that the public's access to records on policy development would inhibit decision-making, because the threat of public scrutiny would curb free and frank discussions, inhibit the candour of advice, and therefore seriously hamper the smooth

running of government (and hence impair the public interest overall).[136]

In Britain, for instance, a former senior civil servant at the Treasury told the *Financial Times* that policy advice should stay private because the media would inevitably focus on the downsides identified in any policy; that would simply deter his ex-colleagues from putting their policy assessments in writing, further undermining conventional Whitehall procedures: "The more they get into the public domain, the more they compromise the internal policy debate."[137]

In rejecting an access applicant's challenge to the usage of the *ATIA*'s policy advice exemption, one Canadian Federal Court ruling bordered on the apocalyptic:

> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. . . . In the hands of journalists or political opponents this is combustible material liable to start a fire that could quickly destroy government credibility and effectiveness.[138]

We ask lawmakers to consider the possibility that continuously reiterating such claims could result in a negative self-fulfilling prophecy, i.e., the fear that the FOI process will inhibit policy-making will make it so. Some traditionalist bureaucrats who began their work in the pre-FOI age – and who frankly wish that transparency laws had never been passed – may infectiously raise worries of some illusory harms in the new generation of public servant raised in the (relatively) stronger culture of openness.[139]

But of course there are contrary viewpoints.

"The argument that the fear of advice becoming public would constrain public servants from giving frank and fearless advice is rubbish," wrote one Canberra journalist with Australian candour. "The contrary is being proved. If public servants think advice will remain secret for 30 years, they will dish up any amount of career-saving tosh that

---

[136]As one Australian newspaper put it: "The public service, both state and federal, degrade its [FOI law] intent in a far more banal manner. Releasing information could "inhibit an officer's ability to provide frank and candid advice in the future". Does this mean the converse is less important - that not releasing information could inhibit the public's ability to assess the issue at hand?" - Damming the flow of information is to damn voters to ignorance. Editorial. The Age (Melbourne, Australia), July 24, 2008

[137]*Publication rules need rethinking, says ex-chancellor*, by Ben Hall and Michael Peel. Financial Times (London), April 3, 2007. Yet Kenneth Clarke, a former chancellor who served at the Treasury in the 1990s, told the BBC that releasing internal documents carried "this bizarre assumption that you should always follow the advice you are given. No sensible chancellor simply followed the advice of the Treasury bureaucrats, he said. 'You have a look at it, consider it, treat it with respect and then make your own judgment.'"

[138]*Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (Fed. T.D.), additional reasons at [1999] 4 C.T.C. 45 (Fed. T.D.), at 260-262, Evans J.

[139]In Israel's FOI law, Section 9.B, "A public authority is not obliged to provide information in any of the following categories: [...] 5. Information concerning internal management of the public authority, which does not concern the public, and is not important to it." This memorably phrased provision regrettably echoes the spirit if not the letter of Canada's *ATIA* Section 21(1)(d).

their masters want to hear."[140]

In one Australian FOI legal dispute on policy records, as a press report summarized it, "the [government] arguments that the Court of Appeal overturned had rested on the claims that public servants have to be secretive or they can't work; or that the public is too stupid to understand anything complex and would be confused by the truth held in government documents."[141]

In Scotland's FOI law, there are harms tests in Section 30, regarding "prejudice to effective conduct of public affairs." Yet it is reported that many senior Scottish civil servants had hoped for an automatic presumption that it would be harmful to release *any* policy information no matter what advice was given (i.e., a class exemption as in Canada). Scotland's Information Commissioner Kevin Dunion countered that such an outlook must change: 'The act should not be bent to meet civil servants' sensitivities - they've got to toughen up."[142]

As James Travers of the *Toronto Star* put it: "the assumption that the actions and decisions of a democratic government can't withstand too much exposure demeans voter intelligence and the institution of Parliament."[143] Even in Canada, governmental resistance may be gradually yielding on this question.

The Canadian government speaks mainly of the supposed harms and not the potential benefits of public transparency for policy advice. The latter, in fact, are more numerous. The Commonwealth Human Rights Initiative considered the traditional claims on policy advice, and concluded:

> The area of official decision-making – how criteria are applied, assessments made, contracts awarded, applications rejected, budgets prepared, or benefits distributed, whose advice counts and whose is ignored – is traditionally an area prone to bias and abuse of power. Without the possibility of disclosure, there is little possibility of checking these tendencies. Conversely, it has been shown that just the threat of disclosure improves the quality of government decision-making.[144]

---

[140]FOI process needs urgent overhaul to halt needless secrecy, by Crispin Hull. Canberra Times (Australia), Nov. 10, 2007. Mr. Hull sensibly added: "If there is no significant change the losers will be the public and, indeed, the politicians. Sure, some things have to remain secret for a while matters of public security, properly and narrowly defined. But lots of innocuous material would be better in the public domain. We can learn from past mistakes. And the prospect of later publicity would add greater rigour to political and administrative processes."

[141]*Official Spin: Censorship and Control of the Australian Press 2007*. Chapter: Informing Freedom, by Michael McKinnon and Matthew Moore. The Media, Entertainment & Arts Alliance 2007 report into the state of press freedom in Australia

[142]*Firm hand with a big stick*. The New Zealand Herald, December 22, 2007

[143]*Harper: Do as I say, not as I do*, by James Travers, The Toronto Star, April 13, 2006

[144]Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*. New Delhi, India, 2003

As well, a 1995 report of the Australian Law Reform Commission found that: "the *FOI Act* has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision-making process. The knowledge that decisions and processes are open to scrutiny... imposes a constant discipline on the public sector."[145]

Even some of those who insist that advice must be secreted during active consideration of an issue may find themselves at loss to assert why it must also remain so after the issue has been decided. Why, for example, must such records be withheld for 20 years in the *ATIA*'s Section 21(1)(d)? As the Commonwealth Initiative put it: "While it may sometimes be necessary to protect official information from disclosure at certain stages of policy-making, the same degree of confidentiality is hardly necessary once the policy has actually been agreed upon."[147]

Recognizing this, in 1994 the United Kingdom Government decided to release the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England – information that had previously been kept a closely guarded secret – six weeks after each meeting. "Initial fears that the policy would create self-censored and bland discussions proved ill-founded," the London Times commented, "Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp."'[148]

But there is a more pressing and personal motive for wishing to proffer advice only in private. It is reported that some policy analysts (particularly junior level) dread being identified as the one pointing out flaws in the sometimes well-meaning but misguided policies of politicians or senior bureaucrats. In the Canadian public forum at least, "Civil servants who inadvertently or otherwise say things that contradict, or even cast the slightest doubt on, the wisdom of the government's policy are severely reprimanded."[149]

For this reason and others, a strong federal whistleblower protection statute remains essential. I am aware that this measure might never be enough to ease some public servants' disquiet, but it might help enable others to "speak truth to power." Positively, the Commonwealth Initiative suggests that publicity on police advice could serve as an antidote to backroom pressures from lobbyists and others: "Doing public business in public also ensures that honest public

---

[145]Australian Law Reform Commission, (1995) *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77, p.16

[146]As well, it is always worth bearing in mind that policy advice records could still be withheld in whole or in part due to other legitimate *ATIA* exemptions, *e.g.*, if such a document contained someone's personal information, or on security or defense grounds.

[147]Commonwealth, *op.cit.*

[148]Commonwealth, *op.cit.*

[149]Jeffrey Simpson, *The Friendly Dictatorship*. Toronto: McCelland and Stewart, 2001

servants are protected from harassment and are less liable to succumb to extraneous influences."[150]

On the matter of a harms test for the exemption, it is difficult to think of a persuasive rationale that could be raised against the addition of one to the *ATIA* Section 21. At a minimum, harms should be qualified as "serious" or "significant."

In the early 1980s (and in some forms more recently), Canadian Treasury Board *ATIA* guidelines *did* in fact suggest a harms test for Section 21, stating that records which would otherwise be exempt under the section should only be withheld if their disclosure would "result in injury or harm to the particular internal process to which the document relates." When our government has accepted such a positive principle in its *ATIA* interpretive guidelines, as here, is it not then only logical to enshrine it in our law? Such guidelines have not the legal force of a statute, of course, and could be annulled any day; hence an *ATIA* amendment to guarantee this right is essential.

In sum, most FOI advocates and I do not call for the deletion of the *ATIA* policy advice exemption entirely. Rather, we urgently call for strong new provisions for transparency therein.

• Canada's *Access to Information Act*, 1982:

Operations of Government

Advice, etc. 21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate.

(*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(*d*) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

Exercise of a discretionary power or an adjudicative function

(2) Subsection (1) does not apply in respect of a record that contains

(*a*) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

[150]Commonwealth, op.cit.

(*b*) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared; 2006, c. 9, s. 149.

Treasury Board statistics show that Section 21 was invoked 11,229 times in 2017/18 (a rise from approximately 10,000 times in 2014/15).[151]

For the present, at least, the wording of the *ATIA*'s Section 21 would ideally be narrowed according to the draft bills below. The section needs the addition of a strong harms test, a public interest override, and a far shorter time limit.

In an important case of 2017, the Federal Court confirmed that factual information appearing alongside advice and recommendations does not amount to these. In addition, decisions based on advice or recommendations do not constitute these. Neither facts nor decisions, therefore, qualify for the Section 21 exemption.[152] (This principle should be explicitly set in a reformed *ATI Act*.)

GLOBAL COMMENTARY

• Article 19, *Model Freedom of Information Law*, 2001:

32. (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: (a) cause serious prejudice to the effective formulation or development of government policy; (b) seriously frustrate the success of a policy, by premature disclosure of that policy; (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body. (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.

• European Union, *Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents*, 2001:

Article 4. Exceptions. [...] 3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Article 12 - Direct access in electronic form or through a register: [...] 3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

---

[151] *Access to Information and Privacy Statistical Report for the 2017 to 2018 Fiscal Year*. Treasury Board Secretariat. https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2017-2018-fiscal-year.html#ToC1 This figure is broken down as 4,680 requests for 21(1)(a); 5,195 requests for 21(1)(b); 927 requests for 21(1)(c); and 427 requests for 21(1)(d). While this is interesting, it does not really tell a reader what percentage of requests that relate to that issue were exempted under each exception.

[152] *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2017 FC 827, http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2016-2017_6.aspx

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

Formulation of policy. 26.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on (a) the free and frank provision of advice; or (b) the free and frank exchange of views for the purposes of deliberation.

(2) Where a document is a document referred to in subsection (1) by reason only of the matter contained in a particular part or particular parts of the document, a public authority shall identify that part or those parts of the document that are exempt. (3) Subsection (1) does not apply to a document in so far as it contains publicly available factual, statistical, technical or scientific material or the advice of a scientific or technical expert which analyses or gives an expert opinion of such material.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

Key Principles: Does it provide access to some internal government policy advice and discussion in order to promote public understanding, debate and accountability around public policy-making? .... Another common exemption found in many acts is the "deliberative process", which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations.

However, this exemption should clearly link the type of document to any form of mischief. Where such clauses appear, such as in the U.S. or South African law, they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. If release of the document would not have a chilling effect on deliberation, the document should not be exempt from disclosure.

• Organization of American States, Model Law on Access to Information, 2010:

41. Public authorities may deny access to information only in the following circumstances, when it is legitimate and strictly necessary in a democratic society: [...] (b) Allowing access would create a clear, probable and specific risk of substantial harm, [which should be further defined by law] to the following public interests: [...] (3) the future provision of free and open advice within and among public authorities; 4) effective formulation or development of policy; [...] The exceptions under sub-paragraphs (b) 3, 4 and 9, do not apply to facts, analysis of facts, technical data or statistical information. The exception under sub-paragraph (b) 4 does not apply once the policy has been enacted.

OTHER NATIONS

Commonwealth

Amongst the 29 FOI laws of Commonwealth nations under study here, I counted 15 with an explicit policy advice exemption. Of those, 10 were mandatory, with 5 discretionary (including Canada's, fortunately), and more than half have exceptions for factual background information.

Twenty year time limits are most common; Uganda and Zimbabwe have 10 year "sunset clauses," while regrettably Kenya, Ghana and Tanzania set 30 years.

• At least three more enlightened FOI jurisdictions in the Commonwealth - South Africa, the United Kingdom and Scotland - include a harms test in certain parts of their policy advice exemptions. In South Africa's statute, Section 44 (1), records of recommendations or consultations may be withheld:

> (b) if —
>
> (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—
>
> (aa) communication of an opinion, advice, report or recommendation; or
>
> (bb) conduct of a consultation, discussion or deliberation; or
>
> (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

• The United Kingdom's FOI law expresses a harms test in regards to public bodies:

> 36. (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act [....]
>
> (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

A harms test, *per se*, is not included in Section 35, regarding the policy advice of central government. Yet, wrote UK FOI advocate Maurice Frankel on this section, "In practice, the public interest balancing test does require the government to show why it would be harmful to the public interest for the information to be disclosed and to show that the harm to the public interest outweighs the public interest in disclosure."[153]

Scotland's exemption, in its Section 30(b), echoes the terms of the U.K.'s Section 36 but is laudably stronger; here, such release must "inhibit substantially" the conduct of public affairs.

• Several nations make clear the exemption should only apply to ongoing discussions, and not to the policy's successful outcome. In Kenya's law, Section 6(1), policy advice access is limited if disclosure is likely to "[...] (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration."

[153]Email to author, November 2007

• In Pakistan's ordinance Section 16(1), "[i] information may be exempt if its disclosure is likely to – [i] cause prejudice to the effective formulation of government policy; [ii] frustrate the success of a policy, by the premature disclosure of that policy; [iii] undermine the deliberative process in a public by inhibiting the free and frank provision of advice or exchange of views."

• Similarly, in the latest Commonwealth FOI law, that of Ghana (2019), in Section 13, policy advice must be exempt if disclosure is "likely to undermine the deliberative process in that public institution."

• The FOI policy advice exemption in New Zealand is slightly narrower than in the *ATIA*, and is covered by a public interest override:

> 9.(2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to - [...] (f) maintain the constitutional conventions for the time being which protect –
>
> (i) the confidentiality of communications by or with the Sovereign or her representative:
>
> (ii) collective and individual ministerial responsibility:
>
> (iii) the political neutrality of officials:
>
> (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
>
> (g) maintain the effective conduct of public affairs through - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty [....]

• In Australia, the override for its policy advice section is framed oppositely to the usual manner; in Section 36(1), such a document is exempt if disclosure "(b) would be contrary to the public interest." Yet it contains a good feature too: 36(5) "This section does not apply to a document by reason only of purely factual material contained in the document."

Non-Commonwealth nations

In the non-Commonwealth nations FOI laws under study here, I counted 24 with a policy advice exemption clearly marked as such, and 37 with no exemption phrased in terms most Canadians are familiar with (yet which may be present nonetheless).[154] As we have already noted for the cabinet deliberations exemption, in FOI statutes that do not shield this explicitly, they include an exception for "deliberative information", "internally confidential material", or some such term. It would surely be doubtful to

[154]Whether such records would be withheld under some national FOI statutes is not entirely clear, sometimes perhaps due to translation ambiguities. Policy advice and recommendations might be included under such descriptions no more specific than "the secrecy of the proceedings of the Government and proper authorities coming under the executive power" (France's FOI law), or "working documents which a government authority has written for its own use" (Iceland's FOI law). Still, it could be worse: records of "opinions" or "recommendation" are explicitly excluded from the scope of Turkey's FOI law entirely.

find any nation that truly leaves internal discussions wide open for requests.[155]

Of those 24 exemptions, 15 are mandatory, with 9 discretionary, and more than half have exceptions for factual background data. The best overall examples may be those of Albania, Mexico, Poland, and Azerbaijan. The Albanian FOI law has most of what one could hope for:

> Article 17. Restrictions [...] 2. The right to information may be restricted, if giving the information causes a clear and serious harm to the following interests [...] (g) preliminary consultations and discussions within or between public authorities on public policy development
>
> Restriction on the right to information, due to the interests foreseen in point 2, letter "g" of this Article, shall not apply once the policies are published.
>
> Notwithstanding the provisions of paragraph 1 of point 2 of this Article, the information requested is not rejected if there is a higher public interest to grant it.

Note the discretionary nature, strong harms test, record release upon the topic's publicity, and mandatory public interest override. The FOI law of Mexico - RTI-ranked #2 in the world after Afghanistan - has a 5 year time limit and a valuable override in Article 115:

> Article 113. The information may be classified as privileged if its publication: [.....] VIII. Which contains the opinions, recommendations or views that are part of the deliberative process of Public Servants, while a final decision is made, which must be documented;
>
> Article 101. Documents classified as privileged will be public when:
>
> I. The causes that gave rise to their classification expire; II. The term for classification expires; III. There is resolution of a competent authority determining that there is a cause of public interest that prevails over the confidentiality of the information, or IV. The Transparency Committee considers appropriate to declassify it in accordance with the provisions of this Title.
>
> Information classified as privileged, under Article 113 of this Act, may remain as such up to a period of five years. The confidentiality period shall run from the date on which the document is classified.
>
> Article 115. The privileged character may not be invoked when: I. It relates to serious human rights violations or crimes against humanity, or II. It is information related to corruption in accordance with applicable law.

Hong Kong's FOI Code, 2.10 (a), has a discretionary exemption for records "the disclosure of which would inhibit the frankness and candor of discussion within

[155]For instance, in the American *FOI Act*, policy advice could be included in exemption (5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Toby Mendel said, "This is effectively the internal deliberations or 'room to think' exception."

the Government, and advice given to the Government." Yet its guidebook notes that risk is not to be automatically assumed for all such records (as Canadian officials apparently do):

This provision does not, however, authorise the withholding of all such information - only to the extent that disclosure might inhibit frankness and candour. Thus, for example, information on the views or advice of an advisory body, consultant or other individual or group may be divulged if there is no such risk. In this connection, it would be prudent and courteous to seek the views of individual advisory bodies, etc. on the extent to which they would wish their advice, etc., to be regarded as confidential.[156]

• In respect to what factual records may be released notwithstanding the policy advice exemption, Canada's *ATIA* Section 21(2)(b) cites merely "a report," yet many other national FOI exemptions are far more detailed (though none much fuller than the British Columbia's law).[157]

Estonia appears to have the most extensive list of such releasable records in its FOI policy exemption, Section 3, that is, 12 items, including "economic and social forecasts" and "notices concerning the state of the environment."

• Time limits for the policy advice exemption are often subdivided into two categories: Topics that have been concluded or publicized, and those that have not yet been.

For the former, good models can be found in the FOI statutes of Latvia, Croatia, and Peru, all in which the use of the exemption ends when the policy topic is decided, not 20 years after the fact as in the Canadian *ATIA*. Peru's law, Article 15B adds a further deciding element for policy openness - publicity:

> The right to access to information shall not include the following: 1. Information that contains advice, recommendations or opinions produced as part of the deliberative or consulting process before the government makes a decision, unless the information is public. Once that decision is made this exemption is terminated if the public entity chooses to make reference to the advice, recommendations and opinions.

For the latter category (undecided or unpublicized topics), time delays in some other FOI statutes are present but usually shorter than in Commonwealth FOI laws. In Portugal's transparency law, access to documents in proceedings that are not decided or in the preparation of a decision can be delayed until the proceedings are

---

[156]Hong Kong government, *Code on Access to Information Guidelines on Interpretation and Application*, April 2016. The guide adds: "It is also apparent that perception of what is in the public interest may change with time and the development of public policy in the context of the move towards a more open society. As government formulates and adopts or changes policies (e.g. an anti-smoking policy or a revised transport policy) this will inevitably affect the perception of where the public interest lies."

[157]The factual background paper exception to the exemption is present but much narrower in the United Kingdom's law, applying to just two of the four types of policy advice records: "35 (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded - (a) for the purposes of subsection (1)(a), as relating to the or development of government policy, or (b) for the purposes of subsection (1)(b), as relating to Ministerial communications."

complete or up to one year after they were prepared. Bulgaria's law mandates that policy advice records may not be withheld after two years from their creation, while the limit is five years in Mexico, Azerbaijan and a few other nations. (Lamentably, a few nations have no time limits or "sunset clauses" for the exemption at all.)

• A matter closely related to a harms test is the need for a strong mandatory public interest override to the policy advice exemption.

Several FOI laws include such an override within the policy exemption itself, such as with Bulgaria (Article 13.4), Kosovo (Section 4.5), Taiwan (Article 18.3). Bulgaria amended its exemption in 2008 to add: "Access to administrative public information shall not be restricted when there is overriding public interest in the disclosure." But a far better course is to include a general public interest override for all FOI exemptions, which many more nations do.[158]

I believe that while Canadians wait for the indefinite future for a general purpose override to be added to the *ATIA* (as they have done without hope over the past 37 years), for the interim the concept of now placing a strong mandatory public interest override within just the policy advice section - the most widely abused exemption - is far better than nothing at all.

As we attempt to raise our *ATIA* to world standards, one need consider both (1) the ideal and (2) the politically realistic. For the latter, such a partial override as this should be seen as a more manageable incremental or transitional step towards a full one (rather like the hesitant half-step toward full order making power in Bill C58).

Even if the weakest override for the exemption were added - that of Australia's Section 36(1) - Ottawa would be newly compelled to justify its once-arbitrary decision to withhold policy advice *vis-à-vis* the public interest, whereas today it need justify nothing at all. The decisions might then generate some more political attention and hence gradually influence a greater spirit of openness.

• Several other FOI policy advice exemptions have unique features of interest:

In Slovenia's law, Article 6.11, information on internal operations can be withheld "the disclosure of which would cause disturbances in operations or activities of the body."

In Japan's law, Article 5.(5), deliberative records can be withheld which, if made public, "would risk unjustly causing confusion among the people, or risk unjustly bringing advantage or disadvantage to specific individuals."

The Netherlands has a most progressive FOI section wherein some policy recommendations require proactive publication (a feature unheard of in a

[158]The 2010 constitutional decision mandated that officials applying all FOI discretionary (but not mandatory) exceptions must take into account the public interest, thereby expanding the scope of this in Canadian laws overall quite considerably. (Ontario (Public Safety and Security) v. Criminal Lawyers Association, [2010] S.C.J. No. 23) Given that *ATIA* Section 21 is discretionary, based on this decision it already contains a public interest override. We need to take that seriously, while adding a broad statutory public interest override to the law. To express this for policy advice alone for now would be at best a baby step.

Commonwealth FOI law).

> 9.1. The administrative authority directly concerned shall ensure that the policy recommendations which the authority receives from independent advisory committees, together with the requests for advice and proposals made to the advisory committees by the authority, shall be made public where necessary, possibly with explanatory notes.
>
> 9. 2. The recommendations shall be made public no more than four weeks after they have been received by the administrative authority. Their publication shall be announced in the Netherlands Government Gazette or in some other periodical made generally available by the government. Notification shall be made in a similar manner of non-publication, either total or partial [....]

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

3.19. The Committee recommends that section 21 of the *Access to Information Act* be amended not only to contain an injury test but also to clarify that it applies solely to policy advice and minutes at the political level of decision making, not factual information used in the routine decision-making process of government. The exemption should be available only to records that came into existence less than ten years prior to a request.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

An amended section [21] should emulate the laws of Ontario and British Columbia. Each has a long list of types of information not covered by the exemption — factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements and reports of internal task forces.

There should also be an attempt to define the term "advice" in the sensible, balanced way currently set out in the Treasury Board policy manual. The exemption should be clearly limited to communications to and from public servants, ministerial staff and ministers. As well, the provision should be made subject to a public interest override.

Finally, paragraph 21(1)(d) should be amended. As it now stands, this exemption allows public servants to refuse to disclose plans devised but never approved. As the British Columbia legislation now allows, rejected plans should be as open to public scrutiny as plans which are brought into effect.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 60: That section 21 of the Act be amended to encompass an injury test.

Recommendation 61: That section 21 of the Act be clarified as to the type of sensitive decision-making information it covers and include a listing of those type of documents it specifically does not cover.

Recommendation 62: That section 21 of the Act be amended to reduce the current time limit on the exemption from 20 to 10 years.

Recommendation 63: That section 21 of the Act be amended in order to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers.

Recommendation 64: That section 21 of the Act be amended to add a definition of advice, perhaps the balanced definition currently in the Treasury Board policy manual.

Recommendation 65: Section 21 of the Act be incorporated in the public interest override provision.

Recommendation 66: That paragraph 21(1)(d) of the Act be amended to exclude rejected plans from the coverage of the exemption.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians. ATIA* Review Task Force report, 2002:

3-5. The Task Force recommends that: the Act be amended to provide that records "under the control of a government institution" do not include notes prepared by public servants for their own use, and not shared with others or placed on an office file; do include such notes when they are used in an administrative decision-making process that can affect rights, or in a decision-making process reflected directly in government policy, advice or program decisions [.....]'

• *Bill C-201*, introduced by NDP MP Pat Martin, 2004:

16. (1) Paragraphs 21(1)(a) and (b) of the Act are replaced by the following: (a) advice or recommendations developed by or for a government institution or a minister of the Crown other than public opinion surveys, (b) an account of consultations or deliberations involving officers or employees of a government institution

(2) Paragraph 21(1)(d) of the Act is replaced by the following: (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation the disclosure of which could reasonably be expected to prejudice the operation of that government institution [...]'

Bill C-201 amends (1)(a) to exclude 'public opinion surveys' and (1)(b) to 'officers or employees of a government institution'; amends (1)(d) to insert injury test (s. 16)

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005 (underlined parts are Mr. Reid's amendments to the existing Act):

17. Section 21 of the Act is replaced by the following:

21. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act that came into existence less than five years prior to the request if the record contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal advice-giving process of the government institution;

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal decision-making process of the government; or

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto and disclosure of the record could reasonably be expected to be injurious to the conduct of the negotiations.

(2) Subsection (1) does not apply in respect of a record that contains (a) any factual material; (b) the results of a public opinion poll, survey or focus group; [...] (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the person making the request; or (o) a report or advice prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

(3) For the purpose of this section, "advice" is an opinion, proposal or reasoned analysis offered, implicitly or explicitly, as to action.'

- **Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005:**

Provision should be narrowed to codify recent case law that states that advice does not include factual information; government is considering amending (1)(d) to provide only a 5 year protection period for plans in respect of which no decision is taken; also consultants' advice should be included in the exemption (p. 19-20)

[On Section 21(1)(d):] According to the Task Force recommendation, the head of a government institution should have the discretion to protect such plans for a reasonable period of time, during which their status may change (e.g. work may cease and recommence a number of times), but that the protection should not exceed five years. The Government is considering an amendment to Section 21 to implement this recommendation.'

- **Justice Gomery report, *Restoring Accountability*, 2006:**

[Proposes a harms test for] the section 21 category of records containing advice or recommendations for a government institution or Minister; there should also be a comprehensive list of the records that must be disclosed.

- **Government of Canada discussion paper, *Strengthening the Access to Information Act*, 2006:**

The proposal to narrow the scope of the section by listing categories of information that would not be protected may be a useful approach to encourage the release of information that is not advice or deliberations. This proposal could help to strike a more appropriate balance between disclosure and the exemption of information that still merits protection.

• Bill C-556, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

18. Section 21 of the Act is replaced by the following:

21. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act that came into existence less than five years prior to the request if the record contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal advice-giving process of the government institution;

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal decision-making process of the government; or

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto and disclosure of the record could reasonably be expected to be injurious to the conduct of the negotiations.

(2) Subsection (1) does not apply in respect of a record that contains

(a) any factual material;

(b) the results of a public opinion poll, survey or focus group;

(c) a statistical survey;

(d) an appraisal or a report by an appraiser, whether or not the appraiser is an officer or employee of a government institution;

(e) an economic forecast;

(f) an environmental impact statement or similar information;

(g) a final report, final study or final audit on the performance or efficiency of a government institution or on any of its programs or policies;

(h) a consumer test report or a report of a test carried out on a product to assess equipment of a government institution;

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of a government institution;

(j) a report on the results of field research undertaken before a policy proposal is formulated;

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a government institution;

(l) a plan or proposal of a government institution to establish a new program or to change a program, or that relates to the management of personnel or the administration of the institution, if the plan or proposal has been approved or rejected by the head of the institution;

(m) information that the head of a government institution has cited publicly

as the basis for making a decision or formulating a policy;

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the person making the request; or

(o) a report or advice prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

(3) In this section, "advice" means an opinion, proposal or reasoned analysis offered, implicitly or explicitly, as to action.

• The Centre for Law and Democracy (Halifax), Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions, 2012:

Every Canadian jurisdiction contains an exception for internal deliberations, and every one of them is overly broad, fails to identify the specific interests that are being protected, and lacks a proper requirement of harm.

Rather than only excluding information whose disclosure would harm the decision-making process, these exceptions are framed as broad catch-alls, for example excluding just about anything that is brought before Cabinet or the Executive Council.

In addition, most Canadian laws prevent the disclosure of this information for 15 years, far longer than is justified by any ongoing deliberative process. Information which relates to a particular decision should normally be disclosed once the decision has been taken.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015:

Recommendation 4.21 -

The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations.

Recommendation 4.22 -

The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

Recommendation 4.23 -

The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

• Standing Committee on Access to Information, Privacy and Ethics: Review of the *Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

(The Information Commissioner's recommendations 4.21 and 4.22 are duplicated in the ETHI Committee's recommendations 19 and 20.)

Recommendation 21 -

That the time limit of the exemption for advice and recommendations be significantly reduced.

• Canadian Environmental Law Association (CELA) and Ecojustice, *Joint submission to Senate review of Bill C-58*, December 2018:

Recommendation 1: Bill C-58 should limit the lifespan of the policy advice exemption under section 21 to the shorter of five years or the calling of an election.

CANADIAN PROVINCES

Policy advice exemptions in the provinces' transparency statutes are far from ideal, yet they still far surpass that of the *Access to Information Act* in their openness.

In all provincial FOI laws, as in the *ATIA*, policy advice exemptions are discretionary. They also lamentably contain no harms tests, but most are covered by general public interest overrides, which the *ATIA* does not do.

The FOI laws of nine provinces and territories have shorter time limits for withholding records under the policy advice exemption than the 20 years prescribed in the federal *ATIA*. The limit is 5 years for Nova Scotia; 10 years for Quebec and British Columbia; 15 years for Prince Edward Island (reduced from 20 years in 2008), Newfoundland, Alberta, the Yukon, the Northwest Territories and Nunavut; 20 years for Manitoba (reduced from 30 years in 2008), Ontario and New Brunswick; 25 years for Saskatchewan.

The release of factual background papers is a vital exception within policy advice exemptions. The *ATIA* contains just one general example:

> 21. (2) Subsection (1) does not apply in respect of a record that contains [...] (b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

By contrast, the policy advice exemptions in the FOI laws of British Columbia, the Yukon, Ontario and Newfoundland each list more than a dozen types of background factual papers that cannot be withheld. These extend far beyond the "report" cited in the *ATIA* Section 21(2)(b), and unlike the *ATIA* this rule applies regardless of who produced the records, i.e., a government employee or other. Section 13(2) of the B.C. law would be advisable for the *ATIA*:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> (b) a public opinion poll,
>
> (c) a statistical survey,
>
> (d) an appraisal,
>
> (e) an economic forecast,

(f) an environmental impact statement or similar information,

(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

(h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

The Quebec FOI law - as a reformed *ATIA* could do - includes an enlightened feature in its policy advice exemption, one that acknowledges how publicity can reduce record sensitivity:

> 38. A public body may refuse to disclose a recommendation or opinion made by an agency under its jurisdiction or made by it to another public body until the final decision on the subject matter of the recommendation or opinion is made public by the authority having jurisdiction. The same applies to a minister regarding a recommendation or opinion made to him by an agency under his authority.

An excellent report by the Quebec Information Commission advised that each provincial agency head have the duty, before refusing to disclose an opinion or recommendation, to inquire into the prejudice, the real harm that could result from such disclosure. If there is no such harm, it should be disclosed and the Québec Commission recommended that to assist public bodies in doing the job, there be "decision help tools" developed by the counterpart of the federal Chief Information Officer Branch.[159] This outlook would be beneficial for the federal *ATIA* process as well.

[159]Québec Commission d'Accès à l'Information, *Reforming Access to Information: Choosing Transparency* (2002)

THE DUTCH PROTECTION FOR POLICY ANALYSTS

Earlier we noted that in the Canadian public forum, civil servants "who even cast the slightest doubt on the wisdom of the government's policy are severely reprimanded." The Netherland's FOI law takes account of this concern, with a unique provision:

> "11. 1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.
>
> "11. 2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.
>
> "11. 3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities."

The initial Dutch exception is phrased in extremely broad terms, and is also mandatory. But its clawbacks (or exceptions to the exception) are indeed interesting as an option, hence worth considering, perhaps with a caveat about the breadth of the initial exception in this area.

In the Netherlands under these terms, much useful policy information could still be released, which is better than no release at all. If included in the *ATIA*, this could relieve the fears of Canadian government analysts distressed at being identified, with the feared potential impact to their careers.

(Perhaps the main exception to this principle would be if an unnamed policy advisor wrote with partiality or a conflict-of-interest; for instance if he/she praised the public value and safety of salmon farms, yet had a private financial or familial stake in that industry, or was subject to various other influences.)

Which Players in the Ballpark?

CHAPTER 4 - SCOPE OF COVERAGE

Which public or private entities should be covered by the FOI law?

A Conservative government will: Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.

- Conservative Party of Canada, election pledge, 2006 (Promise unfulfilled.)

When is a public body not "a public body"? Which records are "public records"? How should these concepts be legally defined for freedom of information purposes?

When a private sector or non-profit entity performs public functions, should its records also be open to public scrutiny? All of its records, or just some? Must an entity prove that it would suffer injuries resulting from FOI disclosures, or just assert that it would, and prove it how? Even if harms might result, should the public's right of access still be absolute, or must it be balanced against the company's interests?

These and many other questions have arisen in the past three decades, and the new reality of government restructuring invokes serious doubts as to the viability of the FOI system.

This is the longest chapter in this report (for which I request the reader's patience) and the subject ideally requires an entire study, because the dilemma of determining which entities should be covered by freedom of information laws is perhaps the most complex, amorphous and perplexing topic in FOI theory and practice.[160]

In Canada, this definitional limbo has also become one of the most frustrating and indisputably necessary problems to be resolved in a reformed *Access to Information Act*. In fact, the problem was - and still is - so serious that it was the only one of its eight *ATIA* reform election promises that the Conservative administration made any progress upon after assuming office in 2006.

If a quasi-governmental entity is excluded from the *Act*'s scope, one may not apply for its records at all, nor obtain them in full or censored forms, at any price, after any time delay, nor appeal the situation with any prospect of success to any appellate body. The other chapters discuss the statutory rules of

[160]In this chapter on scope, I am mainly focused on the topic of corporate bodies doing public business (for I consider this the most pressing today), not on the issue of legislative and judiciary and other coverage; notes on these can be found in the CLD-AIR Rating indicators.

the "FOI game" (which indeed it is), but in this case those rules are irrelevant, for these entities simply stand outside the ballpark and are not part of the game at all.

The process of government restructuring is underway, says Alasdair Roberts, who has written extensively on this topic:

> When it is done, the public sector will look radically different than it did 20 or 30 years ago. Indeed, it may be difficult to speak intelligently about a 'public sector' at all .... This process of restructuring has already posed a substantial threat to existing disclosure laws, and this threat will grow in coming years.[161]

"Scope refers to the public authorities to whom the law does and does not apply," the Centre for Law and Democracy in Halifax noted in 2012. "Here, Canadian jurisdictions performed abysmally, with every law excluding major public authorities."[162]

The question of which entities should be covered by Canadian FOI laws was already being debated before the *Access to Information Act* was passed in 1982, as the era of "big government" was fading. Ottawa decided that most crown corporations would be covered, but not all, because supposedly some required "special protection" from their commercial competitors.

Such objections of economic injury are illogical and spurious because the *ATIA* already contains ample protections - most notably Section 20, which is itself often over-applied in practice - to protect against such harms (and several of the entities have monopoly positions).

When U.S. President Bill Clinton announced in 1996 that "the era of big government is over," the trend towards privatization, reduced or self-regulation, and non-profit entities performing governmental tasks had already been growing for three decades. Policymakers still steer the ship of state but care less about who "rows," that is, who delivers the services; the British term this policy "the third way"; Roberts calls it "structural pluralism." (The British have also coined the term *quango*, that is, quasi-autonomous nongovernmental organization.)

When writing on the draft FOI bill of Nepal, the organization Article 19 observed that: "Modern governments privatize a wide range of services, even if they are clearly public in nature. Such privatization should not, of itself, take the activity outside of the scope of a right to information law. Furthermore, if it did, this would be an additional, and clearly illegitimate, motivation for governments to privatize."[163] (I emphasize that I do not oppose privatization, *per se* – a choice that might work well or not on a case-by-case basis - but

---

[161] Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006. Chapter 7, The Corporate Veil.

[162] CLD, *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

[163] *Memorandum on Nepal's Right to Information Bill*, by Article 19, London, 2006.

only the loss of public transparency that often accompanies it but should not.)

During this era of downsizing, more and more traditional government functions - such as airports and air traffic control, postal services, and the provision of blood products - have been transferred out of the civil service. Increasingly, governmental responsibilities are being devolved to multi-governmental partnerships, government-industry consortia, foundations, trade associations, non-profit corporations and advisory groups. There are three different structures of "P3" partnerships to build prisons in the United States and Australia, and for schools and hospitals in Britain. Potentials for conflicts-of-interest can also be fertile, as officials move between the public and private sectors. The matter is complex indeed, but not insurmountably so.

The *ATIA* applies only to records "under the control of a government institution." Yet as far back as 1987, "concern has been expressed that this wording could lead to the appearance of 'information havens' in the form of consulting firms, research institutes and universities under contract with government."[164] For example, the federal government has at times contracted with the Public Policy Forum, a private entity that is not covered by the *ATIA*, to aid in policy development.[165]

As well, FOI-exempt police foundations are growing in number in Canada and are treated as private, independent charities. But many accept private money and channel these funds into the public police for purchasing equipment and technological upgrades (things that, under normal circumstances, would be purchased by public monies and subject to access and public tendering provisions).[166]

The long simmering problem was spotlighted in its worst form when then Liberal finance minister Paul Martin Jr. proudly announced in his 1995 federal budget the creation and funding of several independent foundations to perform key public services. By not including these in the scope of the *ATIA*, he created gaping vacuums of transparency (although, much later, the Auditor General was granted the right to audit several of these entities).

---

[164]Robert F. Adie and Paul G. Thomas, *Canadian Public Administration: Problematical Perspectives*. Scarborough: Prentice-Hall, 1987. One recent example is the Canadian Energy Centre in Alberta, previously known as the "Energy War Room." This private corporation, with a budget set by the province at $30 million, is exempt from FOI laws. It is tasked with combating what Alberta's government calls a foreign-funded campaign of misinformation at work in Canada, specifically to landlock Alberta oil - something critics call a conspiracy theory. - *Privacy and legal experts question war room's FOIP exemption, raise privacy concerns*, by Kevin Maimann. The Toronto Star, Oct. 15, 2019

[165]The PPF's website explained, "A 1988 gathering in Calgary served as the defining event for the PPF. Eight federal deputy ministers and twelve CEOs, largely drawn from the oil patch, came together under the PPF's neutral umbrella to talk frankly about the internal workings of government and the constraints under which federal public servants operated." The PPF's board has included deputy ministers, and its activities include holding conferences on Canada's health system, border security, a leaders' roundtable on the Kyoto Accord," and taking public submissions on *ATIA* reform itself. Some kind of fuller public transparency on such vital policy development processes should be mandated.

[166]*Access to Information Act reform is overdue*. By Kevin Walby, Randy K. Lippert and Alex Luscombe. Montreal Gazette, April 7, 2017

In 2007 it was reported that *ATIA* coverage should be extended to all bodies that are run by federal appointees or receive more than 50 per cent of their funding from Ottawa, according to a policy discussion report commissioned by the Treasury Board and prepared by Jerry Bartram and Associates management consulting firm.[167] The *ATIA* would also include many native band councils, but the report recommends they be given an exemption.

The *Federal Accountability Act* prompted an increase in the number of institutions subject to the *ATIA* by 70, to bring the total to more than 250. Yet more than 100 entities remain outside the *Act*'s scope. Among the quasi-governmental bodies still not subject to accountability measures are:

- the Canada Pension Investment Board;
- the Waste Management Organization, a new body that will develop Canada's long-term plan for handling and storing nuclear waste;
- Canadian Blood Services, which oversees the safety and management of Canada's blood supply;
- the Canadian Institute for Health Information (CIHI);
- Canada Health Infoway Inc. ($500 million);
- Greater Toronto Airport Authority (and other major airport authorities)
- NAV Canada (air traffic controllers); and
- St. Lawrence Seaway Management Corporation

The fact that there is such a vast number of organizations that are creatures of the federal government, funded by taxpayer dollars and tasked with executing public policy or carrying out vital public functions, which nevertheless operate in a no-man's land of accountability, should be a matter of great concern to all Canadians.[168] The four most troubling exclusions are those of the airport authorities, the agency responsible for the air traffic control, the blood agency and the nuclear waste agency. The wall of secrecy around these bodies poses a potential threat to public health and safety.

With other entities, it is at least possible to advance some economic arguments worth considering. But the latter two are non-commercial bodies, which makes their *ATIA* exclusion even more incomprehensible and morally indefensible; the federal government, imperiously, has not even bothered to advance a full explanation for this situation.

The *Nuclear Fuel Waste Act* established the new agency the Waste Management Organization (WMO), which allows nuclear waste to be imported into Canada while letting nuclear energy corporations sit on the WMO's board of directors. The Liberal majority ignored the advice of the Seaborn panel (set up to advise on the WMO's

[167] *Report recommends widening scope of access law*, by Bill Curry. Globe and Mail. July 26, 2008

[168] For example, "It's outrageous to have the Atomic Energy Control Ltd. not covered by Canada's Access Act, yet dictate what environmental data can be released by line departments covered under the Act about its Candu China sale, especially after the Canadian government kicked in a billion-and-a-half dollar loan to the Chinese." – Ken Rubin, *Reflections of an information rights warrior*. Speech to FIPA Awards event, Vancouver, Nov. 19, 2001

creation) to include it under the *ATIA*, and also voted down amendments by the Bloc Quebecois and Canadian Alliance parties to include it under the *Act*; the WMO is not even directly accountable to Parliament.

One can truly say that the exclusion of entities such as these from the *Act*'s coverage has long been the one Canadian *ATIA* problem that could fairly be described as a scandal. It is also perhaps the one topic in which Canada stands in the starkest contrast to rest of the FOI world community. The New Zealand national blood agency, for example, is covered under that nation's FOI law. The Canadian problem was noted by the Commonwealth Human Rights Initiative, when commenting on the draft FOI bill of Maldives:

> Additionally, to ensure that all bodies funded by public money can be scrutinised using this law, consideration should be given to replicating the definition at s.2(h) of the new Indian *Right to Information Act 2005* which covers "any body owned, controlled or substantially financed... directly or indirectly by funds provided by the appropriate Government". Otherwise, as has happened in Canada at the federal level, resistant bureaucrats may set up other forms of legal entity to avoid the application of the Act.[169]

Then, as if all this was not enough, most galling to hear in this context was the bombast from the Harper government on how it had "kept its election promises" on transparency and about the number of entities it added to the *ATIA*'s scope.

This boast also substitutes *quantity* of entities covered for *quality*. That is, which is ultimately more important to the public interest – the inclusion of agencies overseeing blood banks and nuclear waste, or else all the dozens of newly *ATIA*-covered small companies owned by the Public Sector Pension Investment Board (most of whom will never receive an *ATIA* request), such as 8599963 Canada Inc., or PSP H2O FL G.P. Inc. or PSPIB-RE Finance Partners II Inc. ?

Although the right to access records of quasi-governmental bodies can be prescribed in principle, it must be admitted that it is not always clear how such rights would operate day to day; much of this would be worked out in regulations and practice. For the applicant, often the first and most important challenge is that of obtaining the partnership contract itself through an FOI request.

Roberts notes that the contract is "unambiguously a government record" and not a private one,[170] yet both parties often work to keep the contracts secret, governments to avoid scrutiny of how well the contracted process really works, and companies to shield their data from their competitors. (Indeed, in some years in Canada, businesses account for about half of the *ATIA* requestors, many of them seeking records on their rivals.)

---

[169] *Maldives Draft Freedom of Information Bill & Recommendations for Amendments*. Analysis by the Commonwealth Human Rights Initiative, CHRI, 2006

[170] Roberts, *op.cit.*

Practices are widely varied, and evolving. One Australian state put its prison management contract online, a move that it called a world first; yet Ontario refused an FOI request for its new private highway toll contract, and also its contract with Accenture to manage social services because it argued that it was a unique "trade secret."

Shared records are difficult enough to obtain by FOI, but when information is held by contractors alone, more often there are no rights to such records at all. In the United States there is less regulation but more transparency available for utilities; in Australia the opposite is true. In Britain for a time, even government regulators could not extract needed information on water, gas and electrical services.

Another question arises: Should it matter where the records are stored? In Canada provincial disputes have arisen over who has both the essential and legally defined "custody or control" over "shared" public-private records, and these factors can determine access rights.

Governments can legislate practices but not attitudes. In Canada, many companies simply express zero tolerance for the idea of any of "their" information being released, even the amounts they are paid from taxpayer's funds, more often from reflex than reasoned consideration. (In British Columbia, one company even wanted to keep private the title page of its government contract, as a "trade secret.")

Lengthy and very costly court actions mounted by the corporate sector for this purpose are by now familiar. From longstanding tradition, many companies have come to expect such corporate confidentiality as their right, and some FOI directors too readily defer to their objectives, although this attitude may be gradually diminishing.

By far the most intransigent problem is that dozens of Canadian entities have a "shared jurisdiction" amongst federal, provincial and other governments; since it is claimed that these bodies do not fit the within scope of any one partner's FOI laws, they fall between the cracks and are covered by none. Examples include the Canadian Centre on Substance Abuse, the Canadian Energy Research Institute, and the First Nations Health Authority.

If obtaining consent for FOI coverage from one public-private partner is onerous enough, how much more so to gain it from several? Which partner has legal "custody or control" of the information? There are solutions, though: the federal government should not be able to enter into such arrangements unless it ensures that the records are available under the FOI law of both governments.

Worst of all, when quasi-governmental entities do business amongst themselves, the opacity can be absolute. In 2008 the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC) contracted the Vancouver International Airport authority (YVR) to be an official supplier. Both of these entities were not covered by FOI laws, provincial or federal, and so their contract was secreted.

Even if there was political will for expanded entity coverage, responses from the Canadian senior bureaucracy, expectedly, do not bode well for possible action. It is well known that behind-the-scenes lobbying by quasi-governmental entities to stop potential coverage has long been unrelenting (evident from their correspondence obtained through the *ATIA* and elsewhere). With the lack of a strong equivalent countervailing public interest voice to speak out, their pleas have found receptive ears in government.

For instance, a Justice Department discussion paper of 2005 suggested that even the existing exemptions for business secrets in the *ATIA* are likely not enough. It proposed that new provisions may be created to protect third party confidential information obtained by various government-owned corporations:

> Each provision would be tailored to meet the specific and unique sensitivities of each corporation.... In other words, the provision would be targeted to protecting the core sensitive information that is vital to the competitive position of these corporations without subjecting them to the additional costs of having to prove harm.[171]

Another Justice Department paper, ironically titled *Strengthening the Access to Information Act* (2006), seemed to erroneously equate public transparency with a loss of political independence:

> Making otherwise independent institutions subject to these three pieces of legislation [*ATIA, Privacy Act, Library and Archives of Canada Act*] could result in an increase in the federal government's apparent or actual control of the institutions and a fundamental change in their status.... For every institution added, there is a need to consider whether the current exemption scheme is sufficient or whether additional exemptions or exclusions may be necessary. It is virtually impossible to make such a determination without consulting the institutions themselves, since they know what information they hold and what kind of protection it requires.... An often overlooked factor that any responsible government must also consider when examining the issue of expanding coverage is the probable cost.[172]

One could counter that the costs of administering *ATIA* requests were far overestimated when it was passed in 1982, and also question the concept of placing a price upon a basic democratic right, almost equivalent to questioning whether the public's right to vote in elections can be afforded or not.

Yet the Treasury Board president said, when adding ten companies to the *ATIA* coverage in August 2005, "The ten Crown corporations will incur minor administrative costs to become compliant with the Acts; however, these costs will be outweighed by increased accountability and transparency."[173]

---

[171] Justice Department of Canada, A Comprehensive Framework for Access to Information Reform: A Discussion Paper, 2005

[172] Justice Department of Canada, Strengthening the *Access to Information Act*: A Discussion of Ideas Intrinsic to the Reform of the *Access to Information Act*, 2006

[173] Canada Gazette, Sept. 21, 2005

Why does this all matter? Roberts and several NGOs note that human rights specialists often make a distinction between "two generations" of human rights: (1) basic civil and political rights, and (2) economic, social and cultural rights. He argues that some of the practices which appear to fall only under the second class are also really covered by the first as well, and so the practices should be open to scrutiny through FOI laws. Private companies, for instance, might be contracted to count votes and to educate children; if public money flows to such entities, the taxpayers have a right to know how it is being spent.

Many today claim that access to government records is a basic "human right," but not all agree (such as former Canadian Privacy Commissioner George Radwanski, who called FOI a mere "administrative right"). For Roberts, FOI is a "derivative right," that is, a necessary tool with which to protect human rights.

One example would be that of the private Diamondback prison system in America; this entity is excluded from FOI coverage itself, and yet information on potential dangers to local neighborhoods, and on the health of inmates and staff, render public transparency a human right. Indeed, a few nations prescribe FOI access be applied to an entity when it is deemed necessary to protect a human right, such as in Kenya, South Sudan, Iceland, and Mozambique.

In sum, the basic statutory solution in many nations - and which the *ATIA* would ideally follow - is not for the FOI statute only to list named entities in schedules to the act, but rather to include precise and broader criteria of what kind of entities are covered. A mixed system as in the United Kingdom, which uses both options - definitions and listings - might well be implemented; and it could then be noted in a reformed *ATIA* that covered bodies are those "including but not limited to" those listed in schedules. Hence when an entity claims not to be covered by the *ATIA*, an appellate body such as the information commission or a court could study the criteria and rule whether it should indeed apply or not in each case.

"The very purpose of the *Access to Information Act* was to remove the caprice from decisions about disclosure of government records," said Information Commissioner John Reid. "Now we must remove the caprice from decisions about which entities will be subject to the Act."[174]

• Canada's *Access to Information Act*, 1982:

Current definitions in Section 3: "'government institution' means (a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act."

In August 2005, the government amended the *ATIA* to add ten corporate entities to

[174]Information Commissioner John Reid, *A Commissioner's Perspective* – Then and Now. Nov. 6, 2005

Schedule I.[175] Effective April 1, 2007, the Canadian Wheat Board and five foundations were added to the *ATIA*'s coverage in Schedule I.[176] Agents of Parliament – such as the Information Commissioner, the Privacy Commissioner and the Auditor General – were also added to the *Act*'s coverage, although they were granted special exemptions for certain records (such as investigatory).

As of September 1, 2007, since Crown Corporations and their wholly owned subsidiaries were added to the new definition of "Government Institution" they are no longer listed in Schedule I. On the same day, *ATIA* coverage of these crown corporations became effective: Canadian Broadcasting Corp., Via Rail Canada, Atomic Energy of Canada Limited, National Arts Centre, Public Sector Pension Investment Board, Export Development Canada, Canada Post. (The CBC, in Section 68.1, received an exemption for its journalistic, creative or programming records.)

The new provisions allow the release of information about the "general administration" of the agencies, which the law specifies as including travel and hospitality expenses. Critics predicted the flow of information will be but a trickle: "It means basically you don't get anything more than what's in their annual report," said John Reid, who called the raft of amendments protecting crown corporations the "dumbing down of the act."[177]

(One serious problem is that the government creates new corporate entities that are not covered by the *ATIA*, some of which change their names at times; even the Information Commissioner's office says it can barely keep track of them all – yet another reason they should be added to the law by descriptive criteria rather than by caprice and schedules.)

---

[175]Canada Development Investment Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Cape Breton Growth Fund Corporation, Enterprise Cape Breton Corporation, Marine Atlantic Inc., Old Port of Montreal Corporation Inc., Parc Downsview Park Inc., Queens Quay West Land Corporation, Ridley Terminals Inc. Also that year, in February 2005, the President of the Treasury Board, Reg Alcock, tabled in the House of Commons a report on Crown corporation governance entitled *Meeting the Expectations of Canadians — Review of the Framework for Canada's Crown Corporations*. The report contained 31 measures designed to significantly strengthen the governance and accountability regime for Canada's Crown corporations.

[176]The Asia-Pacific Foundation of Canada, Canada Foundation for Innovation, Canada Foundation for Sustainable Development Technology, Canada Millennium Scholarship Foundation, The Pierre Elliott Trudeau Foundation[177]Canada Gazette, Sept. 21, 2005

[177]*Public gains ability to peek inside Crown corporation files starting today*, by *Dean Beeby*. Globe and Mail. Sept. 1, 2007. Unsurprisingly, a Canada Post office spokesman declined to tell the newspaper the cost of its *ATIA* unit, saying that information itself would have to be requested under the Act – a prime example of how foregoing the routine release route for processing *ATIA* requests wastes public funds.

WHO "CONTROLS" THE RECORDS?

This is a key question, often overlooked. The purpose clause of Canada's *Access to Information Act* states: "2 (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution [...]" Some similar term is used in other FOI laws in the world, such as that of Thailand: "'official information' means an information in possession or control of a State agency."

Most Canadian provinces generally echo the wording of the British Columbia FOI law: "This Act applies to all records in the custody or under the control of a public body." (Although Ontario says only control and not custody.) Yet a problem can arise at times: How exactly does one define "control"?

This occurred in 2006 when I filed an FOI request to the University of British for records of three of UBC's wholly-owned corporate entities (its real estate company, its endowment manager, and its scientific spinoff company manager). UBC refused, claiming that the entities are "independent," and I appealed to the B.C. Information and Privacy Commissioner.

All sides agreed that the entities themselves were not formally included in the law's criteria, indeed, but I still pleaded that UBC had "custody or control" of its subsidiaries' records. This prompted weeks of fastidious arguments over who had actual physical custody of the records – the subsidiaries or UBC.

In 2009 the Commissioner's delegate ruled the records should be released, writing, "UBC is found to have control of the requested records.... All three bodies were entities created and owned 100 per cent by UBC and accountable to it."[178] (Hence the "custody" issue was moot and not dealt with.) The case was won mainly because had I quoted from a dozen of UBC's own official websites, which boasted that UBC had a high degree of control over its entities and had appointed their boards.

UBC then appealed the order to judicial review, and a B.C. Supreme Court Justice overturned it, ruling that such entities were not covered by the *FOIPP Act* because one must not "pierce the corporate veil." That month in response, the

[178]Order F09-06 – https://www.oipc.bc.ca/orders/993 For more on this case, see the chapter on FOI in British Columbia later in this report.

Commissioner publicly wrote to the government to urgent plead that the law be amended to cover such entities (without success).

Careless ambiguities can prompt disputes around the world. For example, the RTI rating system notes of Pakistan's FOI law: "Very confusing as to 'scope' here. Information is defined as 'based on record' which is then defined by reference to section 6, which has a very limited definition. The 'right of access to information' refers to information being 'held by or under the control of' any public body, which is much broader."[179]

The obvious solution to such needless, costly and enervating disputes is for the state to more clearly and explicitly define its legal terms in the FOI statute - such as what exactly is record "control" and carefully detailed criteria on which entities are covered.

GLOBAL COMMENTARY

• Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

For purposes of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).

Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document . . .

• Article 19, *Model Freedom of Information Law*, 2001:

6. (1) For purposes of this Act, a public body includes any body: (a) established by or under the Constitution; (b) established by statute; (c) which forms part of any level or branch of Government; (d) owned, controlled or substantially financed by funds provided by Government or the State; or (e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their

[179]https://www.rti-rating.org/country-data/Pakistan/

statutory or public functions.

(2) The Minister may by order designate as a public body any body that carries out a public function. (3) For purposes of this Act, a private body includes any body, excluding a public body, that: – (a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality.

• European Union, *Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents*, 2001:

This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

• United Nations Development Agency (UNDP), *Right to Information Practical Guidance Note*, 2002:

A 'public body' is defined by the type of service provided and includes all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organizations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).

• Council of Europe, *Recommendations on Access to Official Documents*, 2002:

Public authorities shall mean: i. government and administration at national, regional or local level; ii. natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law. .... In some member states this notion also includes natural or legal persons performing services of public interest, or private entities financed by public funds.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

Key Principles - Does the law cover records held by private bodies as well as public bodies? If not, are the records held by semi-governmental or semi-autonomous entities, like electricity boards, adequately covered by the definition of "public information"?

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions, regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right.

• World Bank, *Legislation on freedom of information, trends and standards*, 2004:

All entities that are part of the executive branch, no matter at what level, should be covered. Many freedom of information laws also include the legislative and judicial branches, subject to certain exceptions.

Constitutional and statutory bodies should also be included, as well as bodies owned, substantially financed, or controlled by government.

• Open Society Justice Initiative, *Access to Information, Monitoring Tool Overview*, 2004:

2. All bodies performing public functions should be obliged to respond to information requests. All government bodies, including the legislative and judicial branches, should be under a duty to provide information to the public, as should all bodies performing public functions. The test for whether a body performs a public function should rest on the nature of its operations and/or its receipt of public funds. Bodies such as privatized telecommunications companies or private universities would fall under this definition.

• Transparency International, *Tips for the Design of Access to Information Laws*, 2006:

Specify which private bodies are covered: Some freedom of information laws also oblige private entities to provide information, particularly where these private bodies receive public funds and/or perform a public function and/or hold information that is necessary for the defence of other rights, such as the right to education or health or participation in public life. To ensure clarity on which bodies are bound to respond to requests for information, they should either be named within the law or the law should specify the criteria to be applied when determining when a public body has an obligation to respond and which of the information it holds must be made public.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information recommendations*, 2007:

All participating States should adopt freedom of information legislation that gives a legal right to all persons and organizations to demand and obtain information from public bodies and those who are performing public functions.

• Organization of American States, *Model Law on Access to Information*, 2010:

3. This Law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake.

• House of Commons [United Kingdom] Justice Committee *Post-legislative scrutiny of the UK Freedom of Information Act 2000.* First Report of Session 2012–13:

36. The right to access information must not be undermined by the increased use of private providers in delivering public services. The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well.

37. We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of

the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced. We recommend that the Information Commissioner monitors complaints and applications for guidance in this area to him from public authorities.

• African Union, *Model Law on Access to Information for Africa*, 2013:

Definitions - "public body means any body: (a) established by or under the Constitution; (b) established by statute; or (c) which forms part of any level or branch of government; relevant private body means any body that would otherwise be a private body under this Act that is: (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service.

OTHER NATIONS

The public and media of most other nations would simply not accept the dismally limited scope of entity coverage found in Canada's *Access to Information Act*. Other statutes and practices serve as living examples to be studied for the answer to a fair and essential question: did their broader coverage actually cause the myriad "harms" that opponents of *ATIA* reform in Canada so direly warn of? They could also be reminded that coverage of an entity does not mean that all of its records will then be revealed; many FOI statutory exemptions still apply, e.g., to prevent harms to commercial interests, privacy, law enforcement.

I am not asserting that a reformed *ATIA* should necessarily cover every single kind of entity noted below, but just that Canadians be aware of the FOI reality in the rest of the world. A political realist would predict that it would take decades, if ever, for Canada to fully catch up to international standards. Still, we must do far better.

From my brief survey of 128 world FOI statutes, I note the following are valuable features of other laws, most of which appear in the "definitions" or "interpretation' sections," and nearly all are missing from Canada's *ATIA*:[180]

• The law explicitly covers organizations financed at least 50 percent, or in full, by government (i.e., operating costs, not business contracts per se), entities more independent than crown corporations:

> In the FOI laws of 12 Commonwealth and 41 non-Commonwealth nations

• The law explicitly covers a "crown corporation," or a "public services corporation" owned in full or part by government; or a "statutory corporation," or a corporation "established by constitution," or controlled by government (sometimes by political appointments to their boards):

[180]Several of the provisions cited here overlap with others, are confusing, and impossible to neatly categorize; some nations include coverage for private entities funded by the state budget and exercising public functions, whereas others use the connective or. Some of the intents are not entirely clear, even in English originals, and translations can compound ambiguities. Yet this list could serve as a beginning for discussion purposes.

In the FOI laws of 13 Commonwealth and 41 non-Commonwealth nations

• The law explicitly covers private entities performing "public functions" and/or "vested with public powers":

In the FOI laws of 10 Commonwealth and 63 non-Commonwealth nations

Commonwealth nations

Canada has fallen far behind its Commonwealth partners on entity coverage. Even one of the most conservative FOI statutes, that of Australia (also passed in 1982), includes a fuller description of entities to be covered than does the Canadian *ATIA* in which explicit mention of "a public purpose" is absent.[181] In the Australian Act's interpretation:

> ***prescribed authority*** means: (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order in Council, other than: (i) an incorporated company or association; or (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act [...]

• New Zealand prescribes coverage for official information held by public bodies, state-owned enterprises, and bodies which carry out public functions. Section 2(5) of the Act deems information held by private contractors that perform work for a government agency to be within the Act's scope.

• The commendable FOI law of India explicitly covers all public authorities set up by the constitution or statute, as well as bodies controlled or substantially financed by the government, and non-government organizations which are substantially funded by the state. [182]

• Kenya's FOI statute has exemplary broad coverage for private entities covered by the Act, in its Interpretation:

> "Private body" means any private entity or non-state actor that (a) receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources); or
>
> (b) is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the

[181]Yet the RTI Rating system noted of coverage in the FOI law of Australia (which it overall ranked 67, even below Canada's rank of 58): "There is a patchwork of clauses relating to various tribunals, agencies and commissions, most of which are only subject to the law if included by regulation. The regime is far too convoluted and riddled with exceptions to merit a point here."

[182]The Justice Initiative noted of India in 2008: "However there is little clarity and hardly any implementation guidelines for identifying bodies in the private and NGO sectors under these criteria. . . . The RTI Act, section 2(f), extends the right of access to 'information' relating to private bodies, even when they are not covered directly by the RTI Act, if a public authority can access the information under any other law in force. A citizen must seek such information from that public authority and not from the private body directly."

information may assist in exercising or protecting any right

• As might be expected, entity coverage in the FOI law of the United Kingdom is not so broad as those above, but it does include companies "wholly owned by the Crown," and a right to access records that are held elsewhere: "3 (2) For the purposes of this Act, information is held by a public authority if (a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by another person on behalf of the authority."

The UK government has at times consulted the public on whether the scope of its FOI law should be extended to private bodies that are carrying out functions of a public nature, or are providing under a contract with a public authority a service which is a function of that authority. Examples of entities that could be covered include UK professional regulators (e.g., Law Society, Bar Council), and the National Air Traffic Services (the equivalent of Canada's NAVCAN, which is not covered under our *ATIA*). The UK consultation paper's introduction of 2007 is still relevant:

> The Government believes that there are good reasons for reviewing coverage of the Act: some organisations receive large amounts of taxpayers' money to carry out functions of a public nature but are not currently subject to the Act. In fulfilling those functions it would seem appropriate that they be subject to the same scrutiny as public authorities within the scope of the Act. To include such organizations within the scope of the Act would increase transparency in the distribution and expenditure of public funds.[183]

• Most remarkably, the FOI law of South Africa includes a provision rare in a Commonwealth statute - and also noted in that nation's Constitution - that allows individuals and government bodies to access records held by private bodies when the record is "necessary for the exercise or protection" of people's rights. Alasdair Roberts observes this fact but adds that, due to intense and well-funded opposition from the private sector, "We know that any attempt to introduce comparable legislation in an established democracy would be doomed to failure."[184]

[183]UK Ministry of Justice, Freedom of Information Act 2000: Designation of additional public authorities. Consultation Paper CP 27 Published on 25 October 2007. The UK paper adds: "Some non-public authorities consider that they carry out work of a public nature and would readily accept that they should be included within the scope of the Act." Such a ready acceptance from similar entities in Canada that have so long tenaciously opposed ATIA coverage would be astonishing but always welcome.

[184]Roberts, Blacked Out, op.cit.

FOI AND PRIVATIZATION IN SCOTLAND

Scottish Information Commissioner Kevin Dunion launched a strong attack on the way privatization removes the public's right to know. In 2007 he ordered NHS Lothian to release the full contract it signed with Consort Healthcare to build and operate the new Edinburgh Royal Infirmary.

The procuring authority, NHS Lothian, had claimed that the entire contract was commercially confidential. "However, other than broadly indicating why Consort Healthcare did not wish the information disclosed, NHS Lothian provided me with no arguments to justify withholding the contract," said Mr. Dunion. More than 5,000 pages of the contract documentation only came to light late in the investigation.

He then went further, calling for a re-think of the law to ensure that the public's right to know "follows the money" when services are transferred into the private sector, although he confirms that genuine commercial confidentiality should be protected. "When council housing is transferred to a housing association or when a charitable trust is established to run local authority leisure and recreation services, local people and employees may find that they have lost freedom of information rights at a stroke, as these bodies are not regarded as public authorities.

"However, in recent investigations I have found that contracts to build schools and hospitals can run to thousands of pages, and that authorities are able to withhold these on the grounds of cost or attempt to argue that the whole contract is confidential. . . . Measures can be taken to ensure that the new trusts are publicly owned and there could be a requirement to publish PPP contracts subject to safeguarding genuinely confidential elements."

- *The public must know, says FOI chief: Commissioner claims private finance is threat to legislation*, by Robbie Dinwoodie. The Herald (Glasgow), October 25, 2007

John Cain, former premier of the Australian state of Victoria, also wrote in favour of more partnership transparency:

> If business wants to get into this [government] work, then it has to recognise that the public who pays through its taxes is entitled to know what the deal is. If we had known in 1982 when we legislated on FOI how the commercial intrusion into government functions was to evolve, then the exemption to disclosure around the concept of 'commercial-in-confidence'' would have been very different. For some years business has demanded confidentiality in so many aspects of its dealings with government in competitive contracts or tenders. It needs to moderate these demands. [185]

• Regarding ownership level for entities, a few jurisdictions such as Fiji, Scotland and the United Kingdom have erred in placing it at 100 percent government-owned in their FOI laws. But in reality control can exist at 51 percent ownership and often at much lower levels. We must always keep in mind that some entities, regrettably, will ever seek FOI escape hatches; therefore I believe it is crucial that these be at least 50 percent publicly owned (as in FOI laws of both Iran and Israel, interestingly), and not fully owned, for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as a dexterous means to elude FOI coverage.

In the fine FOI law of Sri Lanka (RTI-ranked 4th), in Definitions, "'public authority' means [....] (e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold 25% or more of the shares or otherwise has a controlling interest."

Sudan goes one step further in its FOI statute whereby, in Article 9(1), any person can obtain records from "companies in which the government participates *whatever* its equity stake." (Italics mine.) This may work for Sudan, but applying a provision such as this to Norway, or any other country with a large sovereign wealth fund, would be challenging.

In the end, perhaps, rather than setting an arbitrary number, FOI should apply whenever a government exercises effective "control" over an entity, regardless of the total ownership stake.

• A few statutes split entity coverage in perplexing ways. For example, Albania, Luxembourg, Togo and Malawi seem to cover entities that perform public functions but not necessarily those that receive public funding. Visa versa - Ethiopia, Yemen and Seychelles covers private entities that are state financed but not for those performing public functions. In Guyana, "public authority" includes any corporate body which exercises government function or acts on behalf of the state, but only applies to private bodies receiving funds

[185] *Fresh breath for freedom*, by John Cain. Herald Sun (Australia), August 14, 2008. He also called for the Victorian public service to be re-educated into dropping its secretive culture of opposing FOI requests.

from the state if the state controls them.

• When Sierra Leone's FOI law was in its draft stage, it illustrated an important distinction that can easily be misunderstood: truly "private" entities need not worry that all of their records would be opened to public scrutiny, for only some might be. In the bill, for instance, Clause 6 prescribed that a "public body" is defined as, amongst other things, "(e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions."

The organization Article 19 pointed out this means that anyone can submit an information request that is related to its public activity without having to show that the information is needed to enforce a right, as is the case in relation to information requests submitted to an "ordinary" private body. The latter is defined in Clause 6 as any body that "(a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality."

"This is a broad definition that ensures that access can be gained to information held by a corporate body or any business undertaking whenever this is necessary to enforce a right," noted Section 19. "This may be used, for example, to obtain access to information from factory concerning dangerous substances it emits into a river from which drinking water is taken."[186]

Non-Commonwealth nations

Entity coverage is generally much wider in the FOI statutes of non-Commonwealth nations, particularly Eastern European. The definitions of "public" and "private" bodies vary widely amongst these laws, and some terms are not entirely clear, maybe partially due to translation issues. (Argentina's FOI law, for example, applies to "any agency, entity, organism or company established under the jurisdiction of the Executive Power," while the Armenian statute refers to "organizations of public importance.")

• The FOI statute of Mexico (ranked #2 on the RTI chart) has most of what one could hope for:

> Article 23. The regulated entities who are obliged to make transparent and ensure effective access to their information and protect personal data held thereby are: any authority, entity, body or agency of the Legislative, Executive and Judicial branches, autonomous bodies, political parties, trusts and public funds, as well as any individual, legal entity or union who receives and uses public resources or performs acts of authority of the Federation, the States and the municipalities.

• The FOI statutes of France and Germany are amongst the least open in Europe (ranked #107 and #120 on the RTI chart), and yet even they well surpass Canada's in coverage of entities. The French law allows access to records from "public institutions or from public or private-law organizations managing a public service" (which might not even be owned by the state, just be contracted by it). The German law prescribes:

[186]Sierra Leone's draft Access to Information Bill Statement of Support, by Article 19, London, 2005

> 1.(1). This Act shall apply to other Federal bodies and institutions insofar as they discharge administrative tasks under public law. For the purposes of these provisions, a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law.

• A few nations (both within and without the Commonweath) prescribe FOI access be applied to an entity if it is deemed necessary to protect a human right, such as in Kenya, South Sudan, Iceland, South Africa, and Mozambique. In the FOI law of Rwanda: "13: Private organs to which this Law applies are those whose activities are in connection with public interest, human rights and freedoms. A Ministerial Order shall determine private organs to which this Law applies."

• Two nations that many readers might not be quick to historically associate with transparency nonetheless have fuller entity coverage in their FOI statutes than are found in Canadian ones.

In the 2009 statute of the Islamic Republic of Iran (ranked #94 in the RTI rating system), it states: "K. Institutions liable under the law: Private institutions, public institutions and private institutions providing public service." In Article 2 part H, the definition of public institution includes "each institution, company or foundation whose whole share or more than 50 percent of its share belong to the state or government."

Coverage in the Russian Federation's FOI law of 2009 (ranked #44 in RTI) includes "information, created by government bodies, their territorial bodies, bodies of local self-government, or organizations subordinate to government bodies."

Overall, of course, it would be better to follow the examples of emerging democracies such as Moldova, Bulgaria and Guatemala rather than Iran or Russia. I am well aware that the latter two nations and some others have grievous human rights problems and I would not wish to endorse them here as models for anything else. My point here is just to show that the global openness drive is so prevalent that even these nations endorse the subsidiary principle (on paper, while I do not know how they are functioning in practice), along with advanced democracies.

• Some nations extend FOI to entities that manage public functions, indeed, but only in a narrow, qualified way. In Israel, for instance, "public authority" signifies:

> J. Any other agency fulfilling a public function, which is a controlled agency as defined in Section 9 of the State Comptroller Law (5718-1958), as determined by the Minister of Justice, with the approval of the Knesset Constitution, Law, and Justice Committee; such a ruling may apply either to all the activities of the agency, or only to certain activities.[187]

• Regrettably, the United States FOIA does not cover private bodies which are substantially

[187]In practice, the minister has done so for some such bodies, but not all. The Justice Initiative also noted that until 2007, the Israeli FOI Law did not apply automatically to government-owned corporations. The law was amended in 2007 and now includes all government owned corporations, except for some specifically excluded by the Justice Minister with consent of parliament.

publicly funded or which undertake public functions. Yet there is very broad entity coverage in most American states' laws.

• With the goal of fair economic competition – strong in former Soviet Communist bloc nations - access to entities holding a monopoly position is a special feature in the FOI laws of Ukraine, Azerbaijan, Kazakhstan, Poland, Armenia and Estonia.[188] In Azerbaijan, for instance:

> 9.3. The below listed are considered equal to the information owners: 9.3.1. legal entities holding the dominant position, as well as holding a special or exclusive right at the products market, or being a natural monopoly – in relation to the information associated with the terms of offers and prices of goods as well as the services and changes in such terms and prices;
>
> 9.3.2. Fully or partially state-owned or subordinated non-commercial organizations, off budget funds, as well as the trade associations where the state is a member or a participant – in relation to the information associated with the use of the State Budget funds or properties contributed to them.

Poland's FOI law explicitly adds the concern of consumer rights, for its Act covers "legal persons, in which the State Treasury, units of local authority or economic or professional local authority hold dominant position in the understanding of the provisions of competition and consumer protection."

• Political parties are included in the scope of FOI law in Mexico, Nepal, Poland and Lithuania (while the last two also mention trade unions). In Lithuania, Article 6(7) of the ATI law states:

> Other institutions or enterprises, as well as political parties, trade unions, political, public and other organizations, shall provide public information producers and other persons with public information concerning their own activity, according to the procedure established in the bylaws of these institutions, enterprises or organizations.

• Kazakhstan's FOI law has a rare level of unique and specific detail regarding coverage:

> 8(6) legal entities possessing information concerning ecological situation, emergency situations, natural and techno genic catastrophes, their forecast and consequences, fire security, sanitary-epidemiological and radiation conditions and food security and other factors which create a negative impact on health and security of people, settlements and industrial objects.

• The question of scope concerns entity exclusion as well as inclusion. Several nations exclude some of their security-intelligence agencies from the FOI law's coverage, such as the United Kingdom, India, Jamaica,

[188]The Netherlands' FOI statute is a unique case, as noted by the Justice Initiative in 2008: "Dutch law treats industries, such as electricity providers, that include both private and public operators in an interesting fashion. According to Dutch administrative law jurisprudence, as long as at least one of the companies is public, and thus subject to the FOI Act, the Act applies also to all of the private companies - presumably flowing from notions of parity and fair competition. However, as soon as the last public company in an industry is privatized, transparency is gone."

Columbia, Israel, Bangladesh and Mongolia. It is well argued that such total exclusions are needless because such sensitive information can already be shielded by exemptions in the law on that topic (as most nations do).[189] Yet Bangladesh's law has a remarkable override:

> 32. Inapplicability of this Act in case of certain organisations and institutions.— (1) Notwith-standing anything contained in any provisions of this Act, this Act shall not apply to the organisations and institutions which are involved in state security and intelligence mentioned in the Schedule. (2) Notwithstanding anything contained in sub-section (1), this section shall not apply to such information pertaining to corruption and violation of human rights in the above-mentioned organisations and institutions.

• Finally, let us consider the vast scope found in the FOI statute of Liberia (ranked 9th in the RTI rating), perhaps the most detailed and ambitious seen to date:

> Section 1.6 Scope of Act: This Act shall apply to and cover:
>
> (a) All public authorities and bodies at all branches and levels of the Government, including but not limited to ministries, bureau, departments, autonomous agencies, public corporations, commissions, committees, sub-committees, boards, military and paramilitary institutions, and any other related bodies supported in whole or in part by public resources;
>
> (b) All private bodies performing public functions and or providing public services, including academic institutions, hospitals and other health service providers; telecommunications operators, banking institutions, and similar entities;
>
> (c) All private bodies that receive public funds or benefits of whatever nature
>
> DEFINITIONS:
>
> 1.3.5 "Private Bodies" include any entity, business or otherwise, owned by private persons;
>
> 1.3.6. "Public Authorities" means any agency, ministry, or institution of the Government of Liberia or person acting on behalf of such agency, ministry or institution;
>
> 1.3.7. "Public Bodies" refer to all agencies, entities, corporations, bodies and other institutions owned, wholly or substantially by the Government of Liberia.
>
> 1.3.8. "Public Function" refers to any act normally carried out by the Government or any of its agencies, ministries and institutions.
>
> 1.3.9. Public Services" means services rendered for or to the general public at cost or on gratis, and includes sanitation, health, transportation,

[189]Canada does not exclude any of its security intelligence agencies; one reason may be there is nothing to fear, since our ATIA law is so very ineffectual – i.e., it is routine to receive documents more than 95 percent redacted – that no one need worry of any harmful information releases from it. Meanwhile in America, the Federal Bureau of Investigation and the Central Intelligence Agency at times have pleaded, without success so far, to be excluded from the U.S. FOIA entirely.

banking, education, broadcasting and telecommunications, etc.

CANADIAN COMMENTARY

• Bill C-39, introduced by NDP MP Barry Mather, Canada's first freedom of information bill, 1965:

Coverage: Every administrative or ministerial commission, power, and authority

• Bill C-225, the Right to Information Act, introduced by Conservative MP Ged Baldwin, 1974:

2. In this Act, (a) "public business" includes any activity or operation carried on or performed in Canada or elsewhere by the government of Canada, by any department, branch, board, commission or agency of that government, by any court or other tribunal of Canada, or by any other body or authority performing a function of the government of Canada [....]

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

2.3. The Committee recommends that all federal government institutions be covered by the *Access to Information Act* and the Privacy Act, unless Parliament chooses to exclude an entity in explicit terms. Thus the Committee recommends the repeal of Schedule I to the *Access to Information Act* and the Schedule to the Privacy Act. The criteria for inclusion should be as follows: Firstly, if public institutions are exclusively financed out of the Consolidated Revenue Fund, they should be covered. Secondly, for agencies which are not financed exclusively in this way, but can raise funds through public borrowing, the major determinant should be the degree of government control.

2.7. That 'if the Government of Canada controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then both the *Access to Information Act* and the Privacy Act should apply to such an institution.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 87: That all federal government institutions, including Special Operating Agencies and Crown Corporations, be covered by the *Access to Information Act* unless Parliament chooses to exclude an entity in explicit terms.

Recommendation 92: That where the federal government controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then the *Access to Information Act* should apply to it.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

It is recommended that the law be amended to remove any doubt that ministers' offices are, in fact, included in the term "government institution" and subject to the access law [...] The law should be extended to cover all federal government institutions, including: Special Operating Agencies; any institution to which the federal government appoints a majority of governing body members [....]

• *A Call for Openness*, report of the MPs' Committee on Access to Information, chaired by Liberal MP John Bryden, 2001:

5. We recommend that the *Access to Information Act* be amended to include within its scope any institution that is: established by Parliament; publicly funded; publicly controlled; or that performs a public function. . . . Records under the control of Ministers' offices should be included within the scope of the Act.

• Information Commissioner John Reid, *Blueprint for Reform*, 2001:

The mechanism which is recommended is this: Cabinet should be placed under a mandatory obligation to add qualified institutions to Schedule I of the Act. Any person (including legal person) should have the right to complain to the Information Commissioner, with a right of subsequent review to the Federal Court, about the presence or absence of an institution on the Act's Schedule I. As at present, the Commissioner should have authority to recommend addition to or removal from the Schedule and the Federal Court, after a de novo review, should have authority to order that an institution be added to or removed from the Schedule.

The *Access to Information Act* should deem that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts. [....] In particular, the right of access in s. 4 should explicitly state that it includes any records held in the offices of Ministers and the Prime Minister which relate to matters falling within the Ministers' or Prime Minister's duties as heads of the departments over which they preside.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians. ATIA* Review Task Force report, 2002:

2. Revisiting Coverage: Government Institutions. 2-1 The Task Force recommends that: [a] the Act be amended to set out criteria to be taken into account in determining what institutions should be covered under the Act; [b] the criteria provide that institutions may be covered if government appoints a majority of board members, provides all of the financing through appropriations, or owns a controlling interest; or the institution performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security; except where coverage would be incompatible with the organization's structure or mandate.

3-3. That 'the government's Policy on Alternative Service Delivery be amended to ensure that arrangements for contracting out the delivery of government programs or services provide that: records relevant to the delivery of the program or service that are either transferred to the contractor, or created, obtained or maintained by the contractor, are considered to be under the control of the contracting institution; and the Act applies to all records considered to be under the control of the contracting institution, and the contractor must make such records available to the institution upon request.

• Information Commissioner John Reid,

model *ATIA* bill, 2005 (underlined parts are Mr. Reid's amendments to the existing Act):

49 (3). Subsection 77(2) of the Act is replaced by the following: (2) Subject to subsection (3), the Governor in Council shall, by order, amend Schedule I so that it includes (a) all departments and ministries of state of the Government of Canada; (b) all bodies or offices funded in whole or in part from Parliamentary appropriations; (c) all bodies or offices wholly- or majority- owned by the Government of Canada; (d) all bodies or offices listed in Schedules I, I.1, II and III of the Financial Administration Act; and (e) all bodies or offices performing functions or providing services in an area of federal jurisdiction that are essential to the public interest as it relates to health, safety or protection of the environment.

(3) The Governor in Council may not add to Schedule I (a) the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, or any component part of these institutions; or (b) the offices of members of the Senate or the House of Commons.

• Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005:

Since the Act came into force, government functions have been increasingly outsourced to consultants or contractors, or assigned to alternate service delivery organizations, such as NAVCAN. This suggests that improvements should be made to the federal access to information system to ensure that more entities that perform government-like functions are accountable under the Act.

• Justice Gomery report, *Restoring Accountability*, 2006:

It sees little reason for the large number of federal government institutions that are exempted from the provisions of the [*ATI*] Act. It supports an amendment to the Act that would require the Government to add virtually all remaining federal government institutions to Schedule I of the Act, which sets out the institutions that are covered. [....]

Since changes to Schedule I would be made by government regulation after amendments to the Act are passed by Parliament, the Commission agrees that the amendments to the Act should include the right to make a complaint to the Information Commissioner if the Government fails to add any particular government institution or institutions to the list.

• The Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

Recommendation: Every jurisdiction in Canada should amend their access to information law so that it covers all public authorities. This should, in particular, include the executive, legislature and judiciary, as well as statutory boards and tribunals, crown corporations, and private entities that perform a public function or receive significant public funding.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for*

***Transparency: Recommendations to Modernize the Access to Information Act*, 2015:**

Recommendation 1.1 -

The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:

~ institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);

~ institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);

~ institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);

~ institutions established by statute (such as airport authorities); and

~ all institutions covered by the Financial Administration Act.

Recommendation 1.2 -

The Information Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries.

Recommendation 1.3 -

The Information Commissioner recommends creating an exemption in the Act for information related to the parliamentary functions of ministers and ministers of State, and parliamentary secretaries as members of Parliament.

Recommendation 1.4 -

The Information Commissioner recommends extending coverage of the Act to the bodies that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.

Recommendation 1.5 -

The Information Commissioner recommends creating a provision in the Act to protect against an infringement of parliamentary privilege.

Recommendation 1.6 -

The Information Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.

Recommendation 1.7 -

The Information Commissioner recommends that the Act exclude records in court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.

In 2004 the B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that "outsourcing" initiatives by the B.C. government were eroding the B.C. FOI law. He recommended that the law be amended to clarify that records created by or in the custody of any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The same principle should be applied to the federal ATI Act.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 1 -

That in the first phase of the reform of the *Access to Information Act*, the Act be amended in order to identify the institutions subject to the Act according to criteria, which shall include the following:

- institutions that are publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);

- institutions that perform a public function, including those that meet one of the following criteria:

1. The institution performs a public function for the federal government in one of its areas of jurisdiction, such as health and safety, the environment and economic security;

2. The institution has the power to establish regulations or standards in an area of federal jurisdiction;

3. The institution is responsible for carrying out a public policy on behalf of the federal government;

- institutions established by statute (such as airport authorities);

- all institutions covered by the Financial Administration Act.

(Commissioner Legault's 2015 recommendations 1.2, 1.3, 1.4, 1.5, 1.6 and 1.7 above were replicated by the ETHI Committee in 2016.)

• Privacy and Access Council of Canada (PACC), Calgary, Submission to Senate on Bill C-58, October 2018:

Recommendation: Expand Section 81 to stipulate that a "government entity" includes any corporate entity, including non-profit and private sector companies, established to conduct business on behalf of government or a public body, and that such entities do not constitute third parties.

• Democracy Watch, Submission to Senate review of *Bill C-58*, 2018:

Recommendation 1. Any type of record created by any entity that receives

significant funding from or is connected to the government, or was created by the government and fulfills public interest functions, should be automatically covered by the access to information law and system (as in the United Kingdom)

CANADIAN PROVINCES

Most provinces contain much broader definitions of what is a "public body" for FOI purposes than is found in the federal *Access to Information Act*, while they list many of their entities by name in schedules as well. Yet even the most enlightened provinces fall far short of global FOI legal standards, on many grounds.

Canada's best FOI law, that of Newfoundland (2015), has the strongest criteria of entity ownership, in its definitions, where "'public body' means [....] ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown." Yet it should be made unmistakably clear that all *subsidiaries* of public bodies are covered too.

Public functions are a vital factor for inclusion, and Newfoundland is the only province that somewhat alludes to it, within in its definitions of "public body." Yet the principle below should be worded more broadly than "government responsibility," and applied across all government beyond the local (as does the rest of the FOI world):

> (vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility.

Sometimes funding is one criteria for inclusion. In New Brunswick's FOI law, a public body means "any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund, as set out in the regulations."

Control over appointments can also be a factor. In Nova Scotia's law, a public body includes

> a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which (A) are appointed by order of the Governor in Council, or (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown.

Several other provinces have somewhat similar provisions, and both factors are present in Quebec's law:[190]

> Government agencies include agencies not contemplated in sections 5 to 7 to which the Government or a minister appoints the majority of the members, to which, by law,

[190]Interestingly, Quebec's FOI law, in its definition of "public bodies" covered by the Act, is the only one that includes the provincial Lieutenant-Governor, an extension of the British Crown.

> the personnel are appointed in accordance with the Public Service Act (chapter F-3.1.1), or whose capital stock forms part of the domain of the State.

Automatic coverage of all present and future federal foundations is needed for the *ATIA*, and a precedent can be found in Yukon's FOI law, where public body is defined as "each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the Government of the Yukon."

The British Columbian FOI law covers self-governing bodies of professions or occupations (listed in Schedule 3), such as doctors and lawyers – which is advisable for all provinces.

Regrettably, when a crown corporation is technically "privatized" completely - even when it is still owned by government and reports to it - FOI rights can be lost. Examples include the B.C. Ferry Corporation and Ontario Hydro, although both were returned to the FOI fold at the choice of a new administration. Former Ontario Information and Privacy Commissioner Ann Cavoukian called on the provincial government to bring all organizations primarily funded by the province under the FOI law, but this did not occur.

"Let the Record Show. . ."

CHAPTER 5 - RECORD CREATION AND RETENTION

Are public officials obliged to create records to document their actions, and to preserve the records they create?

A Conservative government will: Oblige public officials to create the records necessary to document their actions and decisions.

- Conservative Party of Canada, election pledge, 2006 (Promise unfulfilled.)

In its purpose clause, Canada's *Access to Information Act* grants the public access to information in "records." Yet this right to obtain records is meaningless if they have not been created in the first place, were not retained, or cannot be located. Such a system is as resistant to accountability as any autocracy of the past.[191] Put simply, if there will be no records, then all the other chapters in this book that discuss the administration of records would be pointless.

Some well argue that the greatest single threat to the FOI system today is "oral government." This occurs when officials no longer commit their thoughts to paper, and convey them verbally instead, to avert the chance of the information emerging in response to FOI requests.[192] It is more often the case for the higher level policy documents than for operational records.

This problem has been widely known for over three decades. Since the *ATIA* was passed, journalist Stevie Cameron noted in 1989, access requests caused the government many embarrassments: "As a result, many top-level briefings are done orally. Very little

[191]Such anti-FOI "oral government" culture was faintly foreshadowed in George Orwell's dystopian novel *1984* (published 1949). Here, Ministry of Truth propaganda staffer Winston Smith drops politically undesirable records into a pipe - called "the memory hole" - whereupon they are promptly incinerated, all with this goal: "Those who control the present control the past, *and* those who control the past control the future." This was the chilling outcome: "Everything faded into mist. The past was erased, the erasure was forgotten, the lie became truth. Every record has been destroyed or falsified. . . . History has stopped. Nothing exists except an endless present in which the Party is always right."

[192]Yet Alasdair Roberts takes a somewhat brighter view, noting that "one recent Canadian government study that examined documents produced before and after the *Access to Information Act* was passed found no evidence that the law had any influence on record keeping by government officials." Another key question arose, he adds: would officials now censor themselves in email? "This fear has proved to be overstated. E-mail has become too deeply entrenched in contemporary work life for self-censorship to be an effective strategy: Writing elliptically takes time, and undermines the effort to get work done." - Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006.

paper floats around, paper that could come back to haunt the government in a later news story."[193]

Information Commissioner John Grace reported in 1994, "To this day, some officials have no hesitation in admitting, even advocating, that important matters simply be not written down or preserved."[194] A decade later, Information Commissioner John Reid noted the same ongoing problem:

> A deeply entrenched oral culture exists, tolerated if not encouraged, at the most senior levels of government. The government's policy on the management of government information holdings (which is a good policy) is largely ignored in practice and accountability for its enforcement/implementation is so diffuse as to be non-existent.

The 2002 Treasury Board task force also found that some government agencies question whether the *ATIA* "may undermine transparency by discouraging officials from committing views to paper" and from providing frank advice to ministers for "fear of being misinterpreted" when documents are released.[196] (Whenever officials claim they want to withhold records because of fear the public might "misunderstand" them, it is more often the case they fear the public will understand them all too well.)

Another game, often observed at premiers' offices across Canada, is the use of post-it sticky notes to avoid a paper trail. Such notes affixed to documents can contain the most important information on a topic. Yet when an FOI request comes in, some officials remove the sticky notes, photocopied the denuded original, mailed that copy to the applicant, and then later reattached the notes to the originals – all in the false assumption that the sticky notes are not covered by FOI laws (or knowing they are nonetheless).[197] Officials can also write penciled notes that can easily be erased.

Beyond the gap in public accountability, there is a second grievous loss for the public interest: a lack of written records leads to poor governance, and when that happens we are all deprived. Conversely, the benefits of good record keeping are felt internally as much as externally. (As Confucius put it, "The strongest memory is not so reliable

---

[193]Stevie Cameron, Ottawa Inside Out. Toronto: Key Porter, 1989

[194]Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, Ottawa, 1994

[195]Information Commissioner Reid, *Submission to the Commission of Inquiry into the Sponsorship Program and Advertising Activities*. Ottawa, Oct. 14, 2005. Indeed, the reality still is that public servants who delete important emails know they are very unlikely to be caught or publicly exposed, and if so, still more unlikely to be seriously disciplined even if there were legal penalties; they could plead ignorance of the rules, or technological ineptitude.

[196]Treasury Board Secretariat and Justice Department of Canada, *Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force*. Ottawa, 2002

[197]In the British Columbia FOI regulations, any marginal note made upon a document transforms that record into 'a new record,' and a separate photocopy is made of it for FOI applicants: "Marginal notes and comments or "post-it" notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record." Ideally, such FOI regulations would be in force everywhere. http://www.cio.gov.bc.ca/services/privacy/Public_Sector/backgrounders/transitory_records.asp

as the weakest ink.") The same point was made by Alberta Information and Privacy Commissioner Frank Work:

> Ten years later and across Canada I still hear people say "Well, we just don't take notes, keep minutes, or create records so we don't have to produce them under FOIP." So in order to avoid being accountable, you become a poor, even negligent, manager. You cannot properly manage the affairs of an organization without notes, records, minutes, evidence, instructions. If there was no law, if my Office did not exist, the auditors would still tell you that.[198]

Two decades ago, the former information commissioner John Grace issued a sharp rebuke to the oral government concept, with a note on its origins:

> As to the "don't-write-it-down school," any effort to run government without creating records would be humorous if it were not so dangerously juvenile. Though it is impossible to quantify its seriousness (and its extent is probably exaggerated by critics of access), any such evasion of access poses a threat not only to the right of access, but to the archival and historical interests of the country. Left without written precedents and decisions, other officials are deprived of the benefit of their predecessor's wisdom - or folly. The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions.[199]

This last point is pivotal, and the solution to such ignorance is education. It is likely that some staffers who fear harmful FOI disclosure on records of their specialty are simply unaware (or barely so) of the specific wording of the *ATIA* exemption that was placed there 37 years ago to prevent that very harm.

For instance, one could inquire of new diplomats averse to writing their candid views of this country's future relationship with another nation for worry of their publication via FOI: "Have you considered *ATI Act* Section 15(1), which states: 'the head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs.'"?

The same could be done for the other exemptions such as privacy, law enforcement, national defense, or third party business information. For those officials who are in fact fully aware of such exemptions but still insist these are insufficient protections for the public interest, the onus should be upon them to explain exactly, and with proofs, why that is the case, and not the onus placed on FOI advocates to show why these safeguards are adequate.

Such an education campaign is not by itself a sufficient substitute for a duty-to-document

---

[198]Frank Work, Remarks to Access and Privacy Conference, Alberta, June 16, 2005. http://www.assembly.ab.ca/lao/library/egovdocs/2005/alipc/151986.pdf

[199]John Grace, Information Commissioner of Canada, *Annual Report 1996-97*.

law, but for now it might help to reduce some "oral government" excesses, and hence is at least worth trying. It should also be used in conjunction with a new law. (Of course this move would be efficacious only if avoidance of writing was prompted here by a concern for the public interest, not secrecy being used mainly "as a tool of power and control," as John Reid put it.)

For now, there are no serious consequences for such actions. In one startling case, the Secretariat of the 2010 Vancouver Olympic Games *stopped recording minutes of its meetings* after being annoyed by my FOI requests for these, and the B.C. government defended this action (and so legitimizing a dangerous precedent). Even when minutes are recorded, the passage of FOI laws has led to much reconsideration on just how this should be done. This was discussed in an article in a Canadian administrative journal, with a thoughtful conclusion:

> The *Access to Information* dilemma goes like this: If you record too much detail in minutes, you could be exposing your organization to risk or exposing individuals to personal embarrassment. On the other hand, if you record too little or focus only on the decisions made, your minutes will offer very little historical value, when many years later people are trying to understand why certain decisions were made [...]
>
> To address the fear that documents could be accessed by the public, consider what reasons your board may be giving to citizens to be suspicious and pursue adversarial actions against it. *Access to Information* legislation is yet another reason to always operate with integrity and honesty.[200]

Besides their dread of publicity, it is also likely that officials chafe at the (modest) extra labour of creating records. Yet the taxpaying public needs and deserves much better; whole dimensions of our political awareness and historical consciousness have vanished due to such practices, and the loss to the common good is incalculable.

Canada's *Access to Information Act*, 1982:

There is no general mandate to create or preserve records noted in the *ATIA*, although Sec. 4. (3) includes a duty to create a record in reply to an *ATIA* request if this can be done without much hardship. There was, however, a penalty added for destroying records in 1999 (see box below).

From the *Library and Archives of Canada Act, 2004*:

GOVERNMENT AND MINISTERIAL RECORDS

> 12. (1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

[200] The public may be able to see your minutes. Eli Mina, Administrative Assistant's Update, Jan. 1, 2004

> (2) Despite anything in any other Act of Parliament, the Librarian and Archivist has a right of access to any record to whose disposition he or she has been asked to consent.
>
> (3) For the purposes of this section, the Librarian and Archivist may have access to a record to which subsection 69(1) of the *Access to Information Act* applies [cabinet confidences], only with the consent of the Clerk of the Privy Council and to a government record that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II to that Act, only with the consent of the head of the government institution in question.
>
> (4) Despite anything in any other Act of Parliament, any officer or employee of a government institution may grant to the Librarian and Archivist access to any record to whose disposition the Librarian and Archivist has been asked to consent.

Section 15 of this Act bars the Librarian from granting access to cabinet records as noted in Section 69(1) of the *ATIA*. It also compels every department - as defined in Section 2 of the *Financial Administration Act* - to send the Librarian a written summary of public opinion research within six months of its completion.

There are a number of statutory requirements for the public sector to create records in specific circumstances - for example the *Financial Administration Act, Employment Equity Act, Employment Insurance Act* and the Treasury Board policy on the Management of Government Information.[201]

Francis Bilodeau, Assistant Deputy Minister to the Chief Information Officer, told the Senate in 2019 that the Treasury Board's *Policy on Information Management*[202] already establishes an obligation to document decisions. It is very doubtful if these are rigorously enforced, however; and these terms, at a minimum, should be placed into the text of the *ATIA*. The policy reads:

> 6.1. Deputy heads are responsible for: [...]
> 6.1.2. ensuring that decisions and decision making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review.

Record preservation

Even when important records are created, what guarantees have we that they will be preserved? Section 12 of the *Library and Archives of Canada Act,* 2004 (above) states that no government record can be destroyed without the written consent of the Librarian

[201]Also of interest is the federal Policy on Service and Digital, which will take effect on April 1, 2020. It will replace the Policy Framework on Information and Technology, the Policy on Management of Information Technology, the Policy on Information Management, the Policy on Service, and the Policy on Acceptable Network and Device Use. https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12742

[202]https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12742

and Archivist. Yet penalties are lacking, and one can legitimately ask how closely that Act is followed in practice.[203]

Public bodies generate and collect enormous quantities of information, the vast majority of which is actually destroyed over time. One might first consider that in the *ATIA*'s definition section, '"record" means any documentary material, regardless of medium or form. Although it is often overlooked even by journalists, all Canadian FOI laws grant the applicant access to records other than paper, *e.g.*, audiotapes, films, drawings, maps, microfilm, photographs, CDs and printouts of emails. Some of these formats have far shorter lifespans than paper, and may have special technological archival needs, hence render them harder and more costly to preserve.

As noted by Professor Alasdair Roberts, in a chapter titled "Liquid Paper" in his fine book *Blacked Out*, the preservation and retrieval of records for FOI applicants has been greatly complicated by the digital age.

He notes that popular thinking still refers to "the official file," the one mythical "smoking gun" marked TOP SECRET. But such a reality has long since past. Over the last 30 years, the formats of records have changed immensely; electronic records are often preferred to paper (partly to create a paperless office, which remains an unachieved goal). Because revising records is less costly now, the number of transactions has exploded. Therefore he adds, and unfortunately for journalists, "the stockpile of government information has been liquified – broken down into a vast pool of elements whose significance, taken independently, is not easily grasped."[204] This situation also makes the processing of FOI requests far less straightforward than before.

One might wonder how such a fundamental FOI issue can remain so neglected; perhaps the public and journalists presume the record management system is working adequately. The reality, however, is quite different. The remarks of Information Commissioner John Reid in 1999 are regrettably current:

> I cannot overstate the point: Information management in government is in crisis. The crisis does not only threaten the viability of the right of access, it also threatens to undermine national archival requirements and the ability to deliver

[203]Unauthorized document destruction is one problem; removal is another. In the late 1980s, one former minister wanted to write his memoirs with the aid of ministerial files: "When he left the office, reliable sources say, he took with him 67 filing cabinets of documents, paper the government has been trying to recover ever since." (Cameron, op. cit) By contrast, if a member of the public entered the office and carried away the same documents, he or she might be charged with the theft of government property. (Such action by former ministers was also deplored by historian Carl Berger in *Clio's Craft: A Primer of Historical Methods*, edited by T. Crowley. Toronto: Copp Clark, Pittman, 1988) Former ministers should make an *ATIA* request for copies of the records, as must anyone else, and as did Pat Carney for her memoirs.

[204]Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006. In fact, email is in some ways more enduring than paper, when we consider backup tapes, and email copies floating about amongst recipients (which may then be copied to many further recipients in turn, and so forth). The main problem for the media now becomes volume: One study cited by Roberts found that in 2002, Canada's 150,000 federal public servants exchanged about six million emails every working day; that number has likely ballooned since then.

> good government to the citizenry. Years of government restraint and downsizing have been devastating to the records management discipline. . . . The time is right, it seems to me, for an Information Management Act, designed to regulate the entire life-cycle of government-held information.[205]

As the government converts to digital record creation and archiving, protocols regarding this format will surely become the most ambiguous and contentious of all, e.g., some public servants might not recall that email messages are to be preserved.

Worse yet, many politicians and officials, often at the most senior level, now do the public's business on private, non-governmental email addresses, to bypass an official channel message trail that can be accessed through FOI requests. This problem has been reported around the world, and despite information commissioners' pleas to stop it, this stratagem is so strongly alluring that it stubbornly persists.

In 2016, Catherine Tully, Nova Scotia's Information and Privacy Commissioner, called for a modest but important improvement to the province's transparency framework – that is, a ban on public officials using private email accounts, personal cell phones and tablets for carrying out government business. In reply, Nova Scotia's Premier, Stephen McNeil, stunned reporters by telling them that he routinely used phones, rather than email, precisely to ensure that there would be no paper trail available for FOI requesters.[206]

Yet in this new age, FOI law and policy always struggles to keep up with lightning-paced technological changes. The Commissioner also released a policy statement which expressly includes any form of instant messaging under the definition of records. This applies to phone-based messaging services like SMS and BBM, online messaging services like Facebook, as well as dedicated messaging apps like WhatsApp.

Such reforms would be popular. A poll in 2014 found that75% of Canadians agreed or somewhat agreed with the proposition that the public should have access to a permanent record of public officials' deliberations and decision-making processes regardless of whether the decisions were deliberated in written or non-written forms. [207]

---

[205]John Reid, Information Commissioner of Canada, *Remarks to the CNA Publishers Forum on Access to Information*. Nov. 25, 1999

[206]The Right to Information requires a Duty to Document, a report from the Right to Know Coalition, Halifax, 2016. http://nsrighttoknow.ca/wp- content/uploads/2016/11/Duty-to-Document-1.pdf

[207]"Do Canadians Care About Free Expression", Canadian Journalists for Free Expression, available at: www.cjfe.org/poll_what_do_canadians_think_about_free_expression

WHERE ARE THE RECORDS?

In 2006 two of Parliament's independent watchdogs said their investigations were being thwarted by federal officials who refuse to keep written records of governmental deliberations and decisions. Too often bureaucrats try to avoid accountability and oversight by simply not writing down what it is they are doing, even in cases involving expenditures worth millions of dollars, Auditor-General Sheila Fraser said.

Mr. Reid's investigators said bureaucrats use a variety of ploys to avoid leaving a paper trail. These include briefing cabinet ministers orally without background documents and using BlackBerry privacy technology to send e-mail messages that avoid routing through computer servers that would create copies of the e-mail traffic. Some bureaucrats write cryptic handwritten notes on disposable Post-it notes that can be discarded before a final record is created.

Ms. Fraser complained in her recent report on the gun registry about the dearth of documentation regarding a decision not to record $21-million in costs for a current fiscal year, but to carry it over. Her auditors were amazed not just by the decision, but by the lack of documentation.

"It seems to us like a fairly significant decision,' she said in an interview. 'There was a meeting held where that decision was made and there is great confusion as to what was actually decided. There is confusion about who actually attended. There is even some confusion about the date the meeting was held." Ms. Fraser said undocumented decision-making "is not the norm in government, but it is not an exceptional event: the *ATIA* "has had a chilling effect [on bureaucrats] whether or not reports are written."

- *Decisions lack proper paper trail, watchdogs complain*, by Jeff Sallot, Globe and Mail, 22 May 2006

Controversies about record retention regularly occur. Canada Post destroyed thousands of boxes of documents and deleted e-mails en masse in the months before it was due to be covered by the *ATI Act* in 2007.[208] Figures were reported in 2006 showing that Scottish officials doubled their spending on document shredders in the lead-up to Scotland's FOI law being introduced. [209]

Improper record destruction has a long tradition in Canada, and the sheer volume of information vital to the public interest that has been lost forever over the years is truly grievous. In 1989, Steve Cameron reported:

> Government officials are quietly shredding paper at breathtaking speed. [After the *ATIA* was implemented in 1983] the federal government bought nearly 700 crosscut shredders at a cost of $10 million. What are they all used for? When asked, one senior mandarin confessed that he systematically shredded everything he thought he could get away with to avoid paper trails sought by investigative reporters under access to information law.[210]

One may wonder how much has really changed since then. In 2007, during the RCMP pension fund inquiry, a retired Mountie stunned a Commons committee with revelations that RCMP brass had been involved in altering, censoring, hiding and even pilfering official documents to thwart their lawful release under the *ATIA*. The documents in question were not related at law enforcement, *per se* - they were memos, reports and other key information about money missing from the force's pension fund.[211]

There are at least five reasons why Canada needs a more comprehensive and detailed law than the *LAC* statute to create and preserve records, with penalties for non-compliance:

1) Good governance. "Records are a government, as well as a public, asset," wrote a Scottish critic. "They contain the evidence that helps citizens understand the 'how' of governmental actions and the 'why' of official decisions." Sound decision-making for present or future administrations is impossible without corporate memory, and "oral government" cannot achieve that end. Records of decisions could also provide government with legal protection in certain lawsuits. After the Scotland's FOI law was passed, "The benefits of good records

---

[208] *Canada Post shredding machines in overdrive*, by Peter Zimonjic, Toronto Sun, July 19, 2008. The records for this story were obtained through an *ATIA* request A Canada Post spokesperson replied the purging of documents was not rushed to beat a deadline but to get records in order so they could respond to information requests.

[209] *Holyrood doubled shredder budget ahead of FOI law; Parliament officials claim there is no conspiracy*, by Paul Hutcheon. The Sunday Herald (Scotland), April 23, 2006

[210] Cameron, *op.cit.*

[211] *Let's keep this quiet; When it comes to ethics in government, cues come from the top*, by Greg Weston. The Toronto Sun, May 15, 2007

[212] Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*. New Delhi, India, 2003

management are being felt internally as much as externally," said Scottish Information Commissioner Kevin Dunion.[213]

2) Personal information. The truth and integrity of such records can be indispensable to protect the human rights of a Canadian *Privacy Act* applicant and others. As the Commonwealth Human Rights Initiative noted:

> The human cost of poor recordkeeping is often seriously under-estimated. Across the Commonwealth, newspapers regularly tell the stories of life-long tragedies caused by careless record keeping: some poor ticket-less traveler is imprisoned awaiting trial for years beyond the maximum sentence, or a long cured young woman is abandoned in a mental institution for decades because the system has misplaced a file. Conversely, good record-keeping benefits both government and citizen alike.[214]

For example, several hours of surveillance footage recorded at the Vancouver airport the night Polish immigrant Robert Dziekanski was Tasered and died were inadvertently erased by the Canada Border Services Agency a week after his death, the *Vancouver Sun* learned in 2008.[215]

3) Historical legacy. The history of a people, produced at public expense, is a commonly-held public treasure. History can be of many kinds: political, ethnic, social, economic, military. Familiar proverbs are sometimes invoked here, such as "Those who do not remember the past are condemned to relive it," and "One cannot know where one is today, or where one is going, if one does not know where one has been."

One illustration would be media stories of 1992 that cited cabinet meeting records of 1970 that were obtained through the *ATIA*: during the FLQ crisis, the minutes revealed, the RCMP commissioner advised cabinet not to invoke the *War Measures Act*, this being unnecessary; cabinet disregarded his advice and invoked it anyways.

"Public bodies fail to transfer records to government archives, resulting in decades' worth of missing information," one First Nations advocacy group protested. "This is resulting in inexplicable gaps in the historical record upon which Indigenous Nations depend to substantiate their claims and grievances."[216]

---

[213] *Opening new doors thanks to the public's right to know; A report has found that the act is starting to have an effect in officialdom*, by Douglas Fraser. The Herald (Glasgow), March 10, 2008. The article added positively that "Beyond the high-profile cases in the headlines, there is now academic evidence the act is having an effect on public sector culture. More than two-thirds of organisations believe it has had a significant change of culture and fewer than one in ten see little difference. Nearly half say it has made them more open and they are more likely, he says, to treat information requests as a normal part of their role, rather than treating them "like an unexploded grenade". 'What we've seen is that most authorities are saying the act has been beneficial,' says Mr. Dunion."

[214] *Open Sesame, op.cit.*

[215] *Video of YVR taser victim erased. Border services says it deleted security footage inadvertently*, by Chad Skelton, Vancouver Sun, April 11, 2008

[216] *Submission to the Senate on the Review of Bill C-58*. Submitted by the British Columbia Specific Claims Working Group. Nov. 30, 2018

4) Evidence for media. "Get the record," is a frequently heard command from editors to reporters. Although written records of events and issues are an indirect account of reality, and can be flawed themselves, they are sometimes all the media has. Certain stories could not be published without them; many valuable articles have still been produced without any records at all, but documents can at times be vital to confirm rumors and suspicions, prove a critic's assertions, defend the media against libel actions, and even to fish for story ideas (an entirely justifiable activity, by the way).

5) Integration and coordination of effort. Without a more detailed and comprehensive records law, *ATIA* officials, archivists and others could otherwise duplicate their efforts, or work somewhat at cross-purposes. For instance, "The priority of archivists, which is to preserve historic documents, does not serve the aim of active record management, which is to ensure that records are systematically maintained through their entire life cycle and systematically destroyed."[217] As well, time consumes money, and *ATIA* request processing costs can rise when records are so disordered that it takes officials longer to find them.

The main solution is a new structure comprised of three essential and interconnected pillars, each supporting the others: (1) legislated record creation, (2) legislated record retention, and (3) penalties for violating parts 1 and 2. First, there is no point in creating important records if they will not be preserved; second, records cannot be preserved if they were never created; and third, neither of these actions can guaranteed if there are no penalties for not doing so. Some guidance is offered by the commentators below.

BLOOD COMMITTEE RECORDS SCANDAL PROMPTED *ATIA* REFORM

More than anything else, one shocking event highlighted the urgent need for stronger record retention laws in Canada.

Federal officials destroyed documents that might have been key to understanding the tainted-blood tragedy of the 1980s because they did not want to risk having to make them public, Information Commissioner John Grace concluded.[218]

[217] *Open Sesame, op. cit*

[218] *Key blood documents destroyed Federal officials acted to block files becoming public, Information Commissioner rules,* by Anne McIlroy. Globe and Mail. Jan. 23, 1997

In a report released in January 1997, Mr. Grace castigated two Health Canada officials for destroying all of the written transcripts and erasing all of the tapes of meetings of the Canadian Blood Committee, which oversaw the blood system in the crucial years 1982 to 1989. During those years 1,200 Canadians were infected with the AIDS virus while another 12,000 were infected with hepatitis C through blood and blood products.

His report stated that the committee was under pressure from the Canadian Red Cross Society not to release documents to the public because they might be useful in lawsuits that had been filed by victims of the tragedy. He said the decision to destroy the documents was made in May 1989, after an *ATIA* request was filed by a *Globe and Mail* reporter. One official maintained the records were destroyed for "housekeeping purposes," a claim rejected by Mr. Grace for several reasons.

"You will understand why I must take seriously and investigate thoroughly allegations of records being destroyed in order to thwart their release under the *Access to Information Act*," he concluded. "Any such destruction strikes at the heart of what the Federal Court has called the 'quasi-constitutional' rights bestowed by that *Act*, being a wilful denial of those rights and a flagrant affront to the will of Parliament."

One newspaper editorialized: "If evil does indeed reside in the banal, it is no stranger to craven, grey-faced functionaries whose most fervent wish is to remain anonymous and undisturbed. Thanks to commissioner Grace's landmark report, we now know who they are and what they did."[219]

Yet Mr. Grace said no action could be taken against the individuals involved, one of whom was responsible for administering the *ATIA* at the department. The *Act*, he said, does not provide sanctions against those found to have improperly destroyed records, "perhaps because Parliament did not foresee public servants flouting this law," a presumption he chided as "naïve."

But then, inexplicably, the government simply took one giant step backwards on blood records transparency. The Health department's blood committee was

[219] *Double-crossed: Shredder thwarts tainted blood victims*. The Vancouver Sun. Jan. 24, 1997

replaced in 1998 by the Canadian Blood Services, which now oversees the blood program on behalf of provincial health ministries. It was incorporated as a non-profit agency, and although it spends more than $300 million a year in public money financing the blood system, its proceedings are generally secret, and its records are exempt from FOI laws – unlike those of an identical entity in New Zealand.

GLOBAL COMMENTARY

• Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

Destruction of records - To protect the integrity and availability of records, the law should provide that obstruction of access to, or the willful destruction of, records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

• Article 19, *Model Freedom of Information Law*, 2001:

19. (1) Every public body is under an obligation to maintain its records in a manner which facilitates the right to information, as provided for in this Act, and in accordance with the Code of Practice stipulated in sub-section (3).

(2) Every public body shall ensure that adequate procedures are in place for the correction of personal information.

(3) The Commissioner shall, after appropriate consultation with interested parties, issue and from time to time update a Code of Practice relating to the keeping, management and disposal of records, as well as the transfer of records to the (insert relevant archiving body, such as the Public Archives).

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

Preservation of records and documents. 44. (1) A public authority shall maintain and preserve or cause to be maintained and preserved records in relation to its functions and a copy of all official documents which are created by it or which come at any time into its possession, custody or power, for such period of time as may be prescribed.

• Council of Europe, *Recommendations on Access to Official Documents*, 2002:

Public authorities should in particular: i. manage their documents efficiently so that they are easily accessible; ii. apply clear and established rules for the preservation and destruction of their documents; iii. as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.

Paragraph ii refers to issues related to the preservation and the destruction of official documents. The preservation generally implies the transfer to archives services. There is a strong need for clear rules on these matters.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

Key Principles. Is it an offence to shred records or lie about the existence of records in order to avoid disclosure?

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(8.1) Effective systems of record management are key not only to the effective functioning of an access to information regime but also to good governance.

(8.2) Codes of practice relating to record maintenance can help promote a consistent approach across public bodies and can be used to ensure the highest possible standards in this area. Access to information legislation should require such codes to be developed in consultation with public bodies and then laid before Parliament. (More follows)

• Organization of American States (OAS), *Model Law on Access to Information*, 2010:

Records Management - 33. The [body responsible for archives] must develop, in coordination with the Information Commission, a records management system which will be binding on all public authorities.

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

6. Duty to create, keep, organise and maintain information. (1) Each information holder must create, keep, organise and maintain its information in a manner which facilitates the right of access to information, as provided in this Act.

(2) In furtherance of the obligation contemplated in subsection (1), every public body and relevant private body must:

(a) produce information in respect of all its activities, including but not limited to those expressly provided for under section 7 of this Act;

(b) arrange all information in its possession systematically and in a manner that facilitates prompt and easy identification; and

(c) keep all information in its possession in good condition and in a manner that preserves the safety and integrity of its contents.

THE SOMALIA SCANDAL AND THE BEAUMIER BILL

In the 1990s, after members of Canada's Airborne Regiment had killed a teenager in Somalia, a public inquiry in Ottawa found that defense officials had improperly destroyed records of the case as a means of FOI avoidance. Quebec backbench Liberal MP Colleen Beaumier said that so many of her constituents complained to her upon hearing news reports of the record shredding, that she grew embarrassed. This prompted her to move an amendment to the *Access to Information Act* to fix the problem, and it passed.[220] This 1999 amendment to the *Act*, in *Bill C-208*, states:

"Obstructing Right of Access. 67.1 (1) No person shall, with intent to deny a right of access under this Act, (a) destroy, mutilate or alter a record; (b) falsify a record or make a false record; (c) conceal a record; or (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c). Offence and Punishment.

"(2) Every person who contravenes subsection (1) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both."

Some regard Section 67.1 as a good start, but too narrow a safeguard, i.e., it should prohibit destruction of records in the public interest whether FOI requests were made for these or not.[221]

[220]It worth noting that federal cabinet voted *en masse* against Ms. Beaumier's bill, without explanation, yet it passed nonetheless - a very rare example of an MP successfully defying the will of the autocratic prime minister of that day, and an inspiring example for FOI advocates.

[221]Expectedly, not all applauded this reform. For instance, "Resolving systemic problems with ATI has taken on a greater urgency with the passage of Bill C-208, given the frightening ease with which someone so inclined can now "set up" public servants for stiff fines or even jail time. These and related ATI issues are the root cause of greater secrecy in Defence and the federal public service." - Lt. Col. Brett Boudreau, *Force for Change or Agent of Malevolence? The Effect of the Access to Information Act in the Department of National Defense*. Canadian Military Journal, Vol. 1, No. 2, Summer 2000.

OTHER NATIONS

Although not yet quite a global standard, mandated record creation may hopefully in time become one. New Zealand's *Public Records Act* (2005), states that "every public office and local authority must create and maintain full and accurate records of its affairs" in accordance with "normal, prudent business practice."

Several Australian jurisdictions have had the duty to document in place for two decades. In 1998 the State of New South Wales enacted records management obligations that required each public office to make and keep full and accurate records of the activities of the office.

Back in 1950 the United States enacted the *Federal Records Act*. It states the head of each agency shall cause to be made records on the agencies' "decisions, procedures and essential transactions" so as to protect both the government and "persons directly affected by the agency's activities."

Many national FOI laws include rules to preserve records, or send these to archives, or otherwise govern them. These jurisdictions describe the rules at some length within their FOI laws: Finland, Germany, Japan, Pakistan, Peru, Scotland, St. Vincent and the Grenadines, Thailand, and Trinidad.

Other nations' FOI laws mainly place information management responsibilities in archival statutes, such as in Albania, Austria, China, Columbia, Croatia, Denmark, Estonia, France, Hungary, Iceland, Ireland, Israel, Liechtenstein, Lithuania, Mexico, Moldova, Netherlands, Norway, Romania, Slovenia, Switzerland, Ukraine, Antigua, Australia, Belize, India, Jamaica, and South Africa. (I have not searched for nations that have only an archival law without an FOI law as well.)

With remarkable consistency, at least 20 jurisdictions have chosen to set 30 years[222] as the time limit in their archival statutes to generally release records (except, usually, those records especially marked as confidential, such as for national security): Australia, Belize, Columbia, Croatia, Denmark, France, Germany, Hungary, Iceland, India, Ireland, Israel, Jamaica, Liechtenstein, Norway, Slovenia, Switzerland, Shanghai, Scotland and the United Kingdom. (See Chapter 7 on time limits.)

Government records are - with exceptions for some topics - routinely declassified after 10 years in Latvia, 12 years in Mexico, 15 years in Lithuania, 20 years in Estonia and South Africa, and 25 years in the United States. Record creation and retention laws - apart from FOI statutes - have been common for years in American states such as Florida, and may suggest good models.

In Canada and most nations, records are primarily catalogued for the government's convenience, not to assist FOI applicants. Yet the FOI laws of several nations – such as Finland, India, South Korea, Sierra Leone,

[222]As a point of historical interest, Prime Minister Pierre Trudeau announced in 1969 that 30 years after their transfer to the public archives, practically all departmental documents would be open to the public – a time shortened from 50 years – except for those whose release could harm personal privacy, national security and external relations.

Sri Lanka, Seychelles – set a different course. There, agencies must ensure all their records are catalogued in a way that facilitates access. Consider the statute of India:

> 4. Every public authority shall – (a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act, and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated [....]

The Danish FOI law mandates record creation and is well worth considering:

> Duty to Make Notes etc. 6. (1) In any matter to be decided by an administration authority, an authority receiving information by word of mouth on facts of importance to the decision or in other manner having notice of such facts, shall make a note of the substance of such information, always provided that such information is not contained in the documents of the matter.

A separate topic entails the duty to create records specifically in response to an FOI request, which is an important right included in many FOI laws, including Canada's *ATIA* Section 4(3).

In some jurisdictions, records may not be destroyed after an FOI request for them has been received, even if they had already been scheduled for destruction.[223] The FOI statute of Ecuador commendably goes one step better, wherein "information cannot be classified following a request."[224] Both these features are advisable for Canada.

CANADIAN COMMENTARY

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 13: That section 68 of the Act be amended to eliminate the exclusion of published material from the coverage of the legislation, and that, in addition, that government institutions are required to organize, catalogue and advise the public of the existence of all government publications, including grey literature, through the inventory and government locator system described in the next section.

Recommendation 16: That section 5 of the Act be amended to require government institutions to organize and index their information holdings and compile and maintain in a current state an electronic inventory of these for effective decision-making and to support both active dissemination of useful information to appropriate publics and general accessibility to non-exempted documentation. (All references to accessing manuals currently in

[223]For instance, in Washington state's FOI law, "(8) If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule." WAC 44-14-04003

[224]http://freedominfo.org/countries/ecuador.htm

the legislation should be wrapped up into this requirement.)

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

The Archives Act should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions. A duty to create records has been imposed on the United States federal government by the Federal Records Act.

The need to keep, at least for a time, all [email] messages on these systems stems directly from the notion of open and accountable government. To give the official who created or received a message unfettered choice about its destruction would clearly jeopardize accountability.

• Open Government Canada (OGC), *From Secrecy to Openness*, 2001:

Recommendation 24: The ATI Act should be amended to include electronically stored information (e.g. voice-mail, E-mail, computer conferencing etc.) explicitly in the definition of recorded information, and to give requesters the right to request a record in a particular format if it exists in various formats.

Recommendation 37: The federal government should amend the ATI Act or enact a separate law to require a clear, accurate, detailed, meaningful and useable record be created and routinely disclosed (and preserved for an appropriate period) of each government institutions' organization, functions, policies, decisions, procedures and essential transactions to ensure that the details of each action by the institution are accessible to the public.

Recommendation 38: The federal government should amend the ATI Act to require all government institutions to maintain a public register listing all records, including all public opinion surveys, maintained by the institution, and all records which have been released under the law.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians, ATIA* Review Task Force report, 2002:

9-1. The Task Force recommends that: a co-ordinated government-wide strategy be developed to address the crisis in information management....

9-2. That 'training on the safeguarding, classification and designation of information in accordance with the Government Security Policy be incorporated into an integrated training package that would cover information management and Access to Information...

9-3. That 'an effective accountability regime for information management, including the necessary audit and evaluation tools, be established and implemented within government institutions...

9-4. That 'standards be established for the documentation of the business of government; orientation and training, and ongoing guidance in information management, be available for all employees...

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005:

3. The Act is amended by adding the following after section 2: 2.1 Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations.

In his 2002-2003 Annual Report to Parliament,[225] Mr. Reid proposed a plan with ten key points for a new record keeping law, which is well worth contemplating. (Mr. Reid noted that some of these points are included in the Treasury Board's Management of Government Information policy, available on TBS' website. [226]

• BC Freedom of Information and Privacy Association (FIPA, Vancouver), *A Chance for Transparency: The Federal Accountability Act and Public Access to Information*, 2006:

5. Oblige public officials to create the records necessary to document their actions and decisions. It is difficult to see how one could fail to recognize the clear benefit of this long-overdue proposal to good governance and the public interest. True public access to information cannot exist without an accurate record of government decisions and actions – and above all, the Canadian public has a right to a clear and honest view of its history and how the decisions and actions of the government of the day fit into that history.

• Justice Gomery report, *Restoring Accountability*, 2006:

Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions. (Report also advises additional 'free-standing legislation' for transparency on 'the disbursement of public funds.')

• Government of Canada discussion paper, *Strengthening the Access to Information Act*, 2006:

Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound. Translating this principle to practical application must be done carefully, however, and with a thorough consideration of the results, both intended and potentially unintended.

After examining how other jurisdictions have dealt with this issue, it appears that the duty could be best placed in the Library and Archives of Canada Act. In that way, the rules governing both the creation of records and their eventual disposal, which are presumably based on many of the same principles, would be brought together.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

2. The Act is amended by adding the following

[225] http://www.infocom.gc.ca/reports/2002-2003-e.asp

[226] http://www.tbs-sct.gc.ca/im-gi/imday-2002-jourgi/info/mgi-gig/page01_e.asp

after section 2: **2.1** Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations under this Act.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015:

Recommendation 2.1 –

The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

Recommendation 2.2 –

The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 10 - That in the first phase of the reform of the *Access to Information Act*, the Act be amended to establish a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

• The Right to Know Coalition (Halifax), *The Right to Information requires a Duty to Document*, 2016:

We have drafted a provision based on those found in comparable legislation in force elsewhere, which we believe strikes a fair balance between holding public officials to account in their decision-making processes, while not making the process of governance overly cumbersome. We urge the government of Nova Scotia to insert the following provision into the FOIPOP:

> Proposed Duty to Document - Every public office or local authority must create and maintain full and accurate records, in an accessible form, so as to be able to be used for subsequent reference, containing adequate and proper documentation of the office or authority's organization, functions, policies, decisions, decision-making processes, procedures, and essential transactions.
>
> (1)The "decision-making process" shall include the selected outcome and all options considered in reaching said outcome, as well as all discussions or deliberations regardless of their level of formality.
>
> (2)This includes records of any matter that is contracted out by a public office or local authority to an independent contractor.

• Canadian Bar Association (CBA), Submission to Ethics Committee on *Bill C-58*, 2017:

While the *ATIA* may not be the appropriate legislation, the CBA Sections recommend

that the government consider the need for a new duty to document. The duty to document decisions of government is important to an accountable and transparent government and could prevent the avoidance of disclosure through a lack of appropriate record keeping.

• Privacy and Access Council of Canada (PACC), Calgary, Submission to Senate on *Bill C-58*, October 2018:

Recommendation: Introduce a formal duty to document for all government and public institutions and require them to preserve records that reflect and evidence the full spectrum of their decision making.

Recommendation: Include a provision in the ATI Act that all emails and communications sent from the personal email addresses and from the work email addresses of employees, directors, officers, and contractors, and which relate directly or indirectly to workplace matters, are subject to freedom of information legislation.

• Democracy Watch, Submission to Senate review of *Bill C-58*, 2018:

Recommendation 3. The access to information law and system should require every entity covered (as in the United Kingdom, U.S., Australia and New Zealand): to create detailed records for all decisions and actions and factual and policy research; to routinely disclose records that are required to be disclosed; to assign responsibility to individuals for the creation and maintenance of each record, and; to maintain each record so that it remains easily accessible.

• Brief presented to the Senate by the Fédération professionnelle des journalistes du Québec (FPJQ) concerning *Bill C-58*, 2019:

Recommendation: That an explicit provision be incorporated into the Act to ensure that government documents that attest to government decisions are produced and preserved.

CANADIAN PROVINCES

Most provinces prescribe that a public body must create a record for an FOI applicant if it can be produced by the computer equipment and expertise normally used by the institution. The only provincial FOI law that prescribes record management to assist applicants is that of Quebec:

> 16. A public body must classify its documents in such a manner as to allow their retrieval. It must set up and keep up to date a list setting forth the order of classification of the documents. The list must be sufficiently precise to facilitate the exercise of the right of access [....]

In Ontario, *Bill 8, the Public Sector and MPP Accountability and Transparency Act, 2014*, came into effect in 2016. While welcoming its record retention features, the Ontario information and privacy commissioner nonetheless advised: "the [Ontario] IPC recommends developing a broad and effective duty to document business-related activities, including a duty to accurately document key decisions. This duty must be accompanied by effective oversight and enforcement provisions."

The FOI laws of Alberta and Prince Edward Island have nearly identical records preservation sections; these are the next broadest in scope after Quebec, as the only ones that forbid officials to "conceal" sought records. In PEI's law:

> 75. (1) A person shall not wilfully [....] (e) destroy any records subject to this Act, or direct another person to do so, with the intent to evade a request for access to the records; or (f) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the records.
>
> (2) A person who violates subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $10,000.

Regrettably, there are no provisions for record management or preservation in the FOI statutes of Ontario, British Columbia, Saskatchewan, New Brunswick, the Northwest Territories and Nunavut; hopefully this will change one day.

(For more information on the oral government problem in British Columbia, see Chapter 15.)

The Raison D'Etre

CHAPTER 6 - THE PUBLIC INTEREST OVERRIDE

Is there a public interest override for all or some exemptions in the FOI law?

A Conservative government will: Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.

- Conservative Party of Canada, election pledge, 2006 (Promise unfulfilled.)

In our experience, a public interest override is crucial to the effective functioning of a freedom of information regime. It is simply not possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest, and to address these through narrowly drafted exceptions, or exceptions to exceptions.

- Memorandum on the Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002, by Article 19, 2004

Perhaps the most important and elusive concept in the theory of government transparency, and in fact the *raison d'etre* of most freedom of information statutes, is based on this question: What, exactly, does "the public interest" mean in the law?

Should a public interest override apply to all FOI statutory exemptions, or only to some? Should the override require agencies to release information, or just permit it? Should the state have a duty to proactively publish such information, or only in response to an access request for it? Should it apply to only the most grievous potential harms – such as life and death issues - or to less urgent ones as well? Who should be permitted to decide what can be a very political question – an information commissioner, a judge, or others?

In sum, though, the concept suggests for one thing that the needs or rights of the whole at times override those of the one or few, that is, the community may prevail over the interests of individuals or certain groups. For instance, police sometimes publish the name and address of a potentially dangerous predator who moves into a neighbourhood, overriding his or her privacy rights; a government might reveal the exact composition of chemicals that a company has spilled into a river, overriding its trade secret rights. [227]

[227]On matters of official wrongdoing, "although release of such information usually causes harm to the privacy of the person whose corruption it exposes, the wider public interest in exposing corruption outweighs this harm." - Memorandum on a draft Law on Access to Information for Palestine, by Article 19, London, 2005. This point is most relevant with the 2005 Quebec advertising sponsorship scandal.

"The overriding public interest" is an idea with which courts, legislators and commentators around the world have struggled for decades without agreeing upon one conclusive definition, if indeed one exists. Yet however the public interest is defined is a fair measure of the values and political culture of a nation at one point in time.[228]

• Canada's *Access to Information Act*, 1982:

There are only two public interest override features in the Canadian *Access to Information Act*, both discretionary. The first is within the mandatory Section 20, on third party information.

> 20 (6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if
>
> (a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
>
> (b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

Those paragraphs (1)(b)(c) and (d) refer to financial, commercial, scientific or technical information supplied in confidence; disclosure that could cause financial or competitive loss, or interfere with negotiations.

But the override cannot apply to 20 (1) (a), "trade secrets of a third party." Ideally it would in a reformed *ATIA*, for cases could clearly arise where the public interests of health or safety should surpass trade secret protection.

The second public interest override is found within the *ATIA*'s mandatory Section 19, on personal information. In Section 19 (2)(c) it refers to Section 8 of the *Privacy Act*, which permits disclosure in some cases.

> [*Privacy Act*] 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed [....]
>
> (m) for any purpose where, in the opinion of the head of the institution, (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates.

---

[228]While this chapter focuses solely on the public interest override in the FOI statute, there are also discussions of the override in other topic chapters, such as those on the policy advice and cabinet records exemptions. Incidentally, it is also positive that several federal and provincial statutes aside from FOI laws – such as the federal Fisheries Act and the Canadian Environmental Protection Act - mandate pro-active publication on public interest matters such as environmental protection health and safety.

GLOBAL COMMENTARY

Many international organizations urge the adoption of a much broader "public interest override" section, as an international standard, than the one that now stands in Canada's *Access to Information Act* - that is, the override should apply to all the FOI exemptions and be mandatory, not just apply to two exemptions and be discretionary, as in Canada.

Regarding public interest overrides, there is an important distinction on how they apply to mandatory versus discretionary exemptions: "An override that affects a discretionary exemption will, invariably, require disclosure of the exempted information. Simply to permit disclosure would add nothing to the inherent authority to grant or refuse access that a government institution will already have under a discretionary exemption."[229]

• The *Johannesburg Declaration of Principles*, adopted in 1995 by a meeting of experts in international law, national security, and human rights:

Principle 13: In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

• Article 19, *Model Freedom of Information Law*, 2001:

Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

(Elsewhere, Article 19 asserts that the bar should not be set high to apply the override: "Disclosure should not need to be vital in the public interest; rather, the public interest in disclosure should just outweigh the interest in secrecy."[230])

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in all the circumstances of the case, to do so is in the public interest, having regard both to any benefit and to any damage that may arise from doing so in matters such as, but not limited to - (a) abuse of authority or neglect in the performance of official duty; (b) injustice to an individual; (c) danger to the health or safety of an individual or of the public; or (d) unauthorised use of public funds [....] (Elsewhere, the Commonwealth Human Rights Initiative advised that an FOI public interest override be applied to both public and private bodies. [231])

• Council of Europe, Recommendations on Access to Official Documents, 2002:

Access to a document may be refused if the disclosure of the information contained in

[229]Colin McNairn and Christopher Woodbury, *Government Information: Access and Privacy*. Toronto: Carswell, 2007

[230]*Comments on Draft Sri Lankan FOI Law*, by Article 19, London, 2003

[231]*St. Kitts and Nevis Freedom of Information Bill 2006*, analysis by Cecelia Burgman, CHRI (2007)

the official document would or would be likely to harm any of the interests mentioned in paragraph 1 [list of exemptions], unless there is an overriding public interest in disclosure.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

There should be a general public interest override covering the exemptions. Most laws around the world link a harm test to the notion of public interest, so as to trump the exemption when appropriate. This is critical to drafting a bill that accords with good international practice.

• National Security Archive, George Washington University, The World's Right to Know, 2002:

Even where there is identifiable harm, the harm must outweigh the public interests served by releasing the information.

• World Bank, Legislation on freedom of information, trends and standards, 2004:

Even if disclosure would pose a risk of harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh this risk. Known as the public interest override, this might be applicable where personal information disclosed evidence of corruption or other wrongdoing.

• Open Society Justice Initiative, *Ten Principles on the Right to Know*, 2006:

Principle 7. Information must be released when the public interest outweighs any harm in releasing it. There is a strong presumption that information about threats to the environment, health, or human rights, and information revealing corruption, should be released, given the high public interest in such information.

• United Nations Development Agency (UNDP), *Key questions*, UN Special Rapporteur on Freedom of Information, 2006:

Exceptions to the right of access should be set out clearly in these policies and access should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information, trends and recommendations*, 2007:

The public interest in disclosure should be considered in each case.

• Council of Europe, *Convention on Access to Official Documents*, 2009:

Article 3–2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

• Organization of American States, *Model Law on Access to Information*, 2010:

Public Interest Override - 44. Public Authorities may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, pursuant to the exceptions contained in Article 41, unless the harm to the interest protected by the relevant

exception outweighs the general public interest in disclosure.

45. The exceptions in Article 41 do not apply in cases of serious violations of human rights or crimes against humanity.

Burden of Proof - 54. (1) The burden of proof shall lie with the public authority to establish that the information requested is subject to one of the exceptions contained in Article 41. In particular, the public authority must establish:

a) that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system;

b) that disclosure will cause substantial harm to an interest protected by this Law; and

c) that the likelihood and gravity of that harm outweighs the public interest in disclosure of the information.

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

25 Public interest override. (1) Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information. (2) An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.

OTHER NATIONS

Of the 128 nations with freedom of information statutes, I counted 92 with some explicit form of public interest override, while 38 nations had either no override or none that I could identify in the text. The exact number of overrides is not clear, due to translation issues and by the fact some clauses resemble such overrides by description, but they are not explicitly named as such.[232]

• In Commonwealth nations, about one-third of the overrides are general (covering all exemptions), while two-thirds are limited (covering only some exemptions). In non-Commonwealth nations the numbers are about equal for each kind of override.

• About 75 percent of these 92 overrides are mandatory (that is, the override "shall" override some or all exemptions), with the rest discretionary (it "may" override these).

• In just ten nations' FOI laws the public interest override is proactive instead of reactive, that is, the government must release the information, even if no FOI request for it has been received (as in six Canadian provincial FOI laws).

[232]In the CLD-AIE rating system, the override criteria are noted in Indicator 31: "There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are "hard" overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity. Consider whether the override is subject to overarching limitations, whether it applies to only some exceptions, and whether it is mandatory." https://www.rti-rating.org

• Most public interest overrides apply to all exemptions, while a few apply only to discretionary ones.

In nearly all cases - even in Commonwealth nations - the override is far broader than that found in Canada's *Access to Information Act*. The FOI statutes below have interesting features in their public interest overrides, some worth contemplating for a reformed *ATIA*.

Commonwealth Nations

• In the FOI law of India, Article 8(2), all exemptions are all subject to a blanket override whereby information may be released if the public interest in disclosure outweighs the harm to the protected interest. This override is discretionary, unfortunately.

• The mandatory Section 46 override in South Africa's law applies to most provisions but not all and only works for certain categories of public interest (illegal acts, public safety or environmental issues).

• In St. Vincent and the Grenadines, as in most nations, override criteria are listed, not general:

> 35. Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant (a) abuse of authority or neglect i n the performance of official duty; (b) injustice to an individual; (c) danger to the health or safety of an individual or of the public; or (d) unauthorised use of public funds

The CLD-AIE commentator wrote of this section: "At first glance this appears problematic since, rather than a general override, it provides a list of situations where information shall be disclosed anyway. But the list is quite good and covers every instance I can think of, so I'm giving them full marks."[233] (I could find no national FOI law that contains a laudable phrase found in four Canadian provinces, i.e., that beyond listed criteria, the override will apply for "any other reason" if it serves the public interest.)

• There is also a public interest in the policy making process. In Scotland's FOI law, Section 29 (3), "the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision."

• In Bangladesh, the security services are exempt from the FOI law, and yet in Article 32, there is a limited override whereby "this section shall not apply to such information that are pertaining to corruption and violation of human rights" in those agencies. India does the same in Article 24(1) of its FOI law.

• In the FOI law of Trinidad and Tobago, Section 31(2)(d), a public body may consider:

> (d) whether there are any considerations in the public interest in favour of

[233]https://www.rti-rating.org/country-data/Saint%20Vincent%20and%20the%20Grenadines/ This nation has another noteworthy override: "36. (1) The Minister may, in consultation with a public authority, by order, declare a document to which sections 25 to 35 are not applicable, to be an exempt document for the purposes of this Act on the grounds of national interest."

> disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of regulation by a public authority of corporate practices or environmental controls.

• The latest Commonwealth FOI law, that of Ghana of 2019, is mostly progressive (except for the arbitrary blank cheque below of "public morals"), with a unique and commendable whistleblower protection provision within it:

> 17(1) Despite a provision of this Act on information exempt from disclosure, information is not exempt if the disclosure of the information reveals evidence of
>
> (a) a contravention of, or a failure to comply with a law;
>
> (b) an imminent and serious threat to public safety, public health or morals, the prevention of disorder or crime or the protection of the rights or freedoms of others;
>
> (c) a miscarriage of justice; or
>
> (d) any other matter of public interest
>
> and the benefits of disclosure clearly outweigh the harm or danger that the disclosure will cause.
>
> (2) A person who discloses information or authorizes the disclosure of information under this section is not liable in criminal or civil proceedings for the disclosure or authorization of the disclosure of information under this section.

• The override in the Australian FOI law is rather limited, yet some provisions below help shore up whatever is there. While it seems regrettable that such (perhaps) self-evident points are necessary to state, this may stem from political realism and experience.

> Irrelevant factors – 11A (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
>
> (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
>
> (b) access to the document could result in any person misinterpreting or misunderstanding the document;
>
> (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
>
> (d) access to the document could result in confusion or unnecessary debate.

• Regrettably, a few older FOI laws have a sort of reverse public interest override, that is, the public interest can or must be considered as grounds to withhold information instead of releasing it (in Pakistan, New Zealand, Honduras). This factor is rarer in the newer generation of transparency laws.

• Finally, the hesitant, overcomplicated override in the United Kingdom's FOI law has

vast room for improvement, unfortunately, and it thankfully does not appear to have influenced the rest of the Commonwealth. The public interest only applies to some of the exceptions listed (Sections 26; 27; 28; 29; 31; 36; 38), which caused the CLD-AIE rating system to deduct it three points out of a possible four.

The normal public interest test in Section 2 of the UK Act requires the authority to disclose exempt information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. The override applies to all "non-absolute" exemptions. (In the UK's distinct terminology, "absolute" does not correspond to "mandatory"; it simply means that if the exemption applies, then no additional test of public interest follows.) Toby Mendel writes:

> The Law does provide for a public interest override, albeit in negative terms, providing that the obligation to disclose does not apply where, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)). This is a good test, requiring the grounds for exception to outweigh those in favour of disclosure.
>
> It is, however, undermined in two key ways. First, section 2(3) provides a long list of exceptions which are "absolute", in the sense that the public interest override does not apply to them. Second, the exceptions to the public interest override are wide but even more significant is the power to defeat the public interest override provided for in section 53. [Exception from duty to comply with decision notice or enforcement notice.][234]

The UK law does have a few positive features, however. In the policy advice exemption, Section 35, "regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking." In Section 19(1), when in adopting or reviewing a publication scheme, "a public authority shall have regard to the public interest."

Non-Commonwealth Nations

• Afghanistan's FOI law – top ranked in the world by the CLD-AIE rating system - has the shortest public interest override, applied for all its exemptions: "16 (3) Information under Article 16 (1) shall be made available if it is in the public interest."

• The Mexican law, RTI-ranked #2, includes, among other things: "14. Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake."

• Several statutes have overrides that extend far beyond health, safety and the environment, to consider problems in governmental management. In Montenegro's FOI law, for instance, "Information cannot be withheld if it relates to ignoring regulations, unauthorized use of public resources, misuse of power, criminal offenses and other related maladministration issues."

[234]Correspondence with author, May 2008

• In the FOI law of Armenia, the override extends to a range of social and economic concerns:

> Article 8.3. Information request cannot be declined, if: (a) it concerns urgent cases threatening public security and health, as well as natural disasters (including officially forecasted ones) and their aftermaths; (b) it presents the overall economic situation of the Republic of Armenia, as well as the real situation in the spheres of nature and environment protection, health, education, agriculture, trade and culture; (c) if the decline of the information request will have a negative influence on the implementation of state programs of the Republic of Armenia directed to socio-economic, scientific, spiritual and cultural development.

• Interestingly, like the *ATIA*, the public interest override of China's FOI ordinance is also discretionary and limited to the two topics noted in Canada's *ATIA* overrides:

> Article 14: [...] State organs cannot release government information touching on national secrets, commercial secrets and personal privacy. However, in cases where the consent of the rightful party is obtained, or the administrative organ determines that not releasing certain government information touching on commercial secrecy or personal privacy could do serious harm to the public interest, release may be made.

• The United States' *FOIA* has no general explicit public interest test, per se, yet Article 7(c)(1) has a limited override for police records. The FOI laws of most American states are far more open, such as that of Washington State: "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." (RCW 42.56.550(3))

• In Slovenia, Article 6.2, the override applies to all exemptions except those containing classified information of other country.

• The FOI override in Moldova's law is proactive and the most widely amorphous:

11 (1). The information providers, within their competence, are obliged: [....] 9. to publish immediately, for the knowledge of the public at large, the information that has become known to them in the course of their activity, if such information:

> a) can prevent or diminish danger to citizen's life and health;
>
> b) can prevent or diminish the danger of damages of any type;
>
> c) can prevent the publication of untruthful information, or can diminish the negative impact from the publication of such information;
>
> d) is of outstanding importance to society.

• At the other end, some nations' overrides are restricted to a single topic. Uruguay's Article 12 is a hard override but limited to human rights violations. Switzerland and Turkey have narrow FOI overrides that apply only to third party private information. In

Romania, a sort of public interest override will be applied only over "the information that favors or hides the infringement of the law by a public authority or institution."

• The overrides of several FOI acts concern the corporate sector. In South Korea's law, Section 7(1)(b), there is only one override, on trade secrets, for "Information which must be disclosed for the protection of the property or everyday routines of individuals from unlawful or improper business operations."

• In several FOI statutes, proactive broadcasting and media access is mandated. In Estonia's law, Section 30 (4), "State and local government agencies are required to communicate information concerning events and facts and which is in their possession to the broadcast media and the printed press for disclosure if public interest can be anticipated." In Romania's law, Article 15(1), "The access of the mass media to the information of public interest is guaranteed."

• Beyond the FOI law, many nations have Constitutions with guarantees of access to information of public interest. It is, in a way, the supreme public interest override, one that would even transcend a limited or ineffectual public interest override in the FOI law itself. For example, in the Constitution of Hungary, Article VI: (2): "Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest."

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

3.10. The Committee recommends that section 19(2) [personal information] of the *Access to Information Act* be amended to provide as follows: "Notwithstanding subsection (1) the head of a government institution shall disclose...." [It is currently "may" disclose. i.e., Change the public interest override from discretionary to mandatory.]

3.16. That 'the public interest override contained in section 20(6) of the *Access to Information Act* extend to all types of third-party information set out in section 20.

6.16. That the *Access to Information Act* be amended to add a provision requiring a government institution to reveal information as soon as practicable where there are reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

The absence in the federal *Act* of a general public interest override is a serious omission which should be corrected. Again, with the exception of the personal privacy exemption, the Act should require government to disclose, with or without a request, any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 28: Provide a principle statement that indicates that the public

interest is paramount where records reveal a grave environmental, health or safety hazard to the public on the model of the Ontario legislation.

Recommendation 29: Again following the Ontario model, provide a specific public interest override for section 2, section 13, section 14, section 17, section 18, section 22, section 23, and section 24. The public interest should be in protection of public health, public safety, the environment, law enforcement, the administration of justice and national defence and security.

Recommendation 31: Extend the public interest override in subsection 20(6) of the Act to cover paragraph 20(1)(a), trade secrets.

Recommendation 32: Add a general provision at the beginning of the exemptions part of the Act which obliges heads of institutions to use their discretion in favour of access and openness as opposed to refusal.

• Open Government Canada (OGC), *From Secrecy to Openness*, 2001:

Recommendation 11: A proof-of-harm test and public interest override (as in B.C. and Alberta) should limit the discretion, under all exemptions, to withhold a record.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians*. *ATIA* Review Task Force report, 2002:

4-1. The Task Force recommends that guidelines be issued on how to apply discretionary exemptions by: exercising discretion as far as possible to facilitate and promote the disclosure of information; weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and the fact that information generally becomes less sensitive over time; and having good, cogent reasons for withholding information when claiming a discretionary exemption.

Section 20 - Third Party Information. 4-21. The Task Force recommends that Section 20(6) be amended to add consumer protection as a public interest element for the head of a government institution to weigh in deciding whether to disclose information subject to this provision.

• *Bill C-201*, introduced by NDP MP Pat Martin, 2004:

Sec. 13. The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in subsection (1) if that disclosure would be in the public interest as it relates to public health, public safety, protection of the environment or the governance of corporations and, if the public interest in disclosure clearly outweighs in importance any financial loss, prejudice to the competitive position of or any other injury referred to in this section to the Government of Canada or to a government institution or its officers or employees.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005:

(2) Section 2 of the Act is amended by adding the following after subsection (2): 2.3 Notwithstanding any other provision of this

Act, the head of a government institution shall disclose a record or part thereof requested under this Act, if the public interest in disclosure clearly outweighs in importance the need for secrecy.

• Canadian Newspaper Association, *In Pursuit of Meaningful Access to Information Reform*, 2005:

Recommendation C. Public interest must outweigh government secrecy, especially in cases of risk of significant harm to public health or safety, a grave environmental threat, or health or safety risks to an individual or group. 9. The public interest override in the current Act must be strengthened, in line with freedom of information laws in British Columbia, Alberta, and Ontario. Exemptions for cabinet confidences should also be subject to this provision.

• Justice Gomery report, *Restoring Accountability*, 2006:

The [Canadian *ATI*] Act should state explicitly that records must be disclosed whenever the public interest in disclosure clearly outweighs the need for secrecy.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

2.3 Notwithstanding any other provision of this Act, the head of a government institution shall disclose a record or part of a record requested under this Act, if the public interest in disclosure clearly outweighs in importance the need for secrecy.

[...] 17. (3) Subsection 20(6) of the Act is repealed.

• The Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

Recommendation: All exceptions should be subject to a broad public interest override.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015:

Recommendation 4.1 –

The Information Commissioner recommends that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider the following, non exhaustive list of factors:

- open government objectives;

- environmental, health or public safety implications; and

- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.

Recommendation 4.19 –

The Information Commissioner recommends that the limited public interest override in the third party exemption be repealed in light of the general public interest override recommended at Recommendation 4.1.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

(The Information Commissioner's recommendation 4.1 is duplicated in the ETHI Committee's recommendation 17, but here only for "all non-mandatory exemptions")

• Canadian Environmental Law Association (CELA) and Ecojustice, *Joint submission to Senate review of Bill C-58*, December 2018:

Recommendation 2: The *Act* should include a public interest override for exemptions under the Act. The cabinet confidence exclusions should be replaced by a discretionary exemption which is subject to the public interest override.

CANADIAN PROVINCES

All Canadian provinces have public interest overrides in their FOI statutes, and the strongest one is found in British Columbia's law, Section 25, one that was virtually reproduced in the laws of Alberta and Prince Edward Island. This would serve well as a model for the *ATIA*. Unlike the federal statue, the override in B.C. is general, mandatory, and remarkably broad in the sense it could be applied for *any other* reason - beyond those described here - if the public body or the Commissioner or a court sees a need to do so:

> Sec. 25. (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest. (2) Subsection (1) applies despite any other provision of this Act.

What excuse can there be for Ottawa to have any less than this for its *ATI Act*, with its nearly inconsequential Section 20 and 19(2)(c) discretionary overrides?

• In eight provinces and the Yukon, the FOI public interest override is mandatory, while in three provinces it is discretionary (Nova Scotia, Manitoba, and Saskatchewan).

• The override is general, covering all exemptions, in Nova Scotia, New Brunswick, the Yukon, Newfoundland, Ontario, B.C., Alberta and Prince Edward Island. It is limited, covering only some exemptions, in Quebec, Manitoba and Saskatchewan – and the latter two concern only third-party business information.

• The most laudable phrase, *i.e.*, that beyond listed criteria, the override will apply for "any other reason" if it serves the public interest, is found in four provinces – Nova Scotia, British Columbia, Alberta and Prince Edward Island. Most other provinces phrase it more narrowly, in terms similar to "a risk of significant harm to the environment or to the health or safety of the public."

• In some laws, the override is proactive, *i.e.*, the government must release certain or all information for the public interest "whether or not a request for access is made" – in Nova Scotia, New Brunswick, Newfoundland, British Columbia, Ontario, Alberta and Prince Edward Island. (The others are FOI-request driven.)

• In the Ontario law, some of the exemptions below that the public interest override applies to are mandatory, others discretionary.

> 23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

• In the Newfoundland law, there is some very mild form of override within its mandatory cabinet records exemption:

> 27. (3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

• In Manitoba's law, Section 18(4), business confidentiality can be overridden if it is outweighed for the public purpose of "(b) improved competition; or (c) government regulation of undesirable trade practices."

Although it is mainly beyond the scope of this study, there is one reality we might briefly consider. In regards to the public interest override, unfortunately, there is probably no other FOI topic where a wider gulf exists between law and practice.[235]

Doubtless there are hundreds of incidences per year, most of which we never hear about, where governments had a legal - and arguably moral - duty to proactively publish such records, but simply did not. Political will cannot be legislated, and what Frank Work, Alberta Information and Privacy Commissioner, said in 2011 seems apt here: "I defy anyone to come up with a law that will force good access to information on a public body that doesn't want to do it."[236]

---

[235]The B.C. Information and Privacy Commissioner considered this question in an interesting report of 2015. After the environmental disaster at the Mount Polley mine tailings pond dam, she received complaints that the provincial government had failed to proactively release data on the risks, before the event, per FOIPP Act 25 (public interest override). She found no such failure in this case, but did advise "that Section 25(1)(b) be re-interpreted to no longer require an element of temporal urgency for the disclosure of information that is clearly in the public interest." - Investigation Report F15-02 – Information & Privacy Commissioner. https://www.oipc.bc.ca/investigation-reports/1814

[236]https://albertaviews.ca/access-denied/

Transcending Blackouts and Whiteouts

CHAPTER 7 - HARMS TESTS AND TIME LIMITS

Which exemptions in the FOI law are subject to harms tests and time limits?

A Conservative government will: Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.

- Conservative Party of Canada, election promise, 2006 (Promise not fulfilled.)

There are five key questions to ask about every freedom of information statutory exemption: (1) Does the exemption protect a legitimate interest? (2) Is it mandatory or discretionary? (3) Is it subject to a public interest override or not? (4) Is it subject to a harms test or not? (5) Is there any time limit, and if so, how many years? This chapter will focus on the fourth and fifth questions.

The basic purpose of including exemptions to disclosure in an FOI statute is to avert some sort of harm or injury to a legitimate interest. Therefore it is illogical and indefensible to broadly exempt entire topics, because if harm could have been caused by the release of such records, or portions thereof, those records would have been withheld under the law's exemptions anyway.

Disclosure should be the default and access should only be denied when release would pose a serious risk of harm, with the harm explicitly described. Unfortunately, many FOI laws include exemptions that are not subject to harms tests, which are called "class exemptions," or "absolute exceptions." The *ATIA*'s purpose clause states that "necessary exceptions to the right of access should be limited and specific," but when exemptions lack a harms test, this purpose is defeated.

Although this may be over generous to parliamentarians, sometimes it could be that harms tests were omitted because who passed the law did not consider the need for this thoroughly enough, or perhaps regarded the supposed harms occurring from the release from certain record topics as being too self-evident to bother describing. But to put it plainly, if harms in an exemption are putatively *implicit*, they instead now need to be rendered as *explicit* as possible in the text. Appellate bodies should not need to labour to read the minds of the legislators' of decades ago (of which they can rarely be certain).

Because there are no harms explicitly described in class exemptions, and no legal requirement to search for them, this lack of guidance creates somewhat of a vacuum. As nature abhors a vacuum, the effect is almost

as if the law's drafters, by default, gave the interpreters free reign to assume the harms (real or imaginary) on their own.

The calculation of potential harms will never be an exact science, illustrated by the fact that separate FOI directors often redact the same records very differently. When officials find the calculation of harms is too complex or uncertain, then often, in their view, the only truly responsible course is to err on the side of caution, for it is always best to avert a possible real life tragic outcome, no matter how remote, i.e., "better safe than sorry." (Moreover, officials have been penalized for releasing too much information, but when has one been punished for overzealously withholding it?)

Such questions are rarely black-or-white, and it reminds us indeed how difficult it can be at times to find the (best possible) balance between legitimate interests and the public's right to know. U.S. President Obama's executive order of 2009 is apt here, that records should not be withheld from "speculative or abstract fears." (All this presumes an official calculation of legitimate interests is at work here, with no agenda of political control.)

As well, much of the problem stems simply from Canadian lawmakers' surfeit of hope and trust, as they naively depended upon officials' good will on the spirit of disclosure, one that is regrettably absent.[237] It is naïve not to realize that in practice today the term "discretionary" exemption is often misinterpreted as political discretion. A guidebook of 1984 for *ATIA* applicants seems a poignant reminder of the early high hopes:

> The *Act* contains very few definitions that help an access seeker to know what the exemptions really mean. But do not lose heart. Although the exemptions are a formidable obstacle, they are so poorly drafted and so difficult to understand and to apply that you have a good chance of getting access to what you want.[238]

This may elicit a wry chuckle today. If only it were so. Over the past 37 years the opposite occurred as, whenever in doubt, officials inveterately err on the side of secrecy over openness.

Some requested records are disclosed to applicants only after Commissioners' inquiries or court trials, where they are ordered to be released. During such appellate stages, Crown lawyers often strenuously plead for secrecy because many and varied "harms" – some specific but most vague, all speculative, and none evidence-based – would likely or surely result from disclosure (e.g., third party competitive damage, public security risks, foreign affairs harms).

But there is one key question almost never

[237]The key presumption MPs need to always keep in mind as they design FOI statutes is that officials will always seek the path of least disclosure, and will doggedly exploit any silences or ambiguities in the text to expand the zone of secrecy. While one cannot foresee all their means of doing so, the drafters need to try as much as possible to close all the cryptic escape hatches in the text that they can. This is one reason that harms tests are essential for every exemption.

[238]Heather Mitchell and Murray Rankin, *Using the Access to Information Act*. Vancouver: International Self-Counsel Press, Ltd., 1984, pg. 45

considered: what if - some years after the ruling and the records' publication - one did a followup examination, to see how often these direly warned-of harms actually came to pass in the real world? I would, in fact, be astonished if one ever did.

Information Commissioner John Reid helpfully placed the whole matter into context:

> After I had been confirmed as federal Information Commissioner, I met with the former Commissioner, John Grace, to get his advice. One thing he said struck me in particular; he said that in his seven years as Privacy Commissioner and eight years as Information Commissioner (a total of 15 years spent reviewing the records which government wanted to withhold from Canadians) he hadn't seen a really good secret.
>
> My experience is much the same over the first year of my term. For the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature.239

The lack of a harms test for several exemptions is, unfortunately, an easily overlooked but serious failing of Canada's *Access to Information Act*, despite at least one party's specific pledge (cited above) to resolve this problem.

As the human rights organization Article 19 has noted, FOI statutory exemptions should be narrowly drawn, should be based on the content rather than the type or name of the record, and should be time-limited. Furthermore, it adds, a refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test: First, the information must relate to a legitimate aim listed in the law. Second, disclosure must threaten to cause substantial harm to that aim. Third, the harm to the aim must be greater than the public interest in having the information.[240]

There is general agreement that each freedom of information FOI statute should define potential harms with as much clarity and precision as possible, although appellate bodies would help shape a definition in their rulings. In a hopefully reformed Canadian Access to Information Act, there would ideally be a clear risk raised in each exemption, one based on a balance of probabilities, and in the appellate stages, real evidence for injury should be produced by public bodies and third parties, not merely bald assertions or generic speculations (especially via in-camera affidavits).

Some of the exemptions in the *ATIA* are clearly overbroad and, as the group Article 19 has observed, "A strong harm requirement undoes much of the damage potentially caused by overbroad exceptions.

---

[239]Information Commissioner John Reid, Remarks to *CNA Publishers Forum on Access to Information*, Nov. 25, 1999

[240]Toby Mendel, head of the Law Programme of Article 19, *The Public's Right to Know: Principles of Freedom of Information Legislation*. London, June 1999

This is because, where an exception is cast in excessively broad terms, much of the information in the zone of overbreadth would not, if disclosed, cause any harm to a legitimate interest."[241]

Furthermore, if what B.C. lawyer Rob Botterall said is correct, as I believe it is – that FOI discretionary exemptions in Canada are now being treated as though they were mandatory, i.e., the term "may withhold" is being misread as "must withhold" (an outcome never anticipated by Parliamentary drafters) – then the need to place a good harms test within all exemptions become all the more urgent. An injury test could reduce much of the damage of that new trend - which is in itself less damaging overall than the lack of harms tests is, because it stems from an unwritten and transitory culture, not a text.

Compensating for overbroad exemptions is also very similar to the purpose of the public interest override. In principle, such a general override reduces some of the damage caused by the lack of a harms test in an exemption, but since this override is more remote (often placed on a later page) and in practice so rarely invoked, it is far less effectual than a harms test placed in the exemption itself; to apply this override seems like a larger step to take, which runs contrary to the nature of bureaucratic caution. [242]

An important related concept, which would merit a chapter in itself, is that of *time limits*, or "sunset clauses," for *ATIA* exemptions. This is itself a sort of harms test because the potential for harm generally diminishes with the passage of time. It is true even for older defense and intelligence records - as witness their recent massive declassification in the United States and elsewhere, which can provide startling reassessments of history. Yet in the *ATIA*, some types of records can be sealed *forever*.

For example, the United Kingdom's statutory FOI exemption for certain law enforcement records is 100 years, which would permit a current historian to read records of offenses committed prior to 1919. Is even such a limit as this not preferable to eternity? There should be at least *some* time limit mandated for most exemptions in the *Act*, sunset clauses to be determined by parliamentarians in *ATIA* amendments.

Time limits should be reserved only for the protection of public interests, but not applied for a very few interests such as personal privacy (albeit this should perhaps die with the persons or at least within some period following their death), or commercial confidentiality (the formula for Coca-Cola can always be secret), or third-party – although not governmental - legal privilege (per the common law tradition).

---

[241] *Memorandum on the Ugandan draft Access to Information Bill*, 2004, by Article 19, London, 2004

[242] We need to recognize that a public interest override cannot replace a harm test because there may be cases where there is little public interest but still no harm (so the information should be released due to the latter even if the former will not generate that result).

In some national FOI laws, "the right to refuse information only lasts for the period, in which the reason for refusal lasts" (Czech Republic). I propose that the following may be ideal phrasing for FOI exemptions, as it ensures the best of both worlds:

"The right to refuse information only lasts for the period in which the risk of harm from disclosure remains live, or for [---] years, whichever occurs first." With the first option, the topic sensitivity might expire long before a set time limit and so the records should be opened.[243] Yet even if they should, if an especially recalcitrant agency claims obscure reasons to deny this is so and stubbornly resists in court for years (which will surely happen), then the second option of the fixed time limit would remain – as it does now - as a reliable default catch-all net.

• Canada's *Access to Information Act*, 1982:

Unfortunately, in the *ATIA* there are class exemptions which allow records to be withheld regardless of whether disclosure could cause harm. None of these records (if the exemption is a mandatory one) can therefore be released, even if they are innocuous, old, of public interest or benefit, and no harm would result from release. This situation in the *ATIA* generally falls short of current international FOI standards.

Of the *ATIA*'s exemptions, Section 14, and 15, and 16(1)(c) and (d), and 16(2), and 17, and 18 (b)(c)(d), and 22 (all discretionary, no time limits), permit government to withhold information where disclosure could be "injurious," or cause "prejudice," or "facilitate" an offense, or cause other harms. Yet several *ATIA* sections summarized below lack explicitly-stated harms tests.

- Section 13, information obtained from other governments (municipal, provincial, international) in confidence. Mandatory, with no time limit

- Section 16.(1)(a). Information obtained in the course of legal investigations. Discretionary, with 20 year time limit.

- Section 16.(1)(b). Investigative techniques and plans. Discretionary, with no time limit. (Section 16.(1)(c) and (d) have harms tests)

- Section 16 (3), information obtained by the RCMP in the course of carrying out policing functions in a province. Mandatory, with no time limit.

- Section 18 (1), governmental trade, scientific, technical financial or commercial information with substantial value. Discretionary, with no time limit. (Sec. 18 (b)(c) and (d) have harms tests)

[243]Of course, some officials (often the same kind who call for a reverse public interest override) might object to this option by complaining that, conversely, topic sensitivity could sometimes still exist after the externally set time limit as it can prior to it. But if that was so, on that principle they might as well argue that no time limit should be set at all, for only they are competent to determine the harms question on their own; this in turn would result in many records never being released, as indeed unjustly occurs now with some class-based exemptions.

- Section 19, personal information (which is protected under the Privacy Act). Mandatory, with no time limit[244]

- Section 20, third party information. Mandatory, with no time limit. (Sec. 20.1. (a) and (b) have no harms test, but (c) and (d) do.)

- Section 21, policy advice and recommendations (See Chapter 3). Discretionary, with 20 year time limit[245]

- Section 22.1(1), draft audits. Discretionary, with 15 year time limit. This was added by amendment in 2006.[246] (The full Sec. 22 has a harms test, and is discretionary, with no time limit)

- Section 23, solicitor-client privilege. Discretionary, with no time limit

- Section 24, the disclosure of information prohibited by other statutes. Mandatory, with no time limit (The topic of Chapter 10)

Beyond such exemptions, there are two "exclusions" in the *Act*, where records do not fall under the *ATIA*'s scope, and so the question of a harms test for possible release does not even arise. These are Sec. 68 (certain archival and already published material) and Sec. 69 (cabinet records, the topic of Chapter 2). In a reformed *ATIA*, these exclusions need to be transformed into exemptions.

The special problem of Section 13

Because I have not the space here to discuss all of the *ATIA*'s exemptions that are missing harms tests, I will focus instead on what I consider the two most egregious cases – Sections 13 and 23. Both sit unchanged since 1982 (as we enter the third decade of the 21st century), and as one *ATIA* guidebook by two lawyers notes of Section 13: "This first exemption sets the tone for all the rest. Its meaning is unclear, and the power it gives can be abused."[247]

Information obtained in confidence

13 (1) Subject to subsection (2), the head of a government institution shall refuse to

[244]It would be better to have - as many provinces and other countries do - some qualifier here, such as "unreasonable invasion of privacy". But the lack of a harm test is far less important here since we can normally assume that the disclosure of private information causes harm (to the interest which is privacy)

[245]In the early 1980s (and in some forms more recently), Canadian Treasury Board *ATIA* guidelines *did* in fact suggest a harms test for Section 21 (policy advice), stating that records which would otherwise be exempt under the section should only be withheld if their disclosure would "result in injury or harm to the particular internal process to which the document relates." When our government has accepted such a positive principle in its *ATIA* interpretive guidelines, as here, is it not then only logical to enshrine it in our law? Such guidelines have not the legal force of a statute, of course, and could be annulled any day; hence an *ATIA* amendment to guarantee this right is essential.

[246]The 2002 Treasury Board Task Force, however, had taken a narrower view, recommending that *ATIA* Sec. 22 be amended to allow the agency to refuse to disclose draft internal audit reports until the earliest of: the date the report is completed; six months after work on the audit has ceased; or two years following commencement of the internal audit. The Comptroller General had strongly argued that release of draft internal audits, even after the audit has been completed and the final report has been issued, could therefore harm individuals or programs and will undermine the credibility of the internal audit function. As well, it was stated, the potential of the release of audit working papers has a chilling effect on the candour of individuals in their dealings with auditors. Even if that was the case, a harms test on such points could still have been explicitly written into this *ATIA* subsection, instead of passing it as a class exemption.

[247]Mitchell and Rankin, *op.cit.*

disclose any record requested under this Act that contains information that was obtained in confidence from

(a) the government of a foreign state or an institution thereof;

(b) an international organization of states or an institution thereof;

(c) the government of a province or an institution thereof;

(d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or

(e) an aboriginal government.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

(a) consents to the disclosure; or

(b) makes the information public

The authors note that institutions are not defined here - "Does it include Crown corporations? Water boards? Tribunals?" There is also no time limit - "clearly this cannot have been the intent of the *Act*."

The broad powers it confers can be abused, they add. "For example, other governments could follow Alberta's lead and routinely stamp all records sent to the federal government as 'supplied in confidence,' or provincial or municipal governments could offer local businesses their services to submit their business records to the federal government." This service would make the records eligible for Section 13 coverage.[248]

Even beyond explicit abuse, Section 13 is very problematical because provinces and Ottawa generally do not have sophisticated systems for classifying information in ways that would ensure (at least most of the time) that classification is in line with the FOI laws. Instead, classification practices are generally massively overbroad - and this is also why we do not accept classification as a bar to disclosure. Put differently, classification is just a decision by an official which should not be allowed, under any circumstances, to defeat the principle of disclosure.

There are more questions. Did the other party explicitly ask for secrecy (such as by a written agreement), or was this just implicitly supposed on their behalf? Is it also presumed here that *everything* "received in confidence" would automatically harm intergovernmental relations if revealed?

For example, consider a transborder pollution spill which had been caused by Nation A. Some information, such as Nation B's cleanup reports, may have been "supplied in confidence" to Nation A by B. Yet B might have no objection whatever to having these

[248]An additional problem is that the right to information is (somewhat) constitutionally guaranteed in Canada and so we can expect all provinces to meet certain minimum standards in this regard. (Of course they don't but legally they should.) But this type of Section 13 exemption allows them to extend the scope of secrecy by trading information marked confidential between themselves.

records released via an FOI request made by a journalist in Nation A; it may even politically welcome awareness of A's spill being more widely raised, or change its attitude about this question over the years, perhaps under a new administration. (Under Section (1)(a), release is allowed if the provider "consents to the disclosure" indeed, but there are major uncertainties on how this consent is to work.)

Section 13 needs a harms test whereby the head of a government institution may refuse to disclose records containing information supplied in confidence from another government only "if disclosure could cause serious harm to intergovernmental relations."

On a related issue, *ATIA* Section 14, for federal-provincial affairs - a discretionary exemption, with a harms test and no time limit - should be deleted, if it is not heavily revised. First, it is far too broad, and the government has ignored repeated calls to have its term "affairs" narrowed to "negotiations," which was the term used in the first *ATIA* draft bill.

Secondly, say two lawyers, "Section 14 seems hardly necessary. Other exemptions cover all the concerns," and they cite Section 13 and 21. Indeed, I believe that the topics of Sections 13 and 14 so heavily overlap that they should be combined into one exemption, as some nations and Canadian provinces do.

Section 23 - Solicitor-Client Privilege

Here, one professional group is mandated to draft, interpret and often apply the one FOI exemption that could most advantage itself, a privilege extended to no other sector of society. This observation is not a complaint, *per se*, for obviously this profession is most qualified for these tasks. Yet from this reality, it comes as no surprise that this section is so overbroadly worded and overapplied in practice, as though one can at times forget the wider public interest.

This discretionary section - subject to no time limit or public interest override - reads in full:

> 23 The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

The government simply defers here to the centuries-old common law definition of the privilege, and then more. The government generally treats any advice provided by a lawyer as covered by this even if the lawyer is just providing policy advice like any other official might (which thus should be subject to Section 21 here instead). Section 23 should be limited to a litigation privilege or matters which would be privileged from production in legal proceedings – and surely not for other matters such as records on the crafting of public policy or laws.

For now, politicians sometimes call in a lawyer to merely sit in on a closed door meeting to listen, and then term his or her presence "legal advice"; lawyers also fight to keep secret their taxpayer-funded legal billing figures even after all appeals are finished. If such outcomes were not the intent of parliament, then the *ATIA* should be amended to render the privilege much more narrow and specific, to avoid such disputes and the

ensuing costly litigation to set boundaries.[249]

In its brief to the Senate on Bill C-58, the Quebec journalists' federation noted a special problem:

> Our members' experience in Quebec is instructive; government bodies have a tendency to add the names of lawyers or notaries to distribution lists on documents, so they are able to refuse to disclose the documents, citing solicitor-client privilege. The Commission d'accès à l'information, which makes review decisions in Quebec, has stated that in order to assert solicitor-client privilege, there had to be a relationship with a client; the mere fact of including the name of a lawyer or notary in a distribution list does not create that relationship. Solicitor-client privilege is not a catch-all concept for camouflaging documents.

The main issue here is the scope rather than the absence of harm; if the scope is narrow, then harm can largely be presumed (although a time limit and public interest override are important). It is also important here to distinguish between privilege vested in a private third party and crown privilege; public bodies need to respect the former quite carefully and it is the latter that is largely subject to abuse (and a time limit for third party privilege is likely not advisable).

The 1984 *ATIA* guidebook remarks, "Since the federal government is both its own client and its own solicitor, and lawyers from the Department of Justice work for all other departments, it should be easy for government institutions to waive the privilege."[250] Indeed, one would hope this would occur in practice, but such is not the case.

Moreover, the lack of any time limit, conceivably even for *centuries*, for solicitor-client privilege in an FOI law is simply indefensible. In principle, it could be applied to withhold legal advice on very inactive matters such as the terms of British Columbia's entry into Confederation in 1871. As noted by former Information Commissioner John Reid:

> It has been obvious over the past 22 years that the application and interpretation of Section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.[251]

For example, through the *ATIA*, for a news story, I obtained the minutes of Ottawa

---

[249]Positively, some amendments in *Bill C-58* - i.e., clauses 15 and 50 - would allow the Information Commissioner to examine any record withheld by the head of a government institution on the basis that it is protected by "solicitor–client privilege or the professional secrecy of advocates and notaries and litigation privilege." (Some lawyers protested, to no avail.)

[250]Mitchell and Rankin, *op.cit.*

[251]John Reid, The *Access to Information Act* - Proposed Changes and Notes. Ottawa, 2005

cabinet meetings from 1988 and 1989 on its discussions on what a new abortion law should be. Yet many lines on this vital subject are still being withheld today in 2019 under Section 23 - which would not be possible under the United Kingdom's FOI law, with its 30-year limit for its legal privilege exemption, and even less so with nations with five or 10 year sunset clauses for it. (This process of forging policy and law is also not a "legal proceeding," which is the FOI exemption standard in many nations.)

In the 21st century, we need to carefully and fully reconsider the relationship between the old common law tradition of solicitor-client privilege and the exemption for this interest placed in FOI statutes.

OVERRIDING THE SECTION 23 OVERREACH

Two cases of the overuse of the discretionary *ATIA* solicitor-client privilege exemption were noted in the federal Information Commissioner's *2016-17 Annual Report*. Both cases had positive outcomes.

(1) In 2012, Library and Archives Canada received an *ATIA* request for records from 1918 relating to Norman Earl Lewis's petition of *habeas corpus* against the Borden Government. LAC refused access to historical memos and telegrams between counsel and the Deputy Minister of Justice under Section 23. The requester complained.

"The OIC disagreed that most of this information qualified for legal advice privilege," the Commissioner wrote. "Even if some of the information had consisted of legal advice at one time, LAC could not establish continuing confidentiality of the records. Finally, for any information that did qualify for protection, LAC did not provide evidence that it considered the age of the records or their historical value when exercising discretion to refuse disclosure." LAC then released all of the records.

(2) An applicant had asked for a manual of the Canadian Human Rights Commission via the *ATIA*, only to be denied under Section 23. "Not everything drafted by a lawyer qualifies for legal advice privilege," the OIC wrote.

"While some of the information in the records was legal advice, the majority of the information was not. For those records that did qualify for legal advice privilege, the CHRC's public education mandate weighs in favour of waiving

privilege, as there is a clear benefit in helping the public understand how CHRC's investigations are conducted. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental knowhow. Advice given by lawyers on matters outside the solicitor-client relationship is not protected." The CHRC then released most of the documents. The good principles articulated above need to be placed in a reformed *ATI Act*.

GLOBAL COMMENTARY

• Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

Principle 4. Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests. All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three-part test: (1) the information must relate to a legitimate aim listed in the law; (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information [...]

• Article 19, *Model Freedom of Information Law*, 2001:

33. (1) The provisions of sections 26–31 apply only inasmuch as the harm they envisage would, or would be likely to, occur at or after the time at which the request is considered. (2) Sections 27(c), 29, 30 and 31 do not apply to a record which is more than 30 years old.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

Key Principles. Are the exemptions based on "harm tests" in which non-disclosure is only permissible if it can be shown that disclosure would harm a specified interest, such as national security?

• National Security Archive, George Washington University, *The World's Right to Know*, 2002:

Any exceptions to release should be based on identifiable harm to specific state interests, although many statutes just recite general categories like "national security" or "foreign relations" . . . . Any exceptions to the presumption of openness should be as narrow as possible and written in statute, not subject to bureaucratic variation and the change of administrations.

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003:

Legislation should avoid broad, blanket exemptions. In most cases, each document and the context of its release is unique and should be judged on its merits.

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information.

• World Bank, *Legislation on freedom of information, trends and standards*, 2004:

Access should be denied only when disclosure would pose a serious risk of harm to a legitimate aim. Most exceptions meet this standard, but many laws include exceptions not subject to harm - often referred to as class exceptions.

• United Nations Development Agency (UNDP), *Key questions*, UN Special Rapporteur on Freedom of Information, 2006:

The following principles would need to be applied: .... 2. The disclosure should cause substantial harm to one of the purposes listed in the act (e.g. the disclosure of a report that relates to national defense should indeed have the potential to effectively harm national security).

• Open Society Justice Initiative, *Ten Principles on the Right to Know*, 2006:

Principle 6. Governments may only withhold information from public access if disclosure would cause demonstrable harm to legitimate interests, such as national security or privacy.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information recommendations*, 2007:

The official who wishes to withhold the information must identify the harm that would occur for each case of withholding. . . . Some information of a sensitive nature may be subject to withholding for a limited, specified time for the period it is sensitive. The exemptions should be limited in scope.

The definition of state secrets should be limited only to data that directly relate to the national security of the state and where their unauthorized release would have identifiable and serious consequences. Information designated as "official" or "work secrets" should not be considered for classification as state secrets. Limits on their disclosure should be found in the access to information law.

• Organization of American States (OAS), *Model Law on Access to Information*, 2010:

IV. EXCEPTIONS. Exceptions to Disclosure. 41. Public authorities may deny access to information only in the following circumstances, when it is legitimate and strictly necessary in a democratic society, based on the standards and jurisprudence of the Inter-American system: [....]

(b) Allowing access would create a clear,

probable and specific risk of substantial harm to the following public interests:

1) public safety;

2) national security;

3) the future provision of free and open advice within and among public authorities;

4) effective formulation or development of policy;

5) international or intergovernmental relations;

6) law enforcement, prevention, investigation and prosecution of crime;

7) ability of the State to manage the economy;

8) legitimate financial interest of a public authority; and

9) tests and audits, and testing and auditing procedures.

The exceptions under sub-paragraphs (b) 3, 4 and 9, do not apply to facts, analysis of facts, technical data or statistical information.

The exception under sub-paragraph (b) 4 does not apply once the policy has been enacted. The exception under sub-paragraph (b) 9 does not apply to the results of a particular test or audit once it is concluded.

c) Allowing access would constitute an actionable breach of confidence in communication, including legally privileged information.

Historical Disclosure - 43. The exceptions under Article 41 (b) do not apply to a record that is more than 12 years old. Where a public authority wishes to reserve the information from disclosure, this period can be extended for another 12 years only by approval by the Information Commission.

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

26 Classified information. Information is not exempt from access under this Act merely on the basis of its classification status. [All exemptions in this model law are discretionary, none mandatory.]

OTHER NATIONS

General notes on harms tests and time limits

In a legal dispute before an information commissioner or a court, each qualifying word in an FOI statute can tip the balance between record disclosure or not. Article 19 observes that the international FOI standard allows for refusal only if disclosure "would or would be likely to" cause "substantial harm" to a protected interest, adding that "this is a higher standard than causing prejudice to an interest, since 'prejudice' may have a much wider interpretation, contrary to the requirement that exceptions be as narrow as possible."[252]

It is also important to note that most nations with FOI laws - unlike with the *ATIA* -

[252] *Memorandum on the Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002*, by Article 19, London, 2004

have much broader public interest overrides, and this might on very rare occasions partly compensate for the lack of a harms test in an exemption (although this is not an adequate substitute for one).

Most laudably, some nations prescribe a harms test for *all* FOI exemptions – such as Mexico,

Nicaragua, Albania, Guatemala and Ukraine. The standards in Mexico's law (RTI-ranked #2 in the world) should be set in Canada's *ATIA*:

> Article 103. [....] the regulated entity shall, at all times, apply a harm test.
>
> Article 104. In applying the harm test, the regulated entity must justify that:
>
> I. The disclosure of the information represents a real, demonstrable and identifiable risk of significant harm to the public interest or national security;
>
> II. The harm risk that the disclosure would mean exceeds the public interest of being disseminated, and
>
> III. The limitation is consistent with the principle of proportionality and is the least restrictive means available to avoid harm.

As a counterweight to the blight of "class exemptions," the FOI law of Liberia[253] (RTI-ranked #9), voices an exemplary spirit in a general statement:

> Section 4.8 Exemption must be justified; not merely claimed: A public authority or private entity may not refuse access to or disclosure of information simply by claiming it as "confidential or secret". In order to qualify to be exempted from disclosure, it must be clearly demonstrated that:
>
> a) The information or record falls within or under one or more of the exemptions established in this Act;
>
> b) That the disclosure of the information will cause or likely to cause injury or substantial harm to the interest protected by one or more of the exemptions established in this Act; and
>
> c) The harm to be caused by the disclosure is greater than the public interest in having the information disclosed.

It is usually low RTI-ranked nations (such as Germany and the Dominican Republic) that lack harms tests for most or all FOI exemptions, a flaw that partially explains their rating. Yet the most prominent nation within the Commonwealth could also do much better, as Toby Mendel observed:

> The United Kingdom RTI Law has a very broad regime of exceptions, referred to

[253]The West African nation of Liberia is an interesting case. The first African republic to proclaim its independence, in 1847, it is the continent's first modern republic. A military coup in 1980 led to civil wars that killed 250,000 people, followed by democratic elections in 2005 and the passage of a fine FOI law in 2010. Corruption remains endemic, with 83 percent of the population below the international poverty line. Considering this background, it is remarkable to be RTI-ranked #9. (Yet as noted before, we are only concerned with FOI statutory texts; how they are being actually applied year to year is beyond the scope of this study and should not influence it.)

> in the Law as exemptions, reflecting an ongoing preoccupation with secrecy in government. Indeed, this is the real Achilles heel of the Law, which is otherwise progressive. Most of the exceptions are reasonably clear, but many are anything but narrow and, in some cases, they go well beyond what has been considered necessary in other countries.[254]

Time Limits

Regarding time limits, nations have chosen among four basic options in their FOI laws, or a combination of these: (1) all or some of the exemptions expire when the need for them ends,[255] (2) there are specific time limits for all exemptions, (3) time limits for some exemptions, and (4) no time limits for any exemption.

In the Canadian *ATIA*, only four sections have time limits, set by years – 20 years for Section 16.1(a) (some law enforcement records), Section 13 (policy advice), Section 69 (the cabinet records exclusion); and 15 years for Section 22.1 (draft internal audits) – a truly abysmal record, relative to the rest of the world.

• The first option – flexible, need-based time limits for exemptions.[256]

The FOI laws of Croatia (Section 3), Slovakia (Section 12), and the Czech Republic set valuable models. In the Czech law: "The right to refuse information only lasts for the period, in which the reason for refusal lasts. In justified cases the subject will verify if reason for refusal still lasts." If so, is it conceptually possible here that we could see a particular record released in less than one year?

The Macedonian FOI law emphasizes the need for a harms test for sunset clauses for its nine main exemptions in Article 6.2 (all discretionary and covered by a public interest override):

> 6(2) Information listed in paragraph (1) hereunder shall become available once the reasons for its being unavailable shall cease to exist.
>
> Art. 6 (3) Under exception to paragraph (1) hereunder, information holders shall allow access to information, after the obligatory harm test is conducted with which it will be determined that, in case such information is published, consequences to the interest being protected will be smaller than the public interest to be maintained with the publishing of such information.

A few nations apply this fine principle only to several sections. For example, in the FOI law of Antigua, Section 34. (1), "The provisions of sections 27 to 32 apply only to the extent that the harm they seek to protect against would, or would be likely to, occur at or after the time at which the request is considered."

---

[254]Toby Mendel, correspondence, May 2008.

[255]For some observers, this falls outside of the scope of the time limit and is really part of the harm test

[256]Norway is the only nation in the world that permits royalty to determine this question in its FOI statute: "(7). The King may decide that documents which come under section 6 shall be publicly disclosable when, because of the lapse of time or for other reasons, it is obvious that the considerations which have justified exemption from public disclosure no longer apply."

(Those sections concern legal privilege, commercial records, law enforcement, defense and security, and policy creation.)

• The second option – a time limit set by years for all exemptions.

The first two nations below combine the best of both options – that is, a flexible need-based sunset clause, with a set time limit as a default backup net.

In Liberia's FOI law, Section 4.9: "Information or records exempted from disclosure or public may remain exempted for as long as the reason for their exemption exists, but in any event no longer than a continuous period of 15 years."

The Mexican FOI statute (RTI-ranked #2) partially expresses the same principle:

> Article 101. Documents classified as privileged will be public when: (I). The causes that gave rise to their classification expire; (II). The term for classification expires; (III). There is resolution of a competent authority determining that there is a cause of public interest that prevails over the confidentiality of the information, or (IV). The Transparency Committee considers appropriate to declassify it in accordance with the provisions of this Title.
>
> Information classified as privileged, under Article 113[257] of this Act, may remain as such up to a period of five years. The confidentiality period shall run from the date on which the document is classified.
>
> Exceptionally, regulated entities, with the approval of Mexico's Transparency Committee, may extend the confidentiality period up to one additional five-year period, provided they justify the causes that gave rise to its classification remain, by applying a harm test.

In a very few FOI laws, the flexible override for time limits can work in reverse, contrary to shortening it. That is, in Ecuador information can be kept secret for a maximum of 15 years but the duration can be extended if there is seen to be a justification for it.

For some writers, this may seem quite reasonable, and essentially an appropriate quid pro quo for a short time limit (so a short limit by default and then, in exceptional cases, it can be extended). In Mexico, as cited above, such extensions can happen only with the approval of the Commission, which seems like a very good option.

The FOI law of Vanuatu also prescribes the valuable involvement and guidance of the Information Commissioner in deciding these questions.

> 51. Time limit for exemptions (1) Information that is exempted from disclosure under this Part [i.e., the exemptions] ceases to be exempt if it is more than 10 years old commencing from the date on which it was made, or such other period as may be determined by the Information Commissioner after consultation with the Minister.
>
> (2) Subsection (1) does not apply to the personal information of a natural third party.

> (3) The Information Commissioner may, in consultation with the Minister, review any exempted information under this Part within 2 years of it being exempted.
>
> (4) Subject to subsection (3), the Information Commissioner may remove the exception status of information if it is no longer applicable.

Some nations release certain older records proactively at a set time without FOI requests. For instance, Britain sends cabinet records to the National Archives for public viewing under "the 30 year rule," an ongoing tradition that predated the passage of its FOI law in 2000.

Finally, a few FOI laws simply open up all material prior to a certain historical point. In the statute of Georgia (1999), all public information created before 1990 can be disclosed. In Sierra Leone, information that was produced more than 20 years before its RTI law was passed in 2013 is public, unless the information commission certifies there is an ongoing need to keep it confidential.[258]

• The third option – time limits set by years only for certain exemptions.

In Thailand's law, Section 26, there is a 20 year time limit for most exceptions, but it can be extended. For most but not all of Azerbaijan's FOI exemptions, Article 40.1 mandates: "Limitation of access to information intended for official use shall be removed upon elimination of such limitation's cause, but within a period not exceeding 5 years."

Regrettably, a few nations (mainly Commonwealth) set a very excessive 30 year time limit for most or all of their FOI exemptions – Kenya, Kosovo, Antigua, Ghana, and the United Kingdom.

• The fourth option – no time limit for any exemption.

In a very few nations, such as Japan, no time limits are applicable to exceptions. In Sweden (the first nation to pass an FOI law, in 1766), time limits are not specifically mentioned and the law is vague.

Information obtained from other governments in confidence

Commonwealth Nations

Most Commonwealth nations do have a FOI exemption for information obtained from other governments in confidence (and some combine it with their exemption on harms to intergovernmental relations).[259] Yet most are less restrictive in some ways than *ATIA* Section 13; that is, although most have no harms tests or time limits, some are discretionary and are covered by public interest overrides.

---

[258]On the Sierre Leone case, the CLD-AIE analysts wrote: "Highly problematic - since it applies only to information produced before 1993, rather than to all information 20 years old or more - but still worth a point." https://www.rti-rating.org/country-data/Sierra%20Leone/

[259]Whenever I do not mention here if a nation has such an exemption – or when it does, if that exemption is mandatory, or has a harm test, or has time limits – it only means the law text appears to be silent on these points, or the translation is unclear, and I do not speculate on whether they are actually present or not.

• This exemption is found in the FOI laws of India – Article 8(1)(f); Sri Lanka - Section 5(b)(1)(ii); Fiji - Article 20(g); Uganda - Section 32.(1)(c); the United Kingdom – Section 27.(2); and Trinidad and Tobago - 26.(d).

• The most detailed exemption is found in South Africa in Section 41(1). Although it contains no harms test or time limit, it is discretionary (not mandatory as with the *ATIA*) and covered by a public interest override.

> **41 Defence, security and international relations of Republic**
>
> (1) The information officer of a public body may refuse a request for access to a
>
> record of the body if its disclosure - [...]
>
> (b) would reveal information -
>
> (i) supplied in confidence by or on behalf of another state or an international organisation;
>
> (ii) supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or
>
> (iii) required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution.

• New Zealand has a similar exemption in its FOI law, Section 6. Although this is not subject to a time limit or a public interest override, at least it contains a harms test, unlike Canada's *ATIA*.

> 6. Good reason for withholding official information exists, for the purpose of Section 5 [Principle of Availability], if the making available of that information would be likely [...] [b] to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by - (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation

Non Commonwealth Nations

This exemption is found in the FOI law of only a few non-Commonwealth nations. Most also have a section for harm to foreign relations (or combine them), but that is a separate matter.

• Mexico's exemption is discretionary, with a good override, and a five year time limit, which can be extended five more years by applying a harms test, in Article 101 as discussed above.

> Article 113. The information may be classified as privileged if its publication: [...] III. Is delivered to the Mexican State expressly as confidential by other subjects of international law, except in the case of serious human rights violations or crimes against humanity under international law

• The section in the FOI law of South Sudan (RTI-ranked #12) is also discretionary, and laudably includes a 30 year time limit, harms test, and several overrides within the exemption:

> 27. (1) A public body may refuse to communicate information if: [....] (c) the information was obtained in confidence from another State or International Organization and to communicate it is likely to prejudice relations with that State or International Organization.
>
> (2) A request may not be refused in terms of subsection (1) where:
>
> (a) The disclosure of the information would facilitate accountability and transparency of decisions made by the public body;
>
> (b) The information relates to the expenditure of public funds; or
>
> (c) The disclosure of the information would reveal misconduct or deception.

• The FOI law of Liberia, Section 4.2, states that records are exempted from public access if its disclosure "would divulge any information or matter communicated in confidence by or on behalf of another country to the Government." Yet the exemption is rendered much narrower than Section 13 of the *ATIA* by the harms test that follows:

> Section 4.8. Exemption must be justified, not merely claimed: A public authority or private entity may not refuse access to or disclosure of information simply by claiming it as "confidential or secret". In order to qualify to be exempted from disclosure, it must be clearly demonstrated that:
>
> (a) The information or record falls within or under one or more of the exemptions established in this Act;
>
> (b) That the disclosure of the information will cause or likely to cause injury or substantial harm to the interest protected by one or more of the exemptions established in this Act; and
>
> (c) The harm to be caused by the disclosure is greater than the public interest in having the information disclosed.
>
> 4.9. Information or records exempted from disclosure or public may remain exempted for as long as the reason for their exemption exists, but in any event no longer than a continuous period of 15 years.

• Some form of the exemption is also present in the laws of Israel, Kyrgyzstan, Yemen, and the FOI code of Hong Kong.

• Jordan (RTI-ranked #119) has one of the very few FOI laws that mentions confidentiality on this topic by an explicit agreement, in Article 13(b) which exempts "records classified according to agreement with another country."

• This exemption is present in the FOI law of Zimbabwe (RTI-ranked #100). But unlike the Canadian *ATIA*, it is discretionary, with a harms test ("affect" relations), a 20 year time limit, and it is subject to a limited and unusual public interest override.

> 18. (1) The head of a public body may, on the advice of the Minister responsible for local government or the Minister responsible for foreign affairs, as the case may be, refuse to disclose information to an applicant if such

> disclosure may – (a) affect the relations between the government and
>
> (i) a municipal or rural district council; or
>
> (ii) the government of a foreign state; or
>
> (iii) an international organisation of states;
>
> (b) divulge information received in confidence from a government, council or organisation referred to in paragraph (a).
>
> (2) Subsection (1) shall not apply to information, other than law enforcement information, contained in a record that has existed for 20 or more years.

The good features here are a pleasant surprise, considering the Zimbabwe government told the African Commission on Human Rights that its FOI procedures were "moulded along the lines of Canada's laws on the same subject."[260] (This is, in fact, the only nation in the world claiming to be inspired by our *ATI Act*; and it did replicate the legal advice privilege, as noted below.)

Legal Advice

Commonwealth Nations

• In the British law (RTI-ranked #43), records must be withheld under Section 42, Legal professional privilege. This is mandatory, with no harms test, and it is excluded from the public interest override. Yet 42(1) has a 30 year time limit (which is advisable for the *ATIA*).

> 42.(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

• In New Zealand, records are exempt "if, and only if, the withholding of the information is necessary to [...] [h] maintain legal professional privilege." As is usual in the Commonwealth, there is no harms test or time limit for this section, but it is subject to public interest override. Quite similar exemptions are found in Seychelles, Sierre Leone, and Nigeria. The wide scope of the exemption is a much worse problem than the lack of a hams test.

• This exemption in FOI law of Zimbabwe reads in full: "16. The head of a public body shall not disclose to an applicant information that is subject to client-attorney privilege." This is virtually identical to the Canadian *ATIA* Section 23.

---

[260]In some cases, of course, an FOI law can be used in opposition to its stated purpose and become a negative force in society. In Zimbabwe, the *Access to Information and Privacy Protection Act* was signed by President Robert Mugabe in 2002. The *Act*'s main purpose is to suppress free speech by requiring journalists to register, and prohibiting the "abuse of free expression," with 20 year jail terms prescribed for this. These powers have been widely misused. On paper at least, the *AIPPA* sets out rights for access similar to other FOI laws around the world. See http://www.freedominfo.org/countries/zimbabwe.htm After the 30 year authoritarian rule of Mugabe ended with a military coup in 2017, media censorship eased slightly, and in May 2018 the newly elected president Emmerson Mnangagwa applied for Zimbabwe to rejoin the Commonwealth (which it had left in 2003).

Other FOI statutes have far more detailed exemptions than just the vast, common law concept of "solicitor-client privilege." That is, the privilege is often reserved mainly for ongoing legal proceedings, and not also applied to advice on the forging of policies and statutes as in Canada; this latter point is crucial and needs a much higher profile.

• Kenya's FOI exemption is mandatory, unlike *ATIA* Section 23, and it also expands legal proceedings to "contemplated" ones. Yet on the plus side, it includes a valuable and extremely rare harms test ("damage") in a legal affairs section, plus a public interest override in 6.(4), and a 30 year time limit in 6.(7). No current FOI law is perfect, and such assessments are a tradeoff of pros vs. cons, depending on which factors are most valued by each observer.

> 6. (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to [...] (h) damage a public entity's position in any actual or contemplated legal proceedings.

• The legal affairs exemption of Vanuatu's law (RTI-ranked #15) is discretionary, and there is a 10 year sunset clause for all records, with a strong public interest override; better yet, the Information Commissioner can review any record two years after its exemption and may remove that status "if it is no longer applicable."

> 43. A Right to Information Officer may refuse to indicate whether or not he or she holds information, or refuse to communicate information, if the information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

There is similar wording for Uganda's exemption, Section 13, but it is mandatory, with no time limit, and is subject to a public interest override.

• The exemption in Chapter 2, Article 4 of Rwanda's law is mandatory, with a harms test and a public interest override, but no time limit,: "Information withheld by a public organ or private body to which this Law applies shall not be published when it may: [...] (5) obstruct actual or contemplated legal proceedings against the management of public organ."

• In the FOI ordinance of Pakistan, in Section 16.1.(i)(vi), records may be withheld if their release would likely "disclose privileged information shared between counsel and the client." This commendably has a 20 year time limit, but a weak reverse override (whereby the Minister must provide reasons when declaring confidentiality as to why harm overrides public interest).

• In the wording of South Africa's FOI exemption, although it is mandatory with no time limit, no harms test or public interest override, it is arguably still preferable to Canada's *ATIA* because it is confined to legal proceedings.

> 67. The head of a private body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person

> entitled to the privilege has waived the privilege.

• The exemption is mandatory in the statute of Sri Lanka (RTI-rated #4 in the world and the highest ranked FOI law in the Commonwealth), with no harms test or time limit, but it is covered by a public interest override. On the other hand, is lamentably much broader than Canada's because it covers different types of professional secrets.

> 5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where – [...] (f) the information consist of any communication, between a professional and a public authority to whom such professional provides services, which is not permitted to be disclosed under any written law, including any communication between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority; [or...]
>
> (j) the disclosure of such information would be in contempt of court or prejudicial to the maintenance of the authority and impartiality of the judiciary

Legal advice – Non-Commonwealth nations

The legal affairs FOI exemption here is generally much narrower than the sweeping "solicitor-client privilege" one present in Commonwealth nations, and focused mainly on "legal proceedings." (We may also recall that Canada's *ATIA* Section 23 has no harms test, time limit, or public interest override.) For instance, in the fine FOI law of South Sudan:

> 26. A public or private body may refuse to indicate whether or not it holds a record, or to communicate information, where the information is privileged from production in legal proceedings, or in the public interest, unless the person entitled to the privilege has waived it.

This is discretionary and subject to a public interest override: as well, the law's section on time limits stipulates that the Section 26 exemption "shall apply to the extent of the harm envisaged where it is more likely to occur at or after the time at which the request is considered."

• In Peru's law, the exemption in Section 15.B terminates when the legal process ends (and the law also has a partial public interest override, for human rights violations).

> [Exempt information] 4. Information prepared or obtained by the Public Administration's legal advisors or attorneys whose publication could reveal a strategy to be adopted in the defense or procedure of an administrative or judicial process, or any type of information protected by professional secrecy that a lawyer must keep to serve his client. This exemption ends when the process finishes.

• A legal affairs exemption is also present in the FOI laws of Hungary - Article 27(2); Kosovo - Article 12(1); Lebanon - Article 5.B; Niger - Article 13; Romania – Article 12; South Korea - Article 9. 4. This exemption is mainly restricted to legal or administrative proceedings, and designed to ensure a fair trial.

• The United States *Freedom of Information Act*

(RTI-ranked #72) contains a solicitor-client privilege in Subsection (b), Exemption 5.

This protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." As noted in a U.S. Justice Department guidebook, courts have construed this somewhat opaque language to exempt only those documents that are normally privileged in the civil discovery context.[261] American courts have also confined the privilege to documents prepared in anticipation of particular litigation.

According to U.S. Code § 552, "the privilege shall not apply to records created 25 years or more before the date on which the records were requested." As well, in (8)(A), "an agency shall - (i) withhold information under this section only if - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)."[262] There is no general public interest override in the U.S. FOIA.

• Finally, a very few FOI laws prescribe that the topic be dealt with outside of that statute, as in Portugal's Article 6.2: "Access to documents concerning the confidentiality of legal proceedings shall be governed by specific legislation."

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

3.7. The Committee recommends that the Acts be amended to clarify that the classes of information listed in section 15 [international affairs, defense, security] of the *Access to Information Act* and incorporated by reference in section 21 of the Privacy Act are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analogous to those sorts of state interest listed in the exemption.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 26: That all exemptions under the *Access to Information Act* with the exception of section 19, paragraph 20(1)(a), and any new provision dealing with Cabinet Confidences, be discretionary in nature and injury-based.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005 (underlined parts are Mr. Reid's amendments to the existing Act):

11. Section 13 of the Act is replaced by the following:

13. (1) Subject to subsection (2), the head of a

[261]See *Freedom of Information Act Guide*, May 2004. U.S. Department of Justice at https://www.justice.gov/oip/foia-guide-2004-edition-exemption-5 The guidebook adds: "However, the mere fact that it is conceivable that litigation might occur at some unspecified time in the future will not necessarily be sufficient to protect attorney-generated documents; it has been observed that "the policies of the FOIA would be largely defeated" if agencies were to withhold any documents created by attorneys "simply because litigation might someday occur."

[262]*U.S. Code § 552. Public information; agency rules, opinions, orders, records, and proceedings*. https://www.law.cornell.edu/uscode/text/5/552

government institution may refuse to disclose any record requested under this Act if (a) the record contains information that was obtained in confidence from

(i) the government of a foreign state or an institution thereof, (ii) an international organization of states or an institution thereof, (iii) the government of a province or an institution thereof, (iv) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government, or (v) an aboriginal government; and (b) disclosure of the information would be injurious to relations with the government, institution or organization. [...]

[And there are harms tests for other sections, advised by Mr. Reid.]

• Justice Gomery report, *Restoring Accountability*, 2006:

At present, the [Canadian ATI] Act gives the Government the discretion to withhold records if they fall within certain categories of documents listed in the Act. The Commission supports a different approach, whereby the first rule would be that records must be disclosed, unless their disclosure would be injurious to some other important and competing interest (in other words, an "injury test" applies). Similarly, the Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as [sec. 13, 16, 18, 20, 21, 23, 69].

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

Definitions: '"trade secret" means any information, including a formula, pattern, compilation, program, device, product, method, technique or process (a) that is used, or may be used, in business for any commercial advantage; (b) that derives independent economic value, whether actual or potential, from not being generally known to the public or to other persons who can claim economic value from its disclosure or use; (c) that is the subject of reasonable efforts to prevent it from becoming generally known to the public; and (d) the disclosure of which would result in harm or improper benefit to the economic interests of a person or entity'

[....] 10. Section 13 of the Act is replaced by the following:

13. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act if (a) the record contains information that was obtained in confidence from (i) the government of a foreign state or an institution thereof, (ii) an international organization of states or an institution thereof, (iii) the government of a province or an institution thereof, (iv) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government, or (v) an aboriginal government; and (b) disclosure of the information would be injurious to relations with the government, institution or organization.

(2) The head of a government institution shall disclose any record requested under this Act that contains information described in

subsection (1) if the government, organization or institution from which the information was obtained (a) consents to the disclosure; or (b) makes the information public.

(3) In this section, "aboriginal government" means an aboriginal government listed in Schedule I.1.

11. Paragraph 14(b) of the Act is replaced by the following: (b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial negotiations.

[...] 12. (2) Subsections 16(3) and (4) of the Act is replaced by the following: [...] (4) The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the integrity or independence of the institution's news gathering or programming activities.

[...] 19. Section 23 of the Act is replaced by the following: 23. The head of a government institution may refuse to disclose any record requested under this Act if (a) the record contains information that is subject to solicitor-client privilege; and (b) disclosure of the information could reasonably be expected to be injurious to the interests of the Crown.

21. Section 25 of the Act is renumbered as subsection 25(1) and is amended by adding the following: (2) Where, under subsection (1), a part of a record is, for the purpose of being disclosed, severed from a record that is otherwise subject to solicitor-client privilege, the remaining part of the record continues to be subject to that privilege.'

• Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

Given that information should only be withheld if its disclosure is harmful, and that the harm of disclosure normally fades over time, international better practice also mandates the inclusion of sunset clauses in access laws, whereby information which is withheld to protect public interests – such as national security or decision making – as opposed to private interests, such as commercial competition and privacy, can be withheld beyond the time limit, say of 20 years, only in highly exceptional cases. Every jurisdiction in Canada contains some sunset clauses, but none apply to all exceptions.[263]

• Canadian Union of Public Employees (CUPE), Submission to Ethics Committee on *Bill C-58*, 2017:

The exceptions outlined in Sections 18 and 20, relating to "trade secrets" and "financial, commercial, scientific or technical information" of the government, government institutions, and third parties, are overly broad and do not conform to international standards of access to information.

Recommended Amendments - A transparent and accountable government aims for maximum disclosure, but Sections 18 and 20

[263] The CLD produced focused analyses of Canada's *ATIA* in 2013 and 2016 which are quite critical on the weaknesses of Section 13. See www.law-democracy.org

in application result in the suppression of information vital to this principle. It is not acceptable that information merely related to the aforementioned interests be withheld. Rather, there must be a clear demonstration of actual harm resulting from the disclosure. Sections 18 and 20, in practice, undermine the public interest and should be amended.

• Privacy and Access Council of Canada (PACC), Calgary, Submission to Senate on *Bill C-58*, October 2018:

Recommendation: Ensure that exceptions and exclusions to the right of access are narrowly defined and subject to both a test of actual harm and a mandatory public interest override.

• Democracy Watch, *Submission to Senate review of Bill C-58*, 2018:

Recommendation 2. All exemptions under the access to information law should be discretionary, and limited by a proof of harm test and a public interest override (as in B.C. and Alberta);

• Brief presented to the Senate by the Fédération professionnelle des journalistes du Québec (FPJQ) concerning *Bill C-58*, 2019:

Recommendation: That section 23 and the corollary sections be clarified and limited.

CANADIAN PROVINCES

Consider how the subjects of some of the *ATIA* exemptions that lack harms tests are dealt with in the provincial and territorial FOI laws.

***ATIA* Section 13 - information obtained from other governments in confidence - mandatory, with no harms test, no time limit, no public interest override.**

All provinces have some (much more open) equivalent to this exemption. It sometimes appears as a subsection within the exemption for harms to intergovernmental relations. On the same principle, perhaps the *ATIA* Section 13 and 14 could be combined into one. For example, in British Columbia's *FOIPP* Act,

> 16. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to [....] (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies

• The exemption is discretionary the FOI laws of Nova Scotia (Sec. 12 (1)(b)), Newfoundland and Labrador (Sec. 34 (1)(b)), Prince Edward Island (Sec. 19 (1)(b)), Quebec (Sec. 18), Ontario (Sec. 15), Alberta (Sec. 21 (1)(b)), British Columbia (Sec. 16 (b)), the Yukon (Sec. 20 (1)(b)), and the Northwest Territories (Sec. 16 (1)(c)).

The exemption is mandatory in New Brunswick (sec. 18(1)), Manitoba (Section 20), and Saskatchewan (Section 13).

• Only the Quebec law lacks the qualifying term "in confidence" when citing information received from other governments.

• The laws of Manitoba, Alberta, New Brunswick and Saskatchewan include a more expansive phrase, whereby the information is supplied in confidence "implicitly or explicitly."

• Five statutes say the exemption will not apply if the information provider "consents to the disclosure" – in Manitoba, Alberta, Prince Edward Island, Nova Scotia and New Brunswick.

• Regarding time limits, the exemption cannot be applied after 15 years in Prince Edward Island (reduced from 20 years), Nova Scotia, Newfoundland, Alberta, British Columbia, the Yukon, and the Northwest Territories. It has no time limit in New Brunswick, Quebec, Ontario, Saskatchewan and Manitoba. (Only Newfoundland and British Columbia add this important qualifier to the time limit: "unless the information is law enforcement information.")

• This exemption can be overridden by the public interest override in all provincial laws except two (Manitoba and Saskatchewan).

ATIA Sec. 23 – "information that is subject to solicitor-client privilege" - discretionary, with no harms test, no time limit, no public interest override.

This is one of the rare *ATIA* sections that basically matches those in the FOI laws of the provinces and territories. All of the latter have similar exemptions, sometimes phrased slightly differently or more broadly, all the provincial exemptions are also discretionary (on legal advice within government), and all have no time limits.

In its simplest form, the British Columbia law states in full: "(14). The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege."

• This exemption is detailed further in the 2017 version of New Brunswick's statute: "22.1. The head of a public body shall refuse to disclose to an applicant information that is subject to a solicitor-client privilege of a third party." This mandatory term is separate from the discretionary Section 27 on solicitor-client privilege within government.

• Within their discretionary main legal advice exemptions, Newfoundland, Prince Edward Island and Manitoba also have mandatory subsections that bar the release of legal advice relating to a third party.

• The specificity in Quebec's law is helpful in interpretations:

> 31. A public body may refuse to disclose a legal opinion concerning the application of the law to a particular case, or the constitutionality or validity of legislative or regulatory provisions, or a preliminary or final draft of a bill or regulations.
>
> 32. A public body may refuse to disclose a study if its disclosure might well affect the outcome of judicial proceedings.

• Yet some other provincial FOI statutes are far broader. In Saskatchewan, it applies in Section 22 to a record that "(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege."

• The lengthiest is found in the law of Alberta (which was replicated by Prince Edward Island), and is absurdly broad:

> 27(1) The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,
>
> (b) information prepared by or for
>
> (i) the Minister of Justice and Solicitor General,
>
> (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
>
> (iii) an agent or lawyer of a public body,
>
> in relation to a matter involving the provision of legal services, or
>
> (c) information in correspondence between
>
> (i) the Minister of Justice and Solicitor General,
>
> (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
>
> (iii) an agent or lawyer of a public body,
>
> and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

• In addition to the general exemption, some laws further emphasize its application to the records of prosecutions or ongoing litigation. (Some national FOI laws laudably confine the exemption to only these factors.)

In Quebec's law, Section 32, "A public body may refuse to disclose a study if its disclosure might well affect the outcome of judicial proceedings." In the Ontario statute, Section 19(b), a record can be withheld "that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

• Unlike the *ATIA*, the legal advice exemption in all provincial laws except two (Manitoba and Saskatchewan) can be overridden by the public interest override.

• The 1999 B.C. legislative review committee of this law was concerned about the overly broad scope of B.C. *FOIPP Act* Sec. 14, solicitor-client privilege, the equivalent of *ATIA* Section 23:

> Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in their policymaking role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the *FIPPA*. It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the *FIPPA*.

Achieving Results

CHAPTER 8 - OVERSIGHT AND ENFORCEMENT

What powers should an FOI appellate body have on information releases and other issues?

What is the meaning of rights in an improved *Access to Information Act* if the rights cannot be enforced, and in a timely manner, for an applicant with few resources?

"A right without a remedy is effectively not a right," the Halifax-based Centre for Law and Democracy stated. Yet fortunately "every jurisdiction in Canada has an external oversight body to hear these appeals and this is an area where Canadian jurisdictions generally do well."[264]

The powers that the state should grant to an independent appellate body such as an Information Commissioner to order the government to release records against its will is perhaps the most contentious and misunderstood topic in Canadian freedom of information.

Such order-making power was also the single most urgently-needed procedural amendment to the *ATIA* ever since its passage in 1982. Such was promised by the Conservative Party in 2006 but it broke this commitment. In the 2015 election campaign the Liberal Party repeated the pledge, and then, upon its victory, and to the surprise of some, new Prime Minister Justin Trudeau actually fulfilled it to some extent in *Bill C-58*, which received Royal Assent in 2019.

In Canada the comparative merits of the ombudsman vs order power have been debated for three decades, and to restage the full dispute here would be needless while there still remain other pressing unresolved *ATIA* problems (such as the cabinet records exclusion).

Yet to summarize briefly, in Canada prior to this year, the Information Commissioner had only the power to investigate and recommend to government that information be released to an *ATIA* applicant, advice that the public body often disregarded. Under this old model, the Commissioner's office first tried to negotiate solutions with government; the effect of persuasion often succeeded but sometimes failed. If the latter, the Commissioner or applicant could then appeal that refusal *de novo* to federal court for a binding order, rulings which in turn were sometimes appealed to higher courts.

Even with this limited power, relations between the Commissioner and the federal

[264]The Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

government sadly declined to a state of litigious hostility. In the 1997-2007 decade the Commissioner was subjected to at least two dozen governmental lawsuits (particularly from the Prime Minister's Office and the Defence Department) to challenge even his modest authority.

While the government claimed that even more conflict would result from the Commissioner being invested with order-making power, FOI expert Alasdair Roberts asserted just the opposite:

> In fact, the recent deterioration in working relationships is more accurately regarded as the consequence of an *Act* that makes the Commissioner too weak, rather than too strong. The Commissioner lacks the power to resolve complaints authoritatively, and is therefore obliged to rely on subpoenas and public advocacy to promote compliance with the law.... There is substantial evidence that the enforcement strategy contained in the *Act* has failed. . . . [265]

He advised order-making power as one path to an effective *ATI* system, and even the mainly traditionalist 2002 report by the Treasury Board and the Department of Justice on *ATIA* reform favoured this option:

> In the final analysis we believe that the structural model in place in most jurisdictions, a quasi-judicial body with order-making powers combined with a strong mediation function, would best achieve this [dispute resolution]. In our view, it would be the model most conducive to achieving consistent compliance and a robust culture of access.
>
> As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.... It is an economical model for taxpayers and for requesters, with more than 99 per cent of all complaints being resolved without recourse to the courts.[266]

There are other advantages to the order-making model, noted by NDP MP Murray Rankin: "Credibility among requesters is much greater when the government is ordered to disclose information. The clarity and consistency of the resulting jurisprudence is enhanced through the wide dissemination of orders."

There are still other outstanding needed measures for the Information Commissioner's office beyond order power. In 2009 for example, Commissioner Robert Marleau asked for improvements in the *ATIA* to speed up access requests, and the legislated ability to try to mediate some complaints as opposed to launching into full and costly investigations.[267]

---

[265] Alasdair Roberts, *New Strategies For Enforcement of The Access To Information Act,* Queens Law Journal 647. January, 2001

[266] Treasury Board Secretariat and Department of Justice, *Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force*. Ottawa, 2002. Appended with 29 research papers.

[267] Murray Rankin, *The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada*. A report for the federal Information Commissioner's office, Ottawa, June 2008

All these points are just as valid today. The basic arguments for order power have been won in principle, thankfully, and the focus now should be on how to improve upon the new model and make it work. It will be quite fascinating in the decade to come in Canada to see how - if at all – officials can or will pull free from their comfort zone of the past (which is not easy), and the hopes above will be fulfilled in practice.[268]

The Liberal government's pronouncement that it had fulfilled its electoral promises on *ATIA* reform was sharply and fulsomely rebuked in a controversial report from the Information Commissioner in September 2017: *Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58*.[269]

> The government promised the bill would empower the Information Commissioner to order the release of government information. It does not. Rather than advancing access to information rights, *Bill C-58* would instead result in a regression of existing rights. . . It introduces an oversight model where the Commissioner is not truly empowered to order the disclosure of information, and adds burdensome stages to the investigation process that may lead to delays. It does not take advantage of any of the benefits of a true order-making model.

The Commissioner voiced five serious objections:

(1) Under Bill C-58, as in the old system, court review is launched *de novo*. Review is not of the Commissioner's "order", but of the government's decision. Institutions can bring new grounds to refuse disclosure to the Court, and this can even result in the application of new exemptions. (The five provinces' FOI laws with order powers grant the government the right of judicial review but not as *de novo*, and it is not a global FOI standard.)

(2) *Bill C-58* provided no mechanism to have the "orders" certified with the Court (unlike with the provinces' FOI laws), which reduces their force and effect. This means that there is no recourse available when the institution neither follows an order of the Commissioner nor applies to the Federal Court for a review.

In its report on *Bill C-58*, the Senate recommended an amendment to Section 36.1(6): "Allow orders of the Information Commissioner to be filed with the Registry of the Federal Court for the purposes of enforcement." But the House of Commons rejected this valuable amendment.

---

[268]Yet hostility to the office has a lengthy record in Ottawa. For instance, "The position of the Information Commissioner is virtually unassailable, the critics few. ... it would be in their interest to overstate the depth and scope of Access problems, to publicly remark on these problems with fervour and colour, and to capitalize on public sentiment by assigning blame on a public service under siege from an already cynical public, thereby perpetuating their office, budget and influence/power." (He also complained the OIC's investigative records are not subject to the *ATIA*.) - Lt. Col. Brett Boudreau, *Force for Change or Agent of Malevolence? The Effect of the Access to Information Act in the Department of National Defense*. Canadian Military Journal, Vol. 1, No. 2, Summer 2000.

[269]https://www.oic-ci.gc.ca/en/resources/reports-publications/failing-strike-right-balance-transparency

[267]Murray Rankin, *The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada*. A report for the federal Information Commissioner's office, Ottawa, June 2008

The Senate report on *Bill C-58* noted that that Justice Minister stated that, in most cases, he expects that the orders would be respected by federal institutions. Minister Brison added that "in the unlikely event that a government institution neither challenged nor complied with an order, the commissioner could enforce the order through mandamus proceedings in Federal Court." Yet Information Commissioner Caroline Maynard countered that a mandamus application is not "an easy process" and it can take six to seven months to obtain a court order.[270]

(3) If the Information Commissioner intends to make an order for disclosure under *ATIA* subsection 19(1), he or she must consult the Privacy Commissioner, with no time limit set for this process. Section 19 is historically the most commonly cited exemption, and this new rule is utterly needless, as the Information Commissioner has over 30 years of expertise in interpreting it. The rule will add delays and other forms of obstruction. (The FOI law of no other nation or province has such a requirement.)

(4) *Bill C-58* did not provide for a mediation stage in the Commissioner's investigations. This occurs in practice now, but she writes "explicit inclusion of a mediation function in the *Act* would add rigour to the current investigative model," and this could result in more cooperation, and efficient and timely investigations. (This is a feature of many national and provincial FOI laws.)

(5) There was initially no mechanism in the *Act* to publish the Commissioner's reports of finding as they are issued. If so, there would not be a wide body of precedents guiding institutions and requesters, and it often results in the same issues being re-investigated needlessly. Yet this is no longer an issue; the Commissioner announced on June 19, 2019: "I can now also publish the results of investigations."[271]

The government has not provided any detailed counterarguments to the Commissioner's objections, and we are still waiting. (One could add that the ruling Liberal party also broke its 2015 electoral pledge to have the prime minister's and ministers' offices covered under the *ATIA*.) Yet lawyer and global FOI expert Toby Mendel holds a far less bleak outlook:

> I disagree, for what it is worth, with the former Commissioner. I agree that a judicial review approach would have been preferable, but it [order power] is a big step and the de novo review might help some people accept it. As far as the certification issue, while I always advocate for that in other contexts, I do not believe it is that important in Canada. I support consultation with the Privacy Commissioner; there is no mediation stage prescribed now and yet it has not stopped

[270] *Observations to the thirtieth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-58)*, April 24, 2019 https://sencanada.ca/content/sen/committee/421/LCJC/reports/2019-04-24_30thReport_Observations_e.pdf

[271] https://www.oic-ci.gc.ca/en/resources/news-releases/information-commissioners-statement-passage-bill-c-58

the Commissioner from doing it.[272]

Another view of the situation is advanced by Canadian human rights lawyer Michael Karanicolas in his essay notably titled *Born to Fail: C-58, and the "Canadian Model" of Oversight* (due for 2020 publication). Here he views the new order power as "at best a baby step forward."

> In the absence of any practical advantages to imposing these limits on the Information Commissioner's powers, the only explanation is that the government seeks to retain an ability to hedge against disclosure decisions it does not like, and to resist the imposition of accountability structures beyond its control. This, in turn, virtually guarantees that the efficacy of oversight under the new system will be limited, since the weaknesses described here are, from the government's perspective, a feature of the proposed model, rather than a bug. The government would not have imposed these limitations if it did not intend to utilize them.

I and many others have called for the *ATIA* to be amended again to further improve its order-making power sections. Ottawa would ideally and quite simply adapt the British Columbia FOI order-making model, with all of its features.

One should never underestimate the tenacity of the state's resistance to transparency. It was not politically realistic to expect Ottawa to surrender so much power all in a single large step, so it hesitantly, ambivalently stepped forward part way. It seems as though it had laid down a new road but then grew nervous of the destination and so added obstacle courses upon the road.

Dare we hope this might this be just a transitory move towards fuller order powers, and might this happy event occur in our lifetimes, or at least no later than another three decades hence? While averse to naivety, many longtime Canadian FOI advocates from hard experience, and to help carry on, have learned to "hope for the best but prepare for the worst."

While the new order power in the *ATIA* may be a baby step and a reform born to fail, nonetheless people of good will try to make the best use of it they can (an outlook which faintly echoes the once-hopeful spirit of 1982 when *ATIA* was passed). Considering that even this reform almost surely would never have occurred under any Conservative regime, and that frankly some Canadian FOI advocates had not expected to see it happen in their lifetimes under any party, is this modest step not better than nothing at all, and worth a sporting chance?

Who knows what we may find when we review the scene ten years from now? In practice, might Ottawa appeal for *de novo* reviews less often than observers fear (this being so politically contentious), or the Privacy Commissioner regularly defer to the Information Commissioner's judgment, or mediation succeed somewhat more often so as to avert litigation? After an initial few

[272]Correspondence with author, Oct. 10, 2019

years of boundary testing and legal disputes, might this new power gradually foster a cultural movement towards more cooperation and transparency? It is early yet, and time will tell.

• Canada's *Access to Information Act*, 1982. Revised version, 2019:

36.1 (1) If, after investigating a complaint described in any of paragraphs 30(1)(a) to (e), the Commissioner finds that the complaint is well-founded, he or she may make any order in respect of a record to which this Part applies that he or she considers appropriate, including requiring the head of the government institution that has control of the record in respect of which the complaint is made

(a) to disclose the record or a part of the record; and

(b) to reconsider their decision to refuse access to the record or a part of the record.

Limitation

(2) The Information Commissioner is not authorized to make an order after investigating a complaint that he or she initiates under subsection 30(3).

Condition

(3) The order may include any condition that the Information Commissioner considers appropriate.

Effect

(4) The order takes effect on

(a) the 31st business day after the day on which the head of the government institution receives a report under subsection 37(2), if only the complainant and the head of the institution are provided with the report; or

(b) the 41st business day after the day on which the head of the government institution receives a report under subsection 37(2), if a third party or the Privacy Commissioner is also provided with the report [....]

Consulting Privacy Commissioner

36.2 If the Information Commissioner intends to make an order requiring the head of a government institution to disclose a record or a part of a record that the head of the institution refuses to disclose under subsection 19(1), the Information Commissioner shall consult the Privacy Commissioner and may, in the course of the consultation, disclose to him or her personal information.

Notice to third parties

36.3 (1) If the Information Commissioner intends to make an order requiring the head of a government institution to disclose a record or a part of a record that the Commissioner has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party

or information the disclosure of which the Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the Commissioner shall make every reasonable effort to give the third party written notice of the Commissioner's intention. [....]

17 Section 37 of the Act is replaced by the following:

Information Commissioner's initial report to government institution

37 (1) If, on investigating a complaint under this Part, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution concerned with a report that sets out

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate;

(b) any order that the Commissioner intends to make; and

(c) the period within which the head of the government institution shall give notice to the Commissioner of the action taken or proposed to be taken to implement the order or recommendations set out in the report or reasons why no such action has been or is proposed to be taken. [....]

19 Sections 41 to 43 of the Act are replaced by the following:

Review by Federal Court — complainant

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

Review by Federal Court — government institution

(2) The head of a government institution who receives a report under subsection 37(2) may, within 30 business days after the day on which they receive it, apply to the Court for a review of any matter that is the subject of an order set out in the report.

Review by Federal Court — third parties

(3) If neither the person who made the complaint nor the head of the government institution makes an application under this section within the period for doing so, a third party who receives a report under subsection 37(2) may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of the application of any exemption provided for under this Part that may apply to a record that might contain information described in subsection 20(1) and that is the subject of the complaint in respect of which the report is made.

Review by Federal Court — Privacy Commissioner

(4) If neither the person who made the complaint nor the head of the institution

makes an application under this section within the period for doing so, the Privacy Commissioner, if he or she receives a report under subsection 37(2), may, within 10 business days after the expiry of the period referred to in subsection (1), apply to the Court for a review of any matter in relation to the disclosure of a record that might contain personal information and that is the subject of the complaint in respect of which the report is made. [....]

21 Section 45 of the Act is replaced by the following:

***De novo* review**

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding. [....]

25 The Act is amended by adding the following after section 50:

Order of Court if authorization to refuse disclosure found

50.1 The Court shall, if it determines that the head of a government institution is authorized to refuse to disclose a record or a part of a record on the basis of a provision of this Part not referred to in section 50 or that the head of the institution has reasonable grounds on which to refuse to disclose a record or a part of a record on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to the matter that is the subject of the proceedings, or shall make any other order that it considers appropriate. [....]

27 Subsection 53(2) of the Act is replaced by the following:

Costs — important new principle

(2) If the Court is of the opinion that an application for review under section 41 has raised an important new principle in relation to this Part, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

There are other significant features in this appeal stage. The applicant may (not must) try to negotiate an agreement with the public body before appealing to the Information Commissioner. Under Section 30, applicants have within 60 days (shortened in 2006 from a right to appeal within one year) of receiving an unsatisfactory response from the public body, to appeal to the Commissioner about fees, delays, exemptions or any other issue. There are no time limits set on the Commissioner's investigatory processes. The Commissioner may also initiate an investigation on any issue, without prompting from a complainant.

The Commissioner has investigatory powers to summon witnesses, compel them to testify under oath and produce records in the same manner as a superior court of record; to enter any government premises; to examine or obtain copies of or extracts from records found there.

Since the government states that cabinet records are excluded from the scope of the *Act* entirely, the Commissioner and the Federal Court cannot even review them. Yet the Commissioner now has the power to examine a record held in the office of a minister or the Prime Minister's Office (except a cabinet confidence) for the purpose of determining threshold issues such as whether the record is a departmental record, a personal record or a political record. The Commissioner's power in this regard was confirmed by the Federal Court of Appeal in 2004 when former Prime Minister Chrétien refused to turn over his daily agenda books to the Commissioner.

GLOBAL COMMENTARY

• Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

Upon the conclusion of an investigation, the administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003:

Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release.

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(12.2) The independent administrative body should have the power to hear appeals from any refusal by a public body to provide information, along with all necessary powers to effectively exercise this role. This should include the power to mediate disputes, to compel evidence and to review, in camera if necessary, the information which is the subject of the request, to order the disclosure of information, and, where appropriate, to impose penalties.

• Organization for Security and Co-operation in Europe (OSCE), Access to information by the media in the OSCE region: trends and recommendations, 2007:

There should be an adequate mechanism for appealing each refusal to disclose. This should include having an independent oversight body such as an Ombudsman or Commission which can investigate and order releases.

OTHER NATIONS

As of 2019 there are 128 countries in the world with an access to information law in force, according to the CLD-AIE's global RTI rating. Of these, 82 countries allow the public to file appeals with an external oversight body, and in around half of these countries, the oversight body is able to issue legally binding orders.

The Information Commissioner's recommendations for a better version of *Bill C-58* are overwhelmingly supported by global precedent. The five serious failings that she protested of her new order making-power are mostly absent in the rest of the FOI world.

In his study of the issue, *Born to Fail*, Michael Karanicolas finds that while the right of judicial review are a fairly common feature of FOI laws, "a survey of these laws yield no examples where courts were specifically charged with treating these appeals as *de novo* reviews, though it is possible that this approach is inherent to some of the legal frameworks within which these different systems operate."

Moreover, he adds, it is not rare for systems with order-making power to also provide for mediation processes at the front end, and only if this process fails will the Commissioner move to an adjudication process. No other national or provincial FOI law requires the Information Commissioner to consult with a Privacy Commissioner about applying the FOI law's privacy exemption, as in the revised Canadian *ATIA*. It is also the global FOI standard for such oversight bodies to publish their findings, as do many provinces.

THE SCOTTISH APPROACH - A NOTE FOR CANADIAN READERS

Scotland's *Freedom of Information Act* came into effect in 2005. The first Scottish Information Commissioner Kevin Dunion was asked to break through bureaucratic prevarication to release secrets at twice the rate of requests in the rest of the U.K. In other words, he opens doors such that in Scotland they describe what he does as "to dunion," as in, "you've been dunioned."

Mr. Dunion was aware government, wanted him to regard using his enforcement powers as a last resort. "That's entirely the wrong way to go about it. I'm not an ex-civil servant. My background is as a campaigner and a troublemaker. . . . I can enforce my decisions. If an authority has not been co-operative, I'm able to issue an information notice which, if it's not responded to, I can refer to the court. To not respond is the same as contempt of court, so there is always that very strong legal stick."

"The act gives people rights and people would be quite rightly entitled to criticize me if I was given powers to pursue my investigations and I declined to use them for fear of upsetting authorities." That makes Mr. Dunion hard-line in enforcing the 20 days that public authorities have to comply with information requests.

This approach makes "a palpable difference," concluded a New Zealand journalist. 'In Scotland the freedom of information is seen as something dynamic, to be kept in the public eye. Here [in New Zealand] it's a musty concept gathering dust in out-of-date volumes when bureaucrats get around to writing them up."

- *Firm hand with a big stick*, by Chris Barton. The New Zealand Herald, December 22, 2007

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

4.1. The Committee recommends that the central mandate of the Information Commissioner and Privacy Commissioner to make recommendations on disclosure be confirmed, but that the power allowing the Information Commissioner to make binding orders for certain subsidiary issues (relating specifically to delays, fees, fee waivers, and extensions of time) be provided in amendments to the *Access to Information Act.*

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians, ATIA* Review Task Force report, 2002:

Full Order-Making Powers. 6-25. The Task Force encourages the government to consider moving to an order-making model for the Information Commissioner in the medium-term. [....] Our research indicates that in Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful. It was also the model overwhelmingly favoured by those who participated in public consultations or made submissions to the Task Force....

• Justice Department of Canada, 2005, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*:

The Government is not persuaded of the need to shift to an order-making or quasi-judicial model for the Information Commissioner, but nonetheless would welcome the views of the Committee on this issue.

• Justice Gomery report, *Restoring Accountability*, 2006:

It supports broadening the Information Commissioner's powers to initiate a complaint under the Act and to apply to the Federal Court in relation to any matter investigated by the Office. It also supports allowing the Information Commissioner to grant access to representations made to him in the course of his investigations.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

25. (3) Subsection 30(3) of the Act is replaced by the following: (3) The Information Commissioner may initiate a complaint into any matter relating to requesting or obtaining access to records under this Act.

(4) An investigation into a complaint under this section shall be completed, and any report required under section 37 shall be made, within 120 days after the complaint is received or initiated by the Information Commissioner unless the Commissioner (a) notifies the person who made the complaint, the head of the government institution concerned and any third party involved in the complaint that the Commissioner is extending the time limit; and (b) provides an anticipated date for the completion of the investigation.

(5) A complaint made under this section in respect of a request made to the Office of the Information Commissioner or in respect of any other matter concerning that office shall be made to and investigated in accordance with this Act by an independent person authorized under section 59.

[...] 27. (1) Subsection 36(2) of the Act is replaced by the following: (2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, or solicitor-client privilege, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

[...] 29. The Act is amended by adding the following after section 37: 37.1 Notwithstanding any other Act of Parliament, a person does not commit an offence or other wrongdoing by disclosing, in good faith to the Information Commissioner, information or records relating to a complaint under this Act. [Etc.]

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015:

Recommendation 5.1 -

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

Recommendation 5.2 -

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

Recommendation 5.3 -

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

Recommendation 5.4 -

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 5.5 -

The Information Commissioner recommends that the Act maintain the existing power to initiate investigations related to information rights.

Recommendation 5.6 -

The Information Commissioner recommends that the Act provide for the power to audit institutions' compliance with the Act.

Recommendation 5.7 -

The Information Commissioner recommends that the Act maintain the existing investigative powers of the Information Commissioner.

Recommendation 5.11 -

The Information Commissioner recommends that institutions be required to submit access to information impact assessments to the Information Commissioner, in a manner that is commensurate with the level of risk identified to access to information rights, before establishing any new or substantially modifying any program or activity involving access to information rights.

Recommendation 5.12 -

The Information Commissioner recommends:

- that the appointment of the Information Commissioner be approved by more than two-thirds of the House of Commons and the Senate;

- 10 years relevant experience in order to be eligible for the position of Information Commissioner; and

- a non-renewable, 10-year term for the position of Information Commissioner.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 25 -

That the government strengthen the oversight of the right of access by adopting an order-making model with clear and rigorously defined parameters.

Recommendation 25 -

That if an order-making model is adopted, any ministerial veto be limited to national security issues, be exercised only to overturn an order of the Information Commissioner and be subject to judicial review.

• Canadian Bar Association (CBA), Submission to Ethics Committee on *Bill C-58*, 2017:

The CBA Sections have concerns with the *de novo* proceeding in the proposed section 44.1 of *ATIA* (section 19 of Bill C-58). A *de novo* proceeding would allow new evidence and arguments to be introduced before the Federal Court, with the possibility of obstructing access rights. We suggest that to the extent that order making power is to be granted to the Information Commissioner, judicial review of an issued order is more appropriate.

• Information Commissioner Suzanne Legault, Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58, 2017:

Recommendation 18 -

Remove section 44.1, *de novo* review.

Recommendation 19 -

Amend sections 41-48 of the Act to reflect that

it is the Commissioner's order that is under review before the Federal Court.

Recommendation 20 -

Amend section 36.1 so that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 21 -

Remove notification to, and consultation with, the Privacy Commissioner, the reasonable opportunity for the Privacy Commissioner to make representations during an investigation and the Privacy Commissioner's ability to be an applicant in a judicial review proceeding.

Recommendation 22 -

Include a formal mediation function in the course of investigations.

Recommendation 23 -

Allow the Information Commissioner to publish reports of finding.

• Canadian Environmental Law Association (CELA) and Ecojustice, *Joint submission to Senate review of Bill C-58*, December 2018:

Recommendation 7: The Act should not task the Federal Court of Canada with undertaking a *de novo* hearing, but rather require judicial review of the decision of the Office of the Information Commissioner.

Recommendation 8: The Act should include a bar on costs being awarded against a requestor if a third party appeals a decision to the Federal Court of Canada and the requestor wishes to appear as a party in the Court proceeding.

CANADIAN PROVINCES

Every Canadian province and territory has a freedom of information law that delegates complaints to an independent oversight body. The Information and Privacy Commissioners in five provinces - British Columbia, Alberta, Ontario, Quebec and Prince Edward Island - have the power to order government to release records. In Newfoundland and Manitoba, the situation is more complex.

As Karanicolas observes, in Alberta, Quebec, Prince Edward Island, Nunavut, and British Columbia, decisions of the oversight bodies may be filed with an appropriate court, giving them the force of a judgment by that court. In all five cases, while the government has a right of judicial review, these are not carried out as a *de novo* review.[273] All these features are strongly advisable for the *ATIA*.

Even the traditionalist Treasury Board report of 2002 notes, "The order-making model is also compatible with a high proportion of mediated solutions, as is demonstrated by the experience of the provinces."[274] David Loukidelis, formerly British Columbia's Information and Privacy Commissioner, echoed this point:

> Speaking only to the situation and experience in British Columbia, we

[273] Born to Fail, *op.cit.*

[274] TBS, Making it Work, *op.cit.*

> have found, over the 16 years of our office's experience, that order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office.[275]

Alasdair Roberts observes that Ottawa can learn much from the provincial experience:

> At the federal level, the ombudsman model appears to have produced exactly the sort of vices that it was intended to avoid: adversarialism, legalism and formality. Meanwhile, provincial governments have proved the converse: that giving an "order power" to a Commissioner does not necessarily mean that the process of resolving complaints must be rigid and inflexible.
>
> Of course, the proper question is whether relations would be any better if the federal Commissioner had a role like that assigned to commissioners in Ontario, British Columbia and Alberta. We can only speculate on this point, however, it is noteworthy that commissioners in those provinces have not experienced a comparable deterioration in relations with senior officials. Dissatisfied institutions may ask for judicial review of such orders, but courts are typically reluctant to overturn a Commissioner's judgment about the application of the law.... [276]

Other Powers

Besides order-making power, there are several other parts of the Information Commissioner's legislated mandate that could be expanded.

• The Commissioner should be explicitly granted the power in the *ATIA* to examine and rule upon all records without exception, i.e., those in the cabinet office and prime minister's office.

• In the *ATIA*, there are no time limits set on the Commissioner's processes, and in practice the applicant sometimes waits years for a resolution. In B.C's FOI law, if a portfolio officer cannot negotiate a solution within 90 days, the dispute automatically moves to the full inquiry stage. In Nova Scotia the Review Officer must negotiate a settlement within 30 days or conduct a review.

In the FOI law of the Northwest Territories, the Commissioner is given six months to complete the review - hardly an unreasonable limit - while the Newfoundland Commissioner has 90 days. (Of course, to render this possible, the Commissioner must be granted adequate resources for the task.) Some time limit is surely required for an *ATIA* settlement, if even a year – although it is important to differentiate between the time limit for mediation processes and the time for the actual review.

• Under *ATIA* Section 30, applicants have within 60 days of receiving an unsatisfactory

[275]House of Commons, *The Access to Information Act: First Steps Towards Renewal: Report of the Standing Committee on Access to Information, Privacy and Ethics* (June 2009) (Chair: Paul Szabo)

[276]Roberts, op.cit.

response from the public body, to appeal to the Commissioner about fees, delays, exemptions or any other issue. This was shortened in 2006, from a right to appeal within one year. Six months to appeal would be a fair compromise.

• The federal government could consider granting applicants the right to appeal an *ATIA* request refusal directly to court, bypassing the Information Commissioner. Benefits include a quicker resolution if time is urgent for an applicant, and the raising of some legal burden from an overworked Commissioner's office.

The Commissioner appellate option was created partially as a lower-cost alternative to the courts for applicants with few resources, who may be unaware of the *ATIA*'s more arcane byways or be unable to afford counsel, and that option indeed remains valid. But this rationale should not prohibit better-resourced applicants from proceeding straight to trial if they choose. Some applicants can even overcome financial limitations, most notably Ken Rubin, a private citizen and likely Canada's most effective and prolific *ATIA* user, who often files his own *ATIA* lawsuits and successfully represents himself in court.[277]

[277] In fact the Commissioner's office once issued a pamphlet to educate the *ATIA* applicant on how to appeal in court representing oneself, and Colonel Michel W. Drapeau and Marc-Aurele Racicot include such an instructional chapter in their valuable text, *Federal Access to Information and Privacy Legislation, Annotated 2019*. Toronto: Thomson Carswell, 2018. Unsuccessful appellants bear a modest risk of being assessed with court costs.

If it takes forever. . . .

CHAPTER 9 - RESPONSE TIMES

How are response times and delays dealt with in the FOI law?

If justice delayed is justice denied, than news delayed is news denied. By deferring the release of records through the FOI system, officials calculate - often correctly, sadly enough - that editors will spurn them as "old news," rather like food past its expiry date, and therefore not worth publishing.[278] This has surely led over the years to the loss of hundreds of potential news articles in the public interest that were essentially "spiked" - a news industry term - by the state.[279]

No applicant without an uncommon degree of patience and endurance can prevail, and the legal odds are always stacked against him or her. For example, the applicant has just 60 working days to appeal an *ATIA* refusal, and if that deadline is missed there is no second chance. By contrast government routinely breaks its own deadlines with impunity; there are no penalties for delays, as there needs to be, which stands at variance with other nations' FOI laws (see below).

Under the *Access to Information Act*, public bodies must respond to requests within 30 days. They may then extend this reply for an unspecified "reasonable period of time" – a widely abused free rein, and a breach of global FOI standards that most nations would never accept.

In the summer of 2019 the Senate wisely proposed this *ATIA* amendment: "Limit time extensions taken under s. 9(1)(a) or (b) to 30 days, with longer extensions available with the prior written consent of the Information Commissioner." But the House of Commons rejected it. As a result, some requests are delayed for years, making data outdated and often useless when it is released. The problem was well illustrated in a Canadian journalists' textbook:

> Time-sensitive records can lose all their value is their release is significantly delayed. Consider, for example, a government decision on whether to protect a particular green space or deport someone to his or her native country. Records explaining the context and details surrounding these decisions could have a

[278]For instance, in 2016 the Information Commissioner found the Correctional Service of Canada was negligent for not responding to an *ATIA* request from CBC News about the closure of Kingston Penitentiary for more than three years and taking another nine months to provide the documents in question. Much of the information was by this time publicly available or outdated. – *Correctional Service of Canada 'negligent' on information requests, commissioner says*, CBC News, June 2, 2016

[279]This reality was noted by Information Commissioner Robert Marleau: "I know how crucial a consideration time is for you. After all, what you produce is called 'news' for a reason. If you can't get the information you need easily in the first place and then your access to information request or complaint gets handled after a story has faded from the public attention, the information you seek loses much, if not all, of its news value to you." - Speech to Canadian Association of Journalists (CAJ) luncheon, Ottawa, Feb. 27, 2008

> vital impact on the public debate, but only if they are made public in a timely way. If release is withheld until after the person is deported or the green space has given way to a tower block, that information is clearly of not much use any more, and citizens have been robbed of their ability to engage fully in public debate.[280]

ATIA response delays have been rising for over a decade. A table from the Treasury Board Secretariat (which compiles annual *ATIA* statistics) shows that from 2013/14 to 2017/18, the percentage of requests closed within the statutory deadline, including extensions, dropped from 86.0 percent to 76.2 percent, while the percentage closed outside that deadline rose from 14.0 percent to 23.8 percent.[281] In its defence, official Ottawa pleads that delays are directly related to the overall number of *ATIA* requests rising each year as well (while resources do not keep pace), e.g., 106,255 requests were received in 2017/18, an increase of 15.6 percent from 2016/17.

As a journalist, my paramount source of frustration is *ATIA* non-responses from the Royal Canadian Mounted Police (RCMP) - a vital issue for the public interest, as it polices the majority of this nation's land – as requests appear to have been virtually frozen over the past five years.[282] What Information Commissioner John Grace wrote in his 1996/97 annual report about the "silent, festering scandal" of delays is even more valid more than two decades later:

> Most surprising - and dismaying - about the whole delay problem is that the Act already contains one of the most liberal extension-of-time provisions found in any freedom of information statute... There simply is no basis to the oft-heard cry that the time frames are unrealistically short or set without concern for shrinking departmental resources. . . many countries that are much poorer than Canada, and with far less efficient bureaucracies, manage to comply with far more stringent standards.

In this regard I first consider Afghanistan, whose FOI law, with its 10 day response time and three day extension, is ranked #1 in the world in the CLD-AIE assessments. Could it be that FOI delays in Canada are more often caused not by meager resources but by an archaic *ATI Act* (ranked #58 here) and political resistance?

Some applicants might inaccurately attribute delays to overworked FOI staff, who

---

[280]David McKie, et.al., *Digging Deeper, A Canadian Reporter's Research Guide*. 2nd ed. Toronto: Oxford University Press, 2010, pg. 205

[281]Figure 3: *Access to Information Act* requests closed within established timelines, from 2013 to 2014 fiscal year to 2017 to 2018 fiscal year

[282]In her 2017/18 annual report, the Information Commissioner writes the RCMP has consistently been amongst the top five institutions most complained of. In 2017/18, the OIC registered 435 complaints against the RCMP, three-quarters of them related to delays. "The numbers of requests was overwhelming to the RCMP, and it did not have the resources to address the workload." In January 2018, the OIC and the RCMP worked together to implement a strategy that would allow the RCMP to address its backlog of complaints. "The results were extremely positive," the OIC reported, and many requests were closed. We can only hope this upward trend, if it indeed occurs, continues.

generally try their best, but more often the problem originates elsewhere, such as with the "program area" in which the records must be found, which can be located in another office or city. The final and worst bottleneck is usually the official - sometimes the deputy minister, as the "head of the public body" - who must "sign off" on the records before they can be sent out, whenever he/she can find the time to do so. ("We're too busy" is the general excuse.)

In the decade of Prime Minister Stephen Harper, government imposed so many new layers of scrutiny that even the most benign material was ensnared in reviews for months, even years.[283] The extensions were linked in part to additional checks by the Privy Council Office that advises the Prime Minister and Cabinet, and which reviewed most requests filed with the government. Yet if the PCO does not have "a greater interest" in a request, it has no statutory right to delay it.

Offices also claim they need to consult with multiple departments before releasing material, which further extends the process.[284] There can be disputes over who "controls" a document, said Information Commissioner Robert Marleau. After the clogged funnel of PCO vetting, the government can then improperly delay the *ATIA* reply for weeks longer as its public relations branch toils on pre-release "issues management," i.e., "spin control" plan. (Public relations staff need not be prohibited from being informed about *ATIA* requests, *per se* - in reality this could likely not be stopped anyways - but only if this process does not cause delays, or breach the applicant's privacy.)

In 2008 an investigation by the information commissioner concluded that *ATIA* request documents labelled as "sensitive" were subject to unwarranted delays by government agencies. The probe was launched in 2005 after the Canadian Newspaper Association asked the watchdog to probe whether there were "secret rules" for processing media requests, which led to delays in releasing documents.[285]

"While we were unable to conclude on the basis of our investigation that there exists 'secret rules' or a government-wide systematic practice specifically directed against each media request, or the media in general, we did conclude that there was some merit to the second part of the CNA's complaint about unfair and unjustifiable delays," Mr. Marleau wrote in his report, but there is nothing illegal in the practice, he added.

Besides the problems of official resistance, passive-aggression, or indifference to FOI

---

[283] *Government stymying efforts to obtain information: critics*. Telegraph-Journal, Saint John. Jan 7, 2008. [285] Figure 3: *Access to Information Act* requests closed within established timelines, from 2013 to 2014 fiscal year to 2017 to 2018 fiscal year

[284] *Getting information from feds taking ages*, by Alison Auld. The Spectator. Hamilton, Jan. 7, 2008

[285] *'Sensitive' access requests delayed: investigation. No secret rules for media, commissioner says*, by David Wylie, Ottawa Citizen, Sept. 4, 2008. Scott Anderson, senior vice-president, content for Canwest Publishing Inc., said the ruling was a very positive development for the public's right to know. "It's not hard to imagine that issues that need the most exposure are the ones governments would like to keep under wraps," he said. "This ruling means that so-called 'sensitive' requests for information must be dealt with the same way innocuous requests are. No more playing for time in the hopes the issue will die and the journalist will go away."

deadlines, there is another, more structural issue that seems as immutable as a law of nature:

A week is a long time in journalism (and politics), but a year is a short time in government. Both parties move to very different speeds and rhythms, and often seem unable to understand the other's time culture. This is, of course, a setting for perennial frustration and conflict, and with long-overdue requests, the applicant or Commissioner is compelled to repeatedly call upon the public body like a collections agency. Public servants may regard the situation to be as unjust as chastising an elephant for not keeping pace with a cheetah, while some others might consider that the only solution is to try to meet each other part way.

I believe a reformed *ATIA* would do best to follow the FOI law of Quebec, where the public body has 20 days for an initial reply, with the right to extend for additional 10 days. It may, however, be more politically achievable for now to replicate British Columbia's FOI law, with its 30 day initial time limit and 30 day extension.

• Canada's *Access to Information Act*, 1982:

In Section 7, the head of government institution must reply to *ATIA* requestor in writing within 30 days (subject to Section 8 and 9) after the request is received.

This time limit may be extended for two reasons. First, government may transfer the request to another government institution that has a "greater interest" in the record, within 15 days of receiving it, and so notify the applicant of the transfer in writing. The head of the other institution must reply within the remaining 15 days.

Secondly, the reply may be extended "for a reasonable period of time" if many records must be searched, consultations are required, or third parties must be notified by law. In such cases, the applicant and the Information Commissioner must be notified of any extensions within 30 days. (The next sections of the *ATIA* describe third parties' rights to oppose release, and the time limits for those.)

2006 amendment to *ATIA* (from the *Accountability Act* of Prime Minister Harper):

> Right to access to records. 4. [...] (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

GLOBAL COMMENTARY

• Article 19, Model Freedom of Information Law, 2001:

9. (1) Subject to sub-section (3), a public or private body must respond to a request for information pursuant to section 4 as soon as is reasonably possible and in any event

within 20 working days of receipt of the request.

(2) Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours.

(3) A public or private body may, by notice in writing within the initial 20 day period, extend the period in sub-section (1) to the extent strictly necessary, and in any case to not more than 40 working days, where the request is for a large number of records or requires a search through a large number of records, and where compliance within 20 working days would unreasonably interfere with the activities of the body.

(4) Failure to comply with sub-section (1) is deemed to be a refusal of the request.

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

16. A public authority shall take reasonable steps to enable an applicant to be notified of the decision on a request (including a decision for deferral of access under section 21) as soon as practicable but in any case not later than 30 days from the date on which the request is duly made.

• Council of Europe, *Recommendations on Access to Official Documents*, 2002:

A request for access to an official document should be dealt with promptly. The decision should be reached, communicated and executed within any time limit which may have been specified beforehand.

• Open Society Justice Initiative, *Access to Information, Monitoring Tool Overview*, 2004:

5. Information shall be provided in a timely fashion. The Justice Initiative surveyed 44 FOI laws from around the world, and found that the average timeframe for providing information was 17 working days, with some countries' laws permitting extensions for complex requests....

11. The refusal should be made in writing within the timeframes specified by law (where specific timeframes for refusals are given) or, at the latest, within the timeframe for providing information.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information recommendations*, 2007:

Public bodies should be required in law to respond promptly to all requests for information. Requests for information that are time-sensitive or relate to an imminent threat to health or safety should be responded to immediately.

• Organization of American States (OAS), *Model Law on Access to Information*, 2010:

35. (1) Each public authority must respond to a request as soon as possible and in any event, within 20 working days of its receipt.

(2) In the event the request was routed to the public authority from another authority, the date of receipt shall be the date the proper authority received the request, but in no event shall that date exceed 10 working days from the date the request was first received by a public authority designated to receive

requests.

Extension - 36. (1) Where necessary because of a need to search for or review of voluminous records, or the need to search offices physically separated from the receiving office, or the need to consult with other public authorities prior to reaching a disclosure determination, the public authority processing the request may extend the time period to respond to the request by up to 20 working days.

(2) In any event, the failure of the public authority to complete the processing of the request within 20 working days, or, if the conditions specified in paragraph 1 are met, the failure to respond to the request within forty working days, shall be deemed a denial of the request.

(3) In highly exceptional cases, involving large amounts of information, the public authority may appeal to the Information Commission for an extension beyond 40 working days.

(4) Where a public authority fails to meet the standards of this article, no charge should be imposed for providing the information, and any denial or redaction must be specifically approved by the Information Commission.

37. Under no circumstances may a third party notification excuse the public authority from complying with the time periods established in this law.

• House of Commons [United Kingdom] Justice Committee *Post-legislative scrutiny of the UK Freedom of Information Act 2000*. First Report of Session 2012–13:

15. We were pleased to hear relatively few complaints about compliance with the 20 day response time. We believe that the 20 day response time is reasonable and should be maintained.

16. It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit - 20 days would seem reasonable - in which they must take place. An extension could be acceptable where there is a need to consult a third party. [....]

18. We recommend the 20 day extension be put into statute. A further extension should only be permitted when a third party external to the organisation responding to the request has to be consulted.

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

Article 15. Response to request. (1) Subject to subsection (2), the information officer to whom a request is made, as soon as reasonably possible, but in any event within 21 days after the request is submitted must (a) determine whether to grant the request; (b) notify the requester of the decision in writing; and (c) subject to subsection (7), if the request is granted, subject to the payment of any applicable reproduction fee, translation fee and/ or transcription fee, give the requester access to the information.

(2) Where a request relates to information

which reasonably appears to be necessary to safeguard the life or liberty of a person, the information officer must within 48 hours after the request is submitted: (a) determine whether to grant the request; (b) notify the requester of the decision in writing; and (c) if the request is granted, give the requester access to the information.

Article 16. Extension of time. (1) Subject to subsection (2), the information officer to whom a request is made may extend the period to respond to a request in section 15(1) on a single occasion for a period of not more than 14 days if (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the original time limit would unreasonably interfere with the activities of the information holder concerned; or (b) consultations are necessary to comply with the request that cannot be reasonably completed within 21 days. (2) If any part of the information requested can be considered by the information officer within the time period specified under section 15(1), it must be reviewed and a response provided to the requester in accordance with that section.

OTHER NATIONS

From my basic survey of response times in every national FOI statute, one can clearly see that Canada's law has fallen far behind the rest of the world. The most common initial FOI response time is 14 or 15 days, with the same period for an extension – *half* the 30 day period allowed for the initial response in the *ATI Act*.

Notably, 92 nations prescribe an initial response time ranging from three to 21 days, while just 34 countries mandate 30 days or more. For the extension limit, 58 nations set from three to 21 days, whereas 29 countries set 30 days – all while the 1982 Canadian *ATI Act* can extend a reply for an unspecified "reasonable period of time." Some laws also have penalties for delays, which Canadian statutes lack.

It is significant that the response time averages below are heavily skewed toward the lengthier end because of the (British) Commonwealth nations. This seems likely due overall to a more private, cautious bureaucratic culture in the Commonwealth. The contrast is most striking in the 10 day response time, 22 nations to 1.

There are many gaps in the numbers, mainly due to silences or ambiguities in the original texts, and/or the translations of these. For instance, nations variously refer to FOI responses as *answered*, or *processed*, or *complied with*, or *decided*, or that records are *provided* - and one often cannot be certain exactly how these differ. The term "day" in most FOI laws signifies working day, i.e., 20 working days would be a month, in effect; but in the wording of some laws, it is not clear if calendar or working day was denoted.

It must also be borne in mind that just because these time limits are set in law, that does not mean they are always, or even usually, followed in practice. Indeed, it is well known that these are often "more honoured in the breach than the observance" (but that is the subject for a report on FOI practice).

Initial Response Time				**Total**
3 days -	1	[Commonwealth]	0 [Non- Commonwealth]	= 1 nation
5 days -	0	[Commonwealth]	3 [Non- Commonwealth]	= 3 nations
7 days -	2	[Commonwealth]	8 [Non- Commonwealth]	= 10 nations
10 days -	1	[Commonwealth]	22 [Non- Commonwealth]	= 23 nations
14-15 days -	4	[Commonwealth]	27 [Non- Commonwealth]	= 31 nations
20-21 days -	12	[Commonwealth]	12 [Non- Commonwealth]	= 24 nations
30 days -	12	[Commonwealth]	17 [Non- Commonwealth]	= 29 nations
60 days -	0	[Commonwealth]	3 [Non- Commonwealth]	= 3 nations
90 days -	0	[Commonwealth]	1 [Non- Commonwealth]	= 1 nation

Extension Time Limit				**Total**
3 days -	0	[Commonwealth]	2 [Non- Commonwealth]	= 3 nations
5 days -	0	[Commonwealth]	4 [Non- Commonwealth]	= 4 nations
7 days -	1	[Commonwealth]	2 [Non- Commonwealth]	= 3 nations
10 days -	2	[Commonwealth]	11 [Non- Commonwealth]	= 13 nations
14-15 days -	6	[Commonwealth]	22 [Non- Commonwealth]	= 28 nations
20-21 days -	3	[Commonwealth]	6 [Non- Commonwealth]	= 9 nations
30 days -	6	[Commonwealth]	13 [Non- Commonwealth]	= 19 nations
40 days -	1	[Commonwealth]	1 [Non- Commonwealth]	= 1 nation
60 days -	1	[Commonwealth]	4 [Non- Commonwealth]	= 5 nations
90 days -	2	[Commonwealth]	1 [Non- Commonwealth]	= 3 nations
No day limit –	3	[Commonwealth]	1 [Non- Commonwealth]	= 4 nations

There are other interesting or valuable features of time limits in FOI laws, several of which could be considered for a reformed *ATIA*, perhaps in modified forms:

• In several countries, the public body must provide information within 48 hours for "emergencies" or "to safeguard the life or liberty of a person" (or some variant of these terms):

In Commonwealth nations – Antigua, Ghana, India, Kenya, Sierra Leone, Vanuatu

In non-Commonwealth nations - Montenegro, Serbia, Sudan

Better yet, in Afghanistan and Nepal, such information must be provided within 24 hours. (Regrettably, this option has never been even considered in a Canadian jurisdiction.)

• FOI delays have been a problem in the United States as well, but the issue has been tackled. In 2007 the Senate passed *Bill S.849*, the *Open Government Act of 2007,* which puts some teeth into the statutory mandate that an agency must respond to a FOIA request within 20 days; in the U.S. there had previously been no statutory penalty for agency delay in responding to a request. Some state FOI laws mandate a three day response.

• Three national FOI laws give priority to journalists in FOI processing – Afghanistan (three days), Niger (five days), and Yemen (unspecified time).

• In Norway, internal guidelines issued by the Ministry of Justice say that requests should be responded to in three days. The Norwegian Ombudsman in 2000 ruled, "It should be possible to decide most disclosure requests the same day or at least in the course of one to three working days, provided that no special, practical difficulties were involved."[286] Rwanda and Vietnam have some version of a three-day limit (although short extensions are allowed for complex requests).

In regards to practice, "An interesting phenomenon to observe in countries where access to information legislation is firmly established, such as the Netherlands or Sweden, is that government officials act in the spirit as well as the letter of the law. In practice, the formalities for requests for information are often waived and the information provided without delay."[287]

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

6.12. The Committee recommends that the initial response period available to government institutions be reduced from 30

[286]http://freedominfo.org/countries/norway.htm Article 19 had misgivings about this three day deadline: "While short timeframes are to be promoted, at the same time excessively short timeframes may actually undermine implementation of the law. For example, officials will have to consider whether requested information falls within the scope of an exception. Three days may be insufficient for this purpose. If officials are unable to keep up with these timeframes in practice, they will constantly be operating in breach of the law, undermining its legal quality. As a result, short but realistic timeframes are to be preferred." - *Memorandum on the draft Paraguayan Free Access to Public Information Law*, by Article 19, London, 2004

[287]*Public Access to Environmental Information*, by Ralph E. Hallo. Report for the European Environment Agency, 1997

days to 20 days, with a maximum extension period of 40 days, unless the Information Commissioner grants a certificate as to the reasonableness of a further extension. The onus for justifying such extensions shall be on the government institution.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 98: That section 9 of the Act, extension of time limits, be amended to restrict the delegation of granting time extensions to a senior official, perhaps Assistant Deputy Minister level, with the hopes of increasing the accountability for performance by institutions.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

It is as if government has decided that the right to a timely response is not an important right and can be ignored with impunity. . . . One remedy is to ensure that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines) there are real consequences. One consequence might be loss of the right to collect fees (including application fees and any search, preparation, and photocopying charges). . . . There is no reason why requesters should pay anything for poor service.

Perhaps a more mind-focusing sanction would be to prohibit government from relying upon the Act's exemption provisions to refuse access if the department is in a deemed refusal situation.

[On Section 26] First, the period of grace now stipulated in the section - 90 days - is unnecessarily long. Sixty days is ample time given modern printing methods; the Act should be amended to reduce the grace period. Second, the provision has been relied upon as a device to buy extra time. An institution may receive a request for a record, deny the request on the basis of section 26 and, when that period expires, change its mind about publication and simply apply exemptions to the record. Section 26 should be amended to prevent such abuse by stipulating that if the record is not published within the 90 days (or 60 days as recommended) it must be released forthwith in its entirely with no portions being exempted.

• Information Commissioner John Reid, *Blueprint for Reform*, 2001:

It is recommended that the Act be amended to preclude reliance upon sections 21 and 23 in late responses.

It is recommended that section 9 be amended to provide that no extension of time may exceed one year without the approval of the Information Commissioner. Further, it is recommended that section 31 be amended, to give the Commissioner discretion to extend the one-year period within which a complaint must be made.

It is recommended, therefore, that section 72 be amended to require government institutions to report each year the percentage of access requests received which were in "deemed refusal" at the time of the response and to provide an explanation of the

reasons for any substandard performance.

• Open Government Canada (OGC), *From Secrecy to Openness*, 2001:

Recommendation 31: The ATI Act should be amended to prohibit the use of any of the discretionary exemptions if the response time limits in the law are exceeded.

Recommendation 32: The ATI Act should be amended to prohibit the charging of any fees if the response time limits in the law are exceeded.

Recommendation 33: The ATI Act should be amended to prohibit extensions of the response time limits in the law beyond one year without the permission of the Information Commissioner, and to permit complaints about delays beyond one year with the permission of the Information Commissioner.

Recommendation 34: The ATI Act should be amended to require government institutions to report annually the percentage of requests received which were not responded to within the response time limits in the law, and to provide reasons for the delays.

• Treasury Board Secretariat, *Access to Information: Making it Work for Canadians*, *ATIA* Review Task Force report, 2002:

5-6. The Task Force recommends that Paragraph 9(1)(a) of the Act be amended to permit an extension of the time for responding to a request if "meeting the original time limit would unreasonably interfere with the operations of the government institution".

5-7. That Access to Information Coordinators be encouraged to offer to release information to requesters as soon as it is processed, without waiting for the deadline, or for all of the records to be processed.

• Canadian Newspaper Association (CNA), *In Pursuit of Meaningful Access to Information Reform*, 2005:

Recommendation 13. Delay is particularly injurious to journalism and has been used to "kill" or frustrate investigative projects. The powers of the Information Commissioner must be enhanced to enforce compliance with statutory response times. The Commissioner should be empowered to compel the resolution of complaints involving unjustified delays, whether by sanction or by compelling the production of non-exempt documents.

Recommendation 14. No more than two extensions of the statutory 30-day period for compliance should be permitted, and in no cases without good reason; extensions beyond 90 days should be permissible only on application to the Commissioner.

• Justice Gomery report, *Restoring Accountability*, 2006:

It endorses limiting the Government's authority to extend the initial 30-day default response period to instances of necessity. Where a government institution fails to respond within the time limits, a provision should state that this delay is deemed to be a refusal of the request, and the Government institution must give notice of the refusal to the applicant and to the Information Commissioner.

• *Bill C-470, An Act to amend the Access to Information Act (response time)*, introduced in the House on October 30, 2007 by Liberal MP Larry Bagnell (not passed):

The Bill provides for a report to be given to the requester and the Office of the Information Commissioner explaining the delay and the projected completion date when a request is still outstanding 100 days after it was received. With this notice, the requester could decide to engage in the complaint procedure earlier or could decide to wait, depending on the explanation and the projected completion date. It would allow the Office to monitor the frequency with which federal institutions are late in responding to access requests.

• BC Freedom of Information and Privacy Association (FIPA), 2008:

Some equivalent to the British Columbian information and privacy commissioner's new "consent order" and "expedited inquiry" process to curtail delays, could be considered for the *ATIA* system.

To lessen overall response times, public bodies must give records to the applicant in staged releases if he or she requests it.

"Sign off" authority levels and processes must be streamlined and simplified.

The *ATIA* should be amended to grant the commissioner order making power on delays.

Failures to respond would be reflected in the reduced remuneration and bonuses of the head of the public body responsible for *ATIA* compliance (such as deputy ministers).

The government should release as much information proactively and routinely as possible, in preference to the *ATIA* system.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

6. Paragraphs 9(1)(a) and (b) of the Act are replaced by the following:

(a) meeting the original time limit would unreasonably interfere with the operations of the government institution and the request

(i) is for a large number of records,

(ii) necessitates a search through a large number of records, or

(iii) is part of a group of requests for a large number of records made by the same person on the same subject within a period of 30 days,

(b) consultations with other government institutions are necessary to comply with the request and cannot reasonably be completed within the original time limit,

• Information Commissioner Suzanne Legault. *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, March 2015:

Recommendation 3.1 - The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.

Recommendation 3.2 - The Information Commissioner recommends that extensions

longer than 60 days be available with the permission of the Information Commissioner where reasonable or justified in the circumstances and where the requested extension is calculated with sufficient rigour, logic and support to meet a reasonableness review.

Recommendation 3.3 - The Information Commissioner recommends allowing institutions, with the Commissioner's permission, to take an extension when they receive multiple requests from one requester within a period of 30 days, and when processing these requests would unreasonably interfere with the operations of the institution.

Recommendation 3.4 - The Information Commissioner recommends the Act make explicit that extensions for consultations (as per section 9(1)(b) may only be taken to consult other government institutions or affected parties, other than third parties who already have consultation rights under section 9(1)(c), and only where it is necessary to process the request.

Recommendation 3.5 - The Information Commissioner recommends that, in cases where a consulted party fails to respond to a consultation request, the consulting institution must respond to the request within the time limits in the Act.

Recommendation 3.6 - The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

Recommendation 3.7 - The Information Commissioner recommends allowing an extension when the requested information is to be made available to the public, rather than claiming an exemption.

Recommendation 3.8 - The Information Commissioner recommends that if an extension is taken because the information is to be made available to the public, the institution should be required to disclose the information if it is not published by the time the extension expires.

Recommendation 3.9. The Information Commissioner recommends repealing the exemption for information to be published (section 26).

Recommendation 3.10 - The Information Commissioner recommends that extension notices should contain the following information:

- the section being relied on for the extension and the reasons why that section is applicable;

- the length of the extension (regardless of what section the extension was taken under);

- the date upon which the institution will be in deemed refusal if it fails to respond;

- a statement that the requester has the right to file a complaint to the Information Commissioner about the extension within 60 days following receipt of the extension notice; and

- a statement that the requester has the right to file a complaint to the Information Commissioner within 60 days of the date of deemed refusal if the institution does not respond to the request by the date of the expiry of the extension.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 16 –

That in the first phase of the reform of the *Access to Information Act*, extensions be limited to the extent strictly necessary, to a maximum of 30 days and that extensions longer than 30 days be available with the permission of the Information Commissioner.

• Canadian Environmental Law Association (CELA) and Ecojustice, *Joint submission to Senate review of Bill C-58*, December 2018:

Recommendation 3: The issue of delay in disclosure should be addressed by the *Act*. Bill C-58 should include an automatic fee waiver if the timelines in the *Act* are not met. A simplified appeal process to the Office of the Information Commissioner for a failure to make a decision within the Act's deadlines should be established. Costs should be awarded against the government for the appeal process if they cannot provide a reasonable explanation for the delay.

Recommendation 6: The *Act* should include a time limit of 120 days for the Office of the Information Commissioner to complete an investigation under the *Act*.

• Senate of Canada, *Amendments to Bill C-58 and House of Commons Response*, 2019:

Proposed *ATIA* amendment: "Limit time extensions taken under s. 9(1)(a) or (b) to 30 days, with longer extensions available with the prior written consent of the Information Commissioner." [Rejected by the House of Commons]

CANADIAN PROVINCES

A reformed *ATIA* would do very well to follow the FOI law of Quebec, where the public body has 20 days for an initial reply, with the right to extend for additional 10 days. Then, in Section 52, "On failure to give effect to a request for access within the applicable time limit, the person in charge is deemed to have denied access to the document."

The FOI statute prescribes 30 days for an initial reply and 30 days more for an extension in Nova Scotia, New Brunswick, Manitoba, British Columbia, Alberta and Prince Edward Island.

The law of Newfoundland had this same standard until 2015, when it was most laudably amended to mandate a 20 day response with a 20 day extension. As well, a request must be transferred within 15 days in the *ATIA*, but only 5 days in the Newfoundland FOI law.

In several provinces, officials can ask the Commissioner's permission to approve a second extension even longer than that, yet the timeline for this was regrettably changed from "calendar days" to "working days" in British Columbia.

In the FOI laws of Ontario, the Yukon, the Northwest Territories and Nunavut, public bodies must reply in 30 days and then – as deplorably as the *ATIA* - extend the initial deadline for a "reasonable" time, a vacuous term that could denote virtually anything to anyone.

Saskatchewan allows the applicant one year to appeal to the Information Commissioner, compared to the 60 days in the *ATIA* (which was itself inexplicably shortened from one year).

In November 2006 the B.C. information and privacy commissioner created a new "expedited inquiry" and "consent order" process to curtail delays, which works effectively today, and some equivalent of this should be considered for the *ATIA* system.

Two provinces grant the right for "rolling requests," useful for journalists. In Alberta's law: "Continuing request. 9(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years." The same right exists in Ontario's FOI law, Section 24(3).

In sum, the public and media in other nations would not tolerate the delays of months or years that polite Canadians have passively come to accept as inevitable.

I believe that delays are an important procedural problem but a rather secondary one next to structural FOI law reform. Please consider: if a report prepared for cabinet on a public disease risk is 95 percent blanked out in response to an FOI request - due to archaic exemptions for policy advice or cabinet confidences, the lack of a public interest override, and so forth - then what difference does it make if all those blank pages are released in one month or one decade?

Conflicts of Law

CHAPTER 10 - FOI AND OTHER LAWS

Should other laws override an FOI statute on information release for certain subjects, or visa versa?

A Conservative government will: Ensure that the disclosure requirements of the *Access to Information Act* cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.

- Conservative Party of Canada, election promise, 2006 (Promise not fulfilled.)

The relationship of a transparency statute to other laws is a complex topic that can easily elude the radar, for when a conflict of laws arises on such a score, it may appear as an obscure, unimportant technicality.[288] Freedom of information statutes are designed to contain enough exemptions to prevent the harms that the secrecy clauses in other laws profess to avert, making those other laws' provisions redundant at best, deleterious at worst.

Passing secrecy provisions in other acts to override an FOI statute can give rise to a confusing patchwork of laws, for in such external provisions, this withholding of the information might be mandatory or discretionary; it may have harms tests, time limits, public interest overrides and appeal routes – or, more often, have none of these features. It also cannot be trumped by the public interest override in the FOI law.

Although it is too rarely discussed at Parliamentary review panels, this low profile dilemma really is acutely important, for Section 24 of the Canada's 1982 *Access to Information Act* prescribes that an agency must refuse to disclose any information requested under the *ATIA* that is restricted by dozens of other statutes, as set out in Schedule II of the *ATIA*.

Unchecked, the number of listed statutes could grow still further, a trend that Information Commissioner John Reid well described as "secrecy creep," while his predecessor John Grace called Section 24 "the nasty little secret of our access legislation." Both of them and their successors advised that Section 24 be deleted, as did Justice John Gomery, and as do I.

Section 24 violates the goal of the *ATIA* as stated in Section 2(1), which is to make

[288] In British Columbia, for example, aware that amending the FOI law directly would alert the media and FOI advocates, the government sometimes quietly inserts new secrecy provisions (consequential amendments) that override the FOI law to other statutes in a Miscellaneous Statutes Amendment Act, an old legislative ruse to evade notice that is less successful today than previously.

government more accountable to the public and to provide a right of appeal, as well as Section 4 (1), which gives the *ATIA* primacy over other acts of parliament.

Today there are 60 other statutory provisions in other laws that override the *ATIA*. These include the *Competition Act*, *Criminal Code*, *Canada Elections Act*, *Canadian Environmental Assessment Act*, *DNA Identification Act*, *Hazardous Products Act*, *Nuclear Safety and Control Act*, *Railway Safety Act*, and the *Statistics Act*. (Chapter 12 on whistleblower protection deals at length with the *ATIA*'s interplay with the *Public Servants Disclosure Protection Act*.)

Most of these are intended to protect business secrets and personal privacy, but such provisions are entirely unnecessary because the exemptions in Sections 20 and 19, respectively, of the *ATIA* already provide ample protection for these usually legitimate interests.

Section 24 is a mandatory and so-called "class" exemption: once the government decides that a record contains information of a kind contemplated in one of those other provisions, the agency has no choice but to refuse its release. However, very few of the other provisions by their own terms absolutely bar disclosure; they usually only "restrict" it in some way. Indeed, most grant some measure of discretion to an official to determine whether to release information - usually to other government officials or to the person who provided the information. As one report notes, "This varying degree of discretion fits awkwardly within a mandatory class exemption."[289]

Section 24 also violates the principle of independent review. The scope of the Information Commissioner's review of government refusals to release records under this exemption is quite narrow. In investigating this refusal, all the Commissioner can do is to determine whether or not the disclosure is subject to some other statutory restriction. If it is, then even if the disclosure would likely cause no identifiable harm, it must be withheld nonetheless. This prescription must be followed even if the other statute merely restricts, but does not categorically bar, disclosure.

The *ATIA* gives the Information Commissioner no authority even to recommend that the discretionary power included in the other statute be applied in favour of disclosure in appropriate circumstances. The rights of an *ATIA* applicant to appeal such a discretionary decision through judicial review are also extremely limited.

New exclusions keep arising. For example, in 2008 the Conservative government introduced *Bill C-7*, which provided that information about airline safety-related incidents - including material from flight data recorders and voluntarily self-reported violations would remain sealed. It also designated safety reports as "mandatory

[289]Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the Privacy Act, report: Open and Shut: Enhancing the Right to Know and the Right to Privacy. Ottawa, 1987

exclusions" under the *ATIA*, putting them beyond the reach of access requests. That means they could never be released, or be reviewed by the information commissioner, who had gone to court several times to force disclosure of safety reports Transport Canada argued should remain confidential.[290] (*Bill C-7* did not pass.)

The original version of the *Act* should be considered, and its progressive features incorporated into a reformed *ATIA*. In 1979 the Conservative government introduced *Bill C-15*, the proposed *Freedom of Information Act*. The bill contained a mandatory exemption (Section 25) which provided that records must be withheld if they contained information "required under any other Act of Parliament to be withheld from the general public or from any person not legally entitled thereto." As noted in the 1987 *Open and Shut* report:

> However, this potentially vast exemption was explicitly made subject to certain conditions if the other Act of Parliament provided the duty to withhold information in such a manner as to (1) leave no discretion or (2) set out particular criteria for refusing disclosure or (3) referred to particular types of information to be withheld, then the exemption in the *Freedom of Information Bill* applied. If one of these conditions was not satisfied, then the record could not be refused under this particular exemption.[291]

This approach taken in *Bill C-15* was virtually the same to that which had been implemented when the United States F*reedom of Information Act* was amended in 1976. When Bill C-43 was introduced by the Liberal government in 1980, it in turn copied the pertinent section of Bill C-15 verbatim.

But in 1981, amendments resulted in Schedule II appearing in the Bill for the first time, and the Bill was then altered to emerge as the present flawed *Access to Information Act.* The Minister in charge of shepherding the *ATIA*'s passage noted, however, that it was the task of a future parliamentary committee to review each of the provisions noted in Schedule II and recommend "whether or not they ought to stay in the law." It was anticipated that some of those provisions might be found no longer to merit the type of protection they had been granted by previous parliaments.

The parliamentary committee that reported in *Open and Shut* advised that the Department of Justice undertake an extensive review of these other statutory restrictions and amend their parent acts in a manner consistent with the *ATIA*. But nothing significant happened.

The United Kingdom also allows several other statutes' provisions to override its FOI law. Yet in one report, the UK's Department of Constitutional Affairs (in charge of implementing the law) identified 381 other

---

[290] *Secrecy in the skies; Information about airline safety incidents would be confidential under new bill*, by Don Butler. Ottawa Citizen, Jan. 19, 2008

[291] *Open and Shut, ibid*

pieces of legislation that limit the right of access under the British FOI act, and it committed to repealing or amending 97 of those laws and reviewing a further 201.[292] Canada should do likewise with the *ATIA*.

Resolving this problem seems not a high priority in Canada because statesmen perceive that there will always be other far more urgent political priorities than the harmonization of statutes to avert esoteric conflicts of law disputes that might never arise.

The best solution is straightforward, as noted in the commentaries below: Repeal *ATIA* Section 24 and Schedule II, and detail all government information release policies and practices within the *ATIA* text. The federal government should commit to bring all laws relating to information into line with the principles underpinning the *ATIA*.

• Canada's *Access to Information Act*, 1982:

Sec. 24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

Two decades after its passage, the *ATIA* was amended with one of the most regressive exclusions that could be conceived.

In the wake of the shocking terrorist attacks on New York of September 11th 2001, the federal government passed *Bill C-36*, the *Anti-Terrorism Act*. Its expressed purpose was to address national security concerns, including threats of espionage by foreign powers and terrorist groups, and the intimidation or coercion of ethnocultural communities in Canada.[293]

A portion of *Bill C-36* amended the *Official Secrets Act 1981, which was replaced by and renamed as* the *Security of Information Act*. The Anti-Terrorism Act amends Section 69 of the *ATIA* to authorize the Attorney General of Canada to completely exclude security and intelligence related information received in confidence from foreign governments from the operation of the *Act*, by issuing a certificate:

87. The *Access to Information Act* is amended by adding the following after section 69:

Certificate under *Canada Evidence Act*

69.1 (1) Where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued before a complaint is filed under this Act in respect of a request for access to that information, this Act does not apply to that information.

Certificate following filing of complaint

(2) Notwithstanding any other provision of this Act, where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued after the filing of a

[292]http://www.freedominfo.org/countries/united_kingdom.htm

[293]Government of Canada, Backgrounder No. 12, *Security of Information Act*. April 2004.

> complaint under this Act in relation to a request for access to that information,
>
> *(a)* all proceedings under this Act in respect of the complaint, including an investigation, appeal or judicial review, are discontinued;
>
> *(b)* the Information Commissioner shall not disclose the information and shall take all necessary precautions to prevent its disclosure; and
>
> *(c)* the Information Commissioner shall, within 10 days after the certificate is published in the *Canada Gazette*, return the information to the head of the government institution that controls the information.

In passing this section, the Canadian parliament, uniquely in the world, simultaneously disempowered the information commissioner and all federal courts from conducting any independent review of such a decision.

By contrast - as the *ATIA* textbook of Colonel Michel W. Drapeau and Marc-Aurele Racicot notes - in the United States, all refusals to disclose information are subject to judicial review in the U.S. Federal Circuit Court. In the United Kingdom, Australia and New Zealand, although a minister of the crown may also issue a certificate, it may still be appealed to the Tribunal charged with the review of administrative appeals under the nation's FOI law, which may quash the certificate if it finds the exemption was wrongly applied. In turn, decisions of this Tribunal are reviewable, albeit only on a point of law, by the appropriate court.[294]

The primary concern is that the Canadian government has yet to convincingly explain why such harmful information releases would not be prevented by applying Section 15 of the *ATIA* (which concerns "subversive or hostile activities"). It should be noted that this section, which is heavily applied in practice, was drafted after careful consideration by parliamentary committees, after hours of deliberation and the weighing of testimony from expert witnesses: should their opinion count for nothing?

At a parliamentary committee hearing, the then-Justice Minister, when asked why *ATIA* Section 15 was not adequate, replied:

> I'm afraid, Mr. Chair, that under existing access legislation, there is a loophole created because it permits the Information Commissioner to make certain recommendations. In fact, as far as we're concerned, that is not sufficient for our allies and we must do that which is necessary to ensure that we have the best information and we are protecting that exceptionally sensitive information.[295]

Then-Information Commissioner John Reid and others challenged the Minister to explain the claimed "loophole" – it could not be the Commissioner, because he/she had no power

[294]Colonel Michel W. Drapeau and Marc-Aurele Racicot, Federal Access to Information and Privacy Legislation, Annotated 2007. Toronto: Thomson Carswell, 2006, pg. 1-651 to 1-662

[295]John Reid, federal information commissioner, 2002-03 *Annual Report,* chapter 1

(then) to order disclosure – and no clear explanation was provided. The Commissioner concluded:

> The only loophole, thus, could be the possibility that a misguided judge of the Federal Court would order the disclosure of sensitive intelligence information, notwithstanding a clear exception of such information contained in the access law. [Given judicial history] the "misguided judge" theory has no rational basis. Moreover, there was an air of unreality to the former minister's suggestion that our allies had asked the government to give them a "guarantee" by plugging the "misguided judge" loophole. The Information Commissioner asked the former minister to produce the evidence of any such request; none was forthcoming.
>
> The allies want no more than the simple assurance from Canada that intelligence information which needs to be protected can be protected. Not a single ally doubts Canada's ability to do so under the existing Access to Information Act.[296]

One may wonder: has this argument changed because, after *Bill C -58* amended *ATIA* in 2019, the Commissioner can now order the release of information, beyond just recommending it? If so, Ottawa has still yet to credibly demonstrate why our allies need fear that the existing *ATIA* Section 15 (or its potential application) is insufficient to protect vital security records.

For certain security topics - including ones that could potentially be concealed by a *Security of Information Act* certificate - is it ultimately more dangerous to the public to know the truth, or not to know it? Even if the exclusion does have several legitimate goals, it could also be used to shield information on grievous misuses of authority (e.g., corruption, torture), of the sort that could thrive within the context of such near-absolute secrecy.

Despite everything, the specter of terrorism needs to be kept in perspective, as Ken Rubin said in a speech to a FIPA event, two months after the September 11, 2001 attacks on New York:

> Our identity, cause and circumstances cannot be left to others, and fate. I want to continue to stimulate others to go out and dig around, question authority, and act up front. Nothing will make me back down when Ottawa gets overly power-hungry and wants to trash both the access and privacy acts in its anti-terrorist legislation.... This is not the time to be consumed by fear and anxiety.[297]

Debates on the relationship of the *Security of Information Act* to the *ATIA* can be complex and convoluted.

In 2006, an Ontario Superior Court judgment Ontario court quashed three sections of the so-called leakage provisions

---

[296]Reid, 2002, *ibid*

[297]Ken Rubin, *Reflections of an information rights warrior*. Speech to B.C. Freedom of Information and Privacy Association event, Vancouver, Nov. 19, 2001; here he received a FOI lifetime achievement award

in Section 4 of the *Security of Information Act*, in throwing out RCMP warrants used to search the home and office of Ottawa Citizen reporter Juliet O'Neill, who had published leaked information regarding the Maher Arar case. (The government did not appeal the ruling.) Judge Lynn Ratushny ruled the security provisions were unconstitutional because they violated the *Charter of Rights and Freedoms*, Section 7 and 2(b).

Government lawyers had argued that the *ATIA* helps define the line between information that is an "official secret" and information that can be released. But the judge scoffed at that argument: "I have no evidence that Parliament ever intended the *ATIA* to be the exclusive avenue for the communication of government information and that every other avenue of communication is intended to amount to a criminal offence." Indeed, she added, the very idea "would itself amount to an unjustifiable limitation on freedom of expression and amount to a clear 'chilling' of free speech and of a free press."[298]

The intent of Parliament expressed in the purpose clause of the *Access to Information Act* appears clear enough:

> 2. (2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Leaking records to the media is a longstanding tradition (although not a means of access "normally available to the general public"). If the reporter had applied for the same information through the *ATIA*, it is virtually unthinkable it would have been released by this route because of the *Act*'s Section 15.

Disclosure of government records under *ATIA* commonly takes months or years, and large parts of the records are often blacked out. So journalists often circumvent the Act and turn to sources within the public service to receive more complete and timely information about the inner workings of government.

Any journalist who skirts the *ATIA* to gain government information would become a criminal, if the government prevailed in its court case against the journalist, her lawyer stated during the trial. He argued that the *Security of Information Act* was now being re-interpreted by the government as "the enforcement arm of the *Access to Information Act*.... they are asking you to take a definition of 'protected information' from

---

[298] *Judge quashes law, warrants authorizing RCMP raid on Citizen reporter*, by Don Butler, Ottawa Citizen, October 19, 2006. In its factum filed in court, the Crown argued that the *Security of Information Act* is not vague or broad, if it is interpreted in conjunction with the *ATIA*: "Both leakers and recipients of leaked material must know that absent authorization, releasing information that could not be given out pursuant to a request under the *ATIA* is highly questionable activity. Leakers and recipients ought not be allowed to institute a parallel disclosure system which leaves it to these individuals to determine what information ought to be releasable." The journalist's lawyer countered that the Crown's interpretation is wrong, that the access law is completely distinct from the *Security of Information Act* and that Parliament never intended to make it a crime to circumvent the *ATIA*.

an administrative statute [the *ATIA*] and use it to give length, breadth and definition to a crime."[299]

GLOBAL COMMENTARY

• Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

Principle 8 - Disclosure Takes Precedence. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not take it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.

• Article 19, *Model Freedom of Information Law*, 2001:

5. (1) This Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body. (2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.

· African Union, *Declaration of Principles of Freedom of Expression in Africa*, 2002:

Secrecy laws shall be amended as necessary to comply with freedom of information principles.

• The Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(7.1) Where there is a conflict between the access to information law and any other legislation, the access to information law should, to the extent of that inconsistency, prevail.

(7.2) Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information.

(12.4) The independent administrative body should also play a role in ensuring that other legislation is consistent with the access to information law. This should involve reviewing existing legislation and making recommendations for reform of any inconsistent laws, as well as being consulted on whether or not proposed legislation would impede the effective operation of the access to information regime.

• World Bank, *Legislation on freedom of information, trends and standards*, 2004:

A key issue here is the relationship between freedom of information and secrecy laws. Some laws - such as India's - state that in cases of conflict, the freedom of information law takes precedence over secrecy laws. But in most cases secrecy laws are listed as an

[299] *Government to make criminals of anyone with leaked information, lawyer argues*. By Kate Jaimet. The Ottawa Citizen, August 23, 2006

additional general exception, effectively overriding the freedom of information law. This is contrary to good practice because in most countries secrecy laws were not drafted with openness in mind and so fail to respect the three-part test outlined above.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information recommendations*, 2007:

In cases where information may be deemed sensitive by any other law, the FOI law must have precedence.

• Organization of American States (OAS), *Model Law on Access to Information*, 2010:

4. To the extent of any inconsistency, this Law shall prevail over any other statute. [OAS comment: While the model law does not contain a provision whereby private information that is required for the exercise or protection of international recognized human rights would be brought under the scope of the law, some states, including South Africa have adopted this approach.]

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

4. Primacy of Act. (1) Save for the Constitution, this Act applies to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of an information holder. (2) Nothing in this Act limits or otherwise restricts any other legislative requirement for an information holder to disclose information.

OTHER NATIONS

In my overview of 128 national FOI statutes, I counted 76 laws that can be overridden by other legislation, while 23 FOI statutes stand supreme over the other laws. Commonwealth nations account for 20 laws[300] within the former category, and 11 in the latter.

Commonwealth nations

• The FOI override is stated most clearly and briefly in the statute (2013) of Rwanda[301] : "Article 19: All prior legal provisions contrary to this Law are hereby repealed."

Like Afghanistan, this is another troubled nation which Canada has worked, at high cost, to try to transform into a modern democracy; on this FOI point (although it accounts for only prior legal provisions and not future ones[302]), the reverse influence would be most welcome.

---

[300]The numbers do not add up to the 128 nations with FOI laws, due to silences and ambiguities in some laws on this topic, and/or cryptic, elusive translations – and I do not speculate on what was intended.

[301]After the genocidal conflict of 1994 with its nearly one million casualties, Rwanda became the 54th nation to join the Commonwealth, in 2009. It was the second country, after Mozambique, not to have any historical ties with the United Kingdom, and its FOI law is RTI-ranked #66 in the world.

[302]On this topic, in the draft FOI law of St. Kitts and Nevis, Section 6(1) stated that the bill would apply only to the exclusion of other *existing* legislation in force. For the Commonwealth Human Rights Initiative, although the intent is positive, such a wording was not explicit enough; the CHRI added: "At the very least, consideration should be given to amending the wording of Sec. 6(1) to account for the possibility of another law, policy or practice developing in the future." - *St. Kitts and Nevis Freedom of Information Bill 2006*, analysis by Cecelia Burgman CHRI (2007)

• The South African FOI law, in Section 5, provides another model:

> This Act applies to the exclusion of any provision of other legislation that (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act.

• Antigua and Barbuda's FOI law phrases the matter in a kind of positive reversal, whereby other laws can override the FOI statute, but in aid of openness rather than secrecy:[303]

> Art 6(1) - This Act applies to the exclusion of the provisions of any other law that prohibits or restricts the disclosure of a record by a public or private body to the extent that such provision is inconsistent with this Act.
>
> 6(3) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other law, policy or practice.

Consider if such an equivalent term was present in the Canadian *ATIA*, and an applicant requested records via FOI that could be open under another statute (such as rules in the *Competition Act*, *Criminal Code*, or *Canada Elections Act*). If the *ATIA* would not permit the disclosure of such records - per Section 16 or 21 for instance - then the other "law, policy or practice" would nonetheless trump these *ATIA* restrictions and they could be released.

• In Malawi's FOI law: "6 (2). Nothing in this *Act* shall be construed as limiting or otherwise restricting any other legislative requirement for an information holder to disclose information." (The CLD-AIE notes that "An earlier draft contained an override clause, but this was deleted from the final version.")

• As well, in India, Pakistan, Sri Lanka, Vanuatu, St. Kitts and Nevis, the FOI law trumps restrictions in secrecy provisions in other legislation to the extent of any conflict. The statute of India states:

> Article 22. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

• Most rarely and impressively for a Commonwealth nation, the FOI law of Nigeria overrides that country's *Official Secrets Act*.

> 29 (1) The fact that any information in the custody of a public institution is kept by that institution under security classification or is classified document within the meaning of the *Official Secrets Act* does not preclude it from being disclosed pursuant to an application for disclosure thereof under the provisions of this *Bill*, but in every case the

[303]On this topic, the Ugandan FOI law states: "2. (3) Nothing in this Act detracts from the provisions of any other written law giving a right of access to the record of a public body." The CLD-AIE analyst wrote: "The Law says that nothing here detracts from any right of access granted by another law. By stating this, but not stating that other laws can detract from the right of access granted here, there is an implication that other laws will not supercede this. But this is not explicitly stated." Hence the CLD-AIE gave it only 2 points out of 4. https://www.rti-rating.org/country-data/Uganda

public institution to which the application is made shall decide whether such information is of a type referred to in sections 12, 13, 15, 16, 17, 18, or 20 of this *Bill*. [i.e., the most common exemptions]

(2) If the public institution to which the application in subsection (1) is made, decides that such information is not a type mentioned in the sections referred to in subsection (1) hereof, access to such information shall be given to the applicant.

• Despite all the foregoing, one must regrettably note that within the Commonwealth, FOI laws that can be overridden by other statutes are, for now, about three times more numerous than those countries in which the FOI law is paramount.

The United Kingdom's rule is quite typical: "Section 44: (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it - (a) is prohibited by or under any enactment [...]"[304] Australia's law also contains a list of override-to-FOI secrecy clauses in other laws, in Schedule 3, and this country also has several very strict and oppressive official secrets acts.

Non-Commonwealth nations

On this subject we might first consider Afghanistan's FOI law. Article 39 reads in full: "The provisions of this law, with regard to access to information, supersedes all other laws." As noted above, a reverse national influence vis-a-vis Canada would be most welcome on this legal point. The brevity of other nations is also laudable:

- Angola: "All legislation contrary to the provisions of the present law is hereby repealed." (Article 21)
- South Sudan: "Any existing legislation on the subject governed by this act is hereby repealed" (Article 2)
- Turkey: "The other legal regulations which are incompatible with the provisions contained herein shall cease to be applicable as of the date this Act comes into force" (Article 5.2)
- Yemen: "Any provision contrary to the provisions of this law shall be deleted." (Article 64)

• Several other nations similarly prescribe that the FOI law shall stand supreme on disclosure questions (at least to a large degree, in various forms) - Ethiopia, the Netherlands, Nicaragua, Peru, Serbia, Slovenia, Tunisia, Ukraine and Zimbabwe.[305]

• The spirit of "sunshine legislation" is on full display in the FOI law of Thailand too:

His Majesty King Bhumibol Adulyadej is

[304]As Toby Mendel wrote of the British law in 2008: "The Law preserves secrecy provisions in other laws, as well as disclosures prohibited by European Community obligations or the rules relating to contempt of court (section 44). However, it does at least give the Secretary of State summary powers to repeal or amend by order laws restricting disclosure (section 75), which could in theory serve to mitigate at least the most egregious problems of leaving in place secrecy laws." He still opposes the lack of an override, but just noted that this UK rule might help mitigate it somewhat.

[305]Unsurprisingly, the nation of Palau, with the lowest RTI-rated FOI law in the world at #128, prescribes - much like Canada's *ATIA* - in Section 8: "The following information shall not be made available to the public (c) information specifically exempted by other statutes." This RTI bottom rank was formerly held by Austria, which has similar restrictions.

> graciously pleased to proclaim that: [...] Section 3. All other laws, by-laws, Rules and regulations, insofar as they deal with matters provided herein or are contrary hereto or inconsistent herewith, shall be replaced by this Act.[306]

• The FOI statute of Liberia includes two very important points, regarding the Constitution, and future laws:

> 1.7: Primacy of Act: Save for the Constitution, this Act is and shall be the primary law governing the right of access to information, including all matters related to request for and provision of information in Liberia. No administrative action, order or regulation contrary to, inconsistent with, or in derogation of this Act shall issue or be effective in Liberia, and this Act shall prevail over any and all subsequent inconsistent statutes, except a subsequent statute that specifically amends or repeals it.

• Mexico (RTI ranked #2) also provides a model for Canada to consider:

> Article 113. The information may be classified as privileged if its publication: XIII. Which, by express provision of a law, have such character, provided they are consistent with the bases, principles and provisions laid down in this Act and not contravene it; as well as those provided for in international treaties.

(Try to imagine the 60 overriding Canadian laws referenced in *ATIA* Schedule II, per Section 24, having to be "consistent with the bases, principles and provisions" established in the *ATIA* and not being allowed to contravene it.)

• In regards to the last point in Mexico's Article 113, several nations also prescribe that international agreements shall override their FOI statutes, e.g., Kazakhstan, Iceland, Mongolia. In the last, Article 2.2 states: "If the present [FOI] law conflicts with any treaty obligations of Mongolia, the treaty obligations shall prevail."

Poland enacted the Classified Information Protection Act in 1999 as a condition for entering NATO, as did Macedonia in 2004. Romania did likewise in 2002 after pressure from NATO to adopt this law before it could join the alliance, a move which caused considerable controversy in that country. All these agreements override national FOI statutes.

This raises an important and mainly overlooked question for Canada: What should be the proper relationship between our FOI laws and secrecy clauses in international agreements we have signed? Which should override the other?

• In the United States, unfortunately, *FOIA* Article 7(b)(3) allows for other statutes to classify information (but places some restrictions on how this can be done), and there are 142 different statutes that allow for withholding.

---

[306]Yet there is one qualifier in Thailand's law: "Section 43. The Rule on the National Security Protection, B.E. 2517 (1974), insofar as it deals with the official information, shall continue to be in force to such an extent as not contrary to or inconsistent with this Act, unless otherwise provided in the Rule prescribed by the Council of Ministers under section 16."

Most American state FOI laws, however, are far more open in nearly every way than the national FOIA. In Washington State's Public Records Act, for instance: "In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." (RCW 42.56.030.)

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

The Committee is concerned about a "slippery slope" effect should the current approach of listed other statutory provisions in Schedule II be retained.... The impact of permitting wholesale additions to the list of other statutory exemptions contained in the *Access Act* is obvious: the spirit of the legislation could readily be defeated.

The *Access Act* would not be a comprehensive statement of our rights to the disclosure of government records. Instead, it would be amorphous. One of the benefits to be derived from listing all exemptions in the *Access Act* is that, in effect, the complete *Act* is brought under one roof. No longer would other legislation need to be consulted in order to determine one's rights in this vital area. The Committee recommends that the *Access Act* be amended to repeal Section 24/Schedule II.

We have concluded that, in general, it is not necessary to include Schedule II in the *Act*. We are of the view that in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the *Access Act*. Accordingly, the Committee recommends that the Department of Justice undertake an extensive review of these other statutory restrictions and amend their parent *Acts* in a manner consistent with the *Access to Information Act*.

• *The Access to Information Act: A Critical Review*, by Sysnovators Ltd., 1994:

Recommendation 70: That the review of statutes under Section 24 undertaken by the Standing Committee be immediately reviewed by the Department of Justice and a public report issued as to which statutes are being summarily removed from the list and suggestions made as to how Section 24 will be reformed to prevent it becoming a loophole around the *Access to Information Act*. The Commissioner should suggest to the Minister of Justice that this is a small but very tangible step toward open and accountable government.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

The question must be asked: Why was it necessary to put Section 24 in the Access Act? After all, there are substantive exemptions to cover any conceivable legitimate need for secrecy. The standing committee [in 1987] concluded there was no such need. The fact is Section 24 allows the government to keep information secret even when there may be no reasonable justification for secrecy. Even confidences of the Queen's Privy Council receive absolute protection for only 20 years. Yet all the provisions listed in schedule II are accorded mandatory secrecy forever.

This provision is the nasty little secret of our access legislation and it has no place at all in the law.

• Open Government Canada (OGC), F*rom Secrecy to Openness*, 2001:

Recommendation 12: Given that the *ATI Act* contains more than adequate exemptions and exclusions, Section 24 of the law should be repealed.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005:

19. Section 24 of the Act is repealed.

• Canadian Newspaper Association (CNA), *In Pursuit of Meaningful Access to Information Reform*, 2005:

8. Abolish Section 24 of the *Act*. This section compels the permanent exemption of government information according to a schedule listed in an appendix. This provision has provided governments with an opportunity to narrow the application of the act "through the back-door" by appending an ever-growing list of exclusions, a practice the Information Commissioner has described as "secrecy creep."

• Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005:

In relation to the second issue, that of future additions to Schedule II, the Government believes that criteria should also be adopted. These could include: whether the Government institution has a demonstrable and justifiable need to provide an iron clad guarantee that the information will not be disclosed. This criterion would cover records such as tax payer information and census data.

The Government shares the opinion of the Task Force that the standard to be met for Section 24 protection should be very high. In addition to meeting the criteria, therefore, the government institution seeking to add a confidentiality provision to Schedule II should be required to justify why the information in question cannot be adequately protected by the other exemptions in the *Act*.

• Justice Gomery report, *Restoring Accountability*, 2006:

The Commission favours the deletion of Section 24, which says that if some other federal Act states that certain records/ information must not be disclosed, then the *Access to Information Act* adopts that prohibition as part of the access to information regime.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

20. Section 24 of the Act is repealed.

• From the Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

Canadian lawmakers crafted Canada's access laws in such a way as to ensure that there are plenty of places for recalcitrant bureaucrats or politicians to hide from their openness obligations. The problem starts with paramountcy clauses, which are an

endemic issue in several laws. To be effective, an access framework should be the law of the land when it comes to disclosure.

The most progressive law in the world will be of little use if it is overruled by a patchwork of regressive secrecy laws. Canada's national access law is overruled by 60 other pieces of legislation. It may be noted that if the regime of exceptions in an access law is properly crafted, so that it protects all legitimate confidentiality interests, there is no need for it to be overridden by other laws.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*. March 2015:

Recommendation 4.29 - The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of all of the provisions listed in Schedule II and any legislation that otherwise limits the right of access. Any provision covered by the general exemptions in the *Act* should be repealed.

Recommendation 4.30 - The Information Commissioner recommends that new exemptions be added to the *Act*, in consultation with the Information Commissioner, where the information would not be protected by a general exemption that already exists in the *Act*.

Recommendation 4.31 - The Information Commissioner recommends that Section 24 and Schedule II be repealed.

Recommendation 4.32 - The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of the exemptions and exclusions for institutions brought under the coverage of the *Act* as a result of the *Federal Accountability Act*.

CANADIAN PROVINCES

In all provinces and territories, regrettably, secrecy provisions in other laws also override the FOI statute. For instance, Alberta's access law is overruled by 38 other pieces of legislation, and Saskatchewan's by 26.

The wording in Section 79 of the British Columbia *Act* is standard: "If a provision of this *Act* is inconsistent or in conflict with a provision of another *Act*, the provision of this Act prevails unless the other *Act* expressly provides that it, or a provision of it, applies despite this *Act*."

These provincial laws need reform on this issue, as does the *ATIA*.

"For Immediate Release..."

CHAPTER 11 - DUTY TO PUBLISH AND ROUTINE RELEASE

Must some information be routinely released, or proactively published under the FOI law?

"If officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless."[307]

- Sissela Bok, Swedish philosopher, 1982

The interplay between freedom of information statutes and the proactive release of government information is intriguing, important, and ever evolving.

The passage of FOI laws has profoundly changed the political and journalistic dynamic on the free release of government information, and it has led some people to debate whether the effect of FOI statutes may be a mixed-blessing, that is, whether the laws in practice have resulted overall in more freedom of information or, ironically, in less.[308]

The intent of parliament expressed in the purpose clause of Canada's *Access to Information Act*, Section 2 (2), appears clear enough:

> This *Act* is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Unfortunately, using the FOI law to "limit access" is exactly what many officials in Canada and the world are now doing. As Prof. Wesley Wark put it:

> A pernicious version of the law of unintended consequences has dogged the Access Act from the very beginning. The act has mutated from a "last resort" in a citizen's search for knowledge of public policy, to the main recourse. . . Administering access has created such a black mood among Ottawa officialdom that it has cast a permanent pall over the idea of proactively releasing major bodies of records about decision-making into the public sphere. Here was a second unintended blow to good governance.'[309]

[307]Sissela Bok, *Secrets: on the Ethics of Concealment and Revelation*. New York: Pantheon Books, 1982

[308]For instance, "It's a commonplace among reporters of investigative stripe: the various freedom-of-information acts have actually made it more difficult, not less, to pry loose information from government holdings." – Maxine Ruvinsky, Investigative Reporting in Canada. Toronto: Oxford University Press, 2008

[309]Waiting for access, by *Wesley Wark*. National Post, June 26, 2008

Some records that were routinely granted to reporters in the early 1980s are now blocked unless a formal request is filed. Many applicants note that officials are hiding behind an FOI statute even for the most banal records, telling information seekers they must use the law as their first option, not as the last resort that parliament had intended.

Then, illogically, some politicians and bureaucrats blame a surfeit of requests for supposedly bloating the cost of the FOI system and so burdening the public treasury, a situation that the government itself needlessly created by opposing routine release. (Indeed, one declared purpose of the duty to publish section in Azerbaijan's FOI law is to "lessen the number of multitudinous requests for information.")

The cost is raised further still when the state improperly delays the FOI reply for weeks or months as its public relations branch toils on pre-release "issue management" plan (effectively, a spin control plan). Columnist Greg Weston summed it up:

> The Harper administration's obsession with secrecy and control has had a ripple effect, overwhelming regular communications channels to the point of dysfunction. Able information officers are commonly gagged, not allowed to provide even routine stuff without clearance from the prime minister's office, a perpetually clogged funnel that ensures responses to public inquiries are delayed or simply never given. As a result, journalists, businesses and other Canadians seeking government information are increasingly being forced to file formal requests under the *Access to Information Act*.[310]

Yet it is often forgotten that one may still request any records routinely, and sometimes receive them.[311] At certain times, then, the *ATIA* may seem worse than useless because of its exemptions and delays (though fees are no longer a notable obstacle). [312] As one guidebook explained it:

> A mandatory exemption does not mean that the record will never be available. It only means that the record will not be available if you ask for it under the *Access to Information Act* because the act only applies to records requested under that statute. The act is not a code of information practices for all government records. Therefore, if you ask for the same

[310] *Ask all you like; Just don't expect any answers under the Harper government's Accountability Act*, by Greg Weston. Toronto Sun, June 8, 2008

[311] On this point, Ontario's FOI law includes an enlightened clause, which could also be placed in the *ATIA*: "Pre-existing access preserved. 63 (2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force."

[312] Journalists are routinely advised to first seek records outside the FOI process. For example, "A word of caution is needed: I would suggest using the Access Act only as a last resort. Bureaucrats button up when an access request is made, and people who might have been willing to release information on an informal basis find their hands tied." – Rick Ouston, Getting the Goods: Information in B.C. Vancouver: New Star Books, 1990. On this point the author tells the amusing story of a Vancouver Sun reporter who in the 1980s filed an *ATIA* request to Canada's Defense Department about the environmental impacts of the American military's plan to test its Cruise missile across this country's airspace. His request was rejected under *ATIA* Section 13. A year later he was phoned by a contact, who had seen the environmental impact report . . . sitting on the shelves of the Vancouver Public Library. DND had sent copies to libraries across the nation long before.

> record without mentioning the act, the government institution can give it to you – provided, of course, that there is not some other statute which would prevent disclosure.[313]

When announcing the passage of FOI statutes, some administrations declare the law is just a flagship of new general culture of open government, and this proclamation would seem to auger well for the concept of broader routine release. As new generations of public servants have come to acquire greater familiarity with the FOI process, the prospect seems brighter yet. Besides noting the potential for increased public trust and confidence in government, the organization Article 19 well summed up the need for broader publication:

> Although the main focus of any access to information law will be request-driven access, the proactive publication of information by public bodies is also a key element of a progressive access regime. Most people will never make a specific request for information, so that the system of proactive publication will effectively determine what public information they see.[314]

In many jurisdictions, the presence of an FOI law has leveraged the government's routine release of several types of records that one formerly had to request under FOI. In British Columbia, this includes lists of polluters and restaurant inspection reports, as well as the posting of texts of P3 private-public partnership contracts on websites (although several of these agreements had large passages deleted to shield commercial interests – passages which I later revealed through FOI upon appeal stages).[315]

As most governments seem sensitive to their reputations for transparency, they often proudly announce such actions in press releases. Their hope is that such publicity can engender more public trust, demonstrating that government "has nothing to hide," while conversely, withholding innocuous records solely by habit and for no sensible cause can provoke public suspicions when none need exist. An additional benefit is that, as the state came to realize, releasing records routinely is far less labour-intensive and costly to taxpayers than the FOI process.[316] As Information Commissioner Robert Marleau said:

> Departments should not be waiting until there is a formal request before disclosing

---

[313]Heather Mitchell and Murray Rankin, *Using the Access to Information Act*. Vancouver: International Self-Counsel Press, Ltd., 1984

[314]*Memorandum on a proposed draft Bill on Freedom of Information for Brazil*. Article 19, London, 2005

[315]In a similar vein, for a news story in *The Tyee.ca*, I obtained databases via FOI from the BC Oil and Gas Commission naming the companies that were sent the 14 enforcement orders in 2012 and those that were issued 77 tickets. The Commission had refused to publicly identify the violators; soon after the story appeared - and perhaps in response to it - this agency changed its policy and began posting all such records on its website. - *New Details on BC Energy Companies that Broke Environmental Regulations*, by Stanley Tromp. *The Tyee*. July 6, 2013

[316]Yet such publication should never be solely internet-based because, even today, not all of the public have internet access or expertise. As Article 19 put it: "Moreover, it is not sufficient that the public bodies 'make available' the information, but should be obligated to 'publish and disseminate widely'... We submit that simply publishing the information on its website does not satisfy this latter obligation." *(Memorandum on the Chilean draft Access to Government Held Information Bill, by Article 19. London,*

> information. The default mode should be more routine and voluntary disclosure. . . . The ideal I am aiming for is that all information requests be handled outside the Act. . . . As journalists, you should also be able to get the answers you need by calling someone at a government department-just like that-without filing a request, without paying a fee and, most importantly, without waiting.[317]

Sometimes when an FOI request for a high-profile record comes in - or the government anticipates that it likely will - and no FOI statutory exemptions could be invoked to withhold it, the government realizes it is pointless to resist, and so it suspends the FOI process in that case and gives out the record freely. At other times, an FOI director might advise the applicant there was never a need to go the FOI route because the record has been already posted on an obscure, poorly organized government webpage, and directs him or her to it.

All this is especially welcomed by the media working on deadlines. Routine release is more feasible for older records, which generally become less sensitive with age. In many nations and provinces, some proactive publication is also mandated in statutes other than the FOI law, e.g., annual salaries over $75,000 and expenses in B.C's *Financial Information Act*.

There is another concept that needs implementation. Treasury Board guidelines mandate the completion of a Privacy Impact Assessment (PIA) for new programs or services involving personal information. Similarly, upon the establishment of each new program or governmental corporate entity, the Canadian government ideally would have to produce and publish a "Transparency Impact Assessment" (TIA) to explain the means by which the new project would be transparent and accountable to the public – by FOI law and/or legislated proactive publications - and a pledge to maintain these standards.

What may seem incomprehensible or even Kafkaesque to the average reader are documented examples of agencies invoking discretionary *ATIA* exemptions to withhold information published in *old newspaper clippings*, and data already posted on a company's website.[318] Such occasions illustrate the point of a critic earlier in this report who noted that "It is about time we had less law and more common sense in deciding what information the public has a right to know."

If harms could have resulted from such information release, these most likely would

---

[317]Robert Marleau, Information Commissioner, Speech to Canadian Association of Journalists (CAJ) luncheon, Ottawa, Feb. 27, 2008

[318]For instance, in the matter of drug companies submitting data to Health Canada as they seek approval for their products, "while the government is obliged to keep this 'third party information' confidential, the sponsor company is free to make public whatever it wants. Hence Health Canada has found itself in the unusual situation of refusing to release information that is already posted on a company's website." - Transparency and the Drug Approval Process at Health Canada, by Ann Silversides, for Women and Health Protection, Fall 2005

have occurred during its first, "informal" publication. If this did not happen, then fears of harms resulting from a second, formal release via *ATIA* are almost certainly groundless. Perhaps the FOI law could be amended to prescribe that exemptions cannot be applied to withhold information that has already been published, subject to a very few exceptions.

WHEN ROUTINE RELEASE IS NOT ENOUGH

Genuine transparency entails more than only what a government chooses to release, and FOI laws are mainly designed for, and will always be necessary for, records that the state definitely does not want released.

Some longtime FOI users frankly and not unreasonably regard much of the information that governments are now placing on their websites as woefully incomplete, self-serving and vacuous. In addition, very few Canadian governmental agencies maintain any kind of public archive of materials released under access, and it would be very difficult to find any Canadian equivalent of the *FOIA* "electronic reading rooms" that have worked well in the United States.

In 2008 *Vancouver Sun* reporter Chad Skelton filed FOI requests to Fraser Health and Vancouver Coastal Health for a large volume of inspection data. The *Sun* then made that data available on its website through a series of searchable online databases. These, which can be searched by a facility's name, allow users to see a wide variety of inspection data for more than 3,000 licensed care facilities across the region -- not only daycares, but long-term care homes, seniors' homes, drug rehab centres and group homes for the disabled. This enables readers to check the current risk rating (high, moderate or low) for every licensed facility before placing their children or grandparents there – a great public service.

Yet Skelton explained that most of the database stories produced at the *Sun* were based on data sets that the newspaper had to obtain by FOI requests and not by governments' routine releases "and so we need the legal backstop of the FOI law." (One reason is that it is difficult for governments to redact data sets to protect individuals' privacy, such as for lists the newspaper posted of all 35,000 serious incidents reported by each facility – e.g., abuse, neglect and medication errors.) This fact alone confirms the far lesser value of the voluntarily posted datasets than FOI laws.

The Quebec journalists' federation had another warning about the proactive disclosure emphasis in *Bill C-58*, in its brief to the Senate: "They can arbitrarily choose the documents that will be disclosed, and even their content. They can remove columns of information from a database. They can remove portions of documents that affect the integrity of the document from the public gaze. Sometimes, this enables governments promoting that idea to hide behind very effective smokescreens."

Canada's *Access to Information Act*, 1982:

Under Section 5 (retained from the original *ATIA*), the government must publish at least each year a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution, manuals, and a description of all classes of records under their control.

[Only the indented parts below are quoted verbatim; the rest are summarized.]

Part 2 - Proactive Publication of Information [Added through Bill C-58 in 2019]

Mandate letters

73. The Prime Minister shall cause to be published in electronic form any letter or revised letter in which he or she establishes the mandate of any other minister within 30 days after the issuance of the letter or revised letter.

Briefing materials

74. A minister shall cause to be published in electronic form (a) within 120 days after the appointment of the minister, the package of briefing materials that is prepared for the minister by a government institution for the purpose of enabling the minister to assume the powers, duties and functions of his or her office;

(b) within 30 days after the end of the month in which any memorandum prepared by a government institution for the minister is received by his or her office, the title and reference number of each memorandum that is received;

(c) within 30 days after the last sitting day of the House of Commons in June and December or, respectively, no later than July 31 or January 31 if the House of Commons is not sitting in June or December, the package of question period notes that were prepared by a government institution for the minister and that were in use on the last sitting day of the month in question; and

(d) within 120 days after the minister's

> appearance before a committee of Parliament, the package of briefing materials that is prepared by a government institution for the minister for the purpose of that appearance. [....]
>
> 91(1). The Information Commissioner shall not exercise any powers or perform any duties or functions in relation to the proactive publication of information under this Part, including receiving and investigating complaints or exercising any other powers, duties or functions under Part 1

Section 75 – Travel expenses – prescribes that minsters and their staffs must publish their travel expenses within 30 days, including the purpose of the travel, the dates, and the places visited

Section 76 – Hospitality expenses - hospitality expenses for minsters and their staffs

Section 77 - Contracts over $10,000 – any contract over this amount in relation to the activities of the minister's office must be published within 60 days after the end of each fourth quarter

Section 78 - Contracts under $10,000 – if contracts are amended so that their value exceeds $10,000, this must be published. Ministers must also publish all expenses incurred by their offices [...]

Section 80(1) – Ministers need not publish any information described in Sections 74 to 78 if it may be withheld via an *ATIA* discretionary exemption if an *ATIA* request had been filed for it

Section 80(2) – Ministers must not publish any information described in Sections 74 to 78 if it must be withheld via an *ATIA* mandatory exemption if an *ATIA* request had been filed for it [...]

Section 84 - Reports tabled in Parliament – any report of a government institution about its activities that must be tabled in the Senate or the House of Commons must also be published [...]

Section 87 - Grants and contributions over $25,000 – the government must publish the details of a grant or contribution over $25,-000, that is in relation to the activities of a government entity, that was authorized by Parliament under an appropriation Act [...]

(In its report on *Bill C-58*, the Senate recommended an amendment to Section s. 91(1.1): "The Information Commissioner shall review annually the operation of Part 2, proactive disclosure, and include comments and recommendations in relation to that review in her annual reports." The House of Commons rejected this amendment.)

In the election campaign of 2015, the centerpiece of the Liberals' platform commitment on transparency was to "ensure that *Access to Information* applies to the prime minister's and ministers' offices." The 2016 mandate letter from the new Prime Minister to the Treasury Board President prescribed that he work to ensure that "that the *Act* applies appropriately to the Prime Minister's

and Ministers' Offices."[319]

The key word, of course, is "appropriately" - here used as a vacuous term that could mean virtually anything to anyone. In June 2017, Treasury Board president Scott Brison, proudly announced: "We are fulfilling our mandate commitment - we are extending the *Access to Information Act* to ministers' offices and to the Prime Minister's Office for the first time ever," he told reporters, before adding a vital qualifier: "Through proactive disclosure."[320]

This amounts to a broken promise. Such documents offer little insight into government, beyond what it already wishes to be made public. More sensitive information, such as briefing notes sent to ministers, will not be released - only their titles will be published. The records will surely also be carefully written for public consumption, with much important detail missing. In a Parliamentary debate on *Bill C-58*, Conservative MP Peter Kent chided the Treasury Board president:

> With regard to the proactive disclosure provisions in Bill C-58, which is something of a bait and switch, I think, in terms of what it qualifies, it is actually a false promise to the opening of ministerial offices. Remember, the Liberal campaign promise was to ensure that access to information applies to the Prime Minister's Office and ministers' offices, as well as to the administrative institutions that support Parliament and the courts. The proactive disclosure provisions don't come anywhere close to that.... The experts are unanimous in these criticisms.[321]

(As well, I advised without success - as some nations do in their FOI laws – that proactive disclosure in the *ATIA* mandate the publication of salaries and expenses, as well as both winning and losing contract bids, so the public can judge for itself the wisdom of the award decisions.)

In September 2017, the Information Commissioner issued a detailed analysis of *Bill C-58* in a report entitled *Failing to Strike the Right Balance for Transparency*,[322] which is essential reading on this issue. In this very dark, bleak assessment, most of the new measures in *C-58* were flayed as being not merely inconsequential, but actual "regressions." Amongst the objections:

• *Bill C-58* states the Commissioner cannot exercise her oversight function over any matter relating to proactive disclosure, including any information or materials that

[319] Mandate letter from Prime Minister to Treasury Board President, 2016. The government framed these relatively narrow changes to "modernize" the Act as a first step in a longer process to implement more major reforms. We shall see.

[320] *The Trudeau government's access to information reform doesn't expand transparency like they promised*, by Justin Ling. Vice News, June 19, 2017

[321] Parliamentary debate on Bill C-58, House of Commons, Ottawa. October 18th, 2017. To this, Brison countered: "Your party, the Conservatives, actually committed in its platform in 2006 to modernize the *Access to Information Act*. You had 10 years to do it, and when asked in the final days of your government why it wasn't done, [Conservative Treasury Board president] Tony Clement said, 'Well, we didn't get around to it.' We're doing this in the first two years of our government."

[322] *Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58*. Information Commissioner of Canada. Sept. 2017 https://www.oic-ci.gc.ca/en/resources/reports-publications/failing-strike-right-balance-transparency

must be published, and the application of exemptions.[323]

• *Bill C-58* allows institutions to refuse to respond to a request for many records - such as briefing materials, contracts, and travel and hospitality expenses - if they have been proactively disclosed.

• The Bill provides timelines for proactive disclosure that are longer than the 30 days to respond to an access request. It also allows institutions to refuse to respond to a request for these materials if they have been made available. "This is a regression of current rights." (As well, the duty to publish mandate letters provides no timeline for publication.)

• There are inconsistent and confusing disclosure obligations present under these provisions as a result of the differences between the definition of a "government institution" and a "government entity."

(See Recommendations 7 to 14 of this report in the Canadian Commentary section below.)

In practice so far, said longtime CBC journalist Dean Beeby, "those pro-active disclosure requirements of Bill C-58 have already sucked up enormous resources, resources that would be better spent actually responding to specific requests, without running up huge delays."[324]

GLOBAL COMMENTARY

• Article 19, *Model Freedom of Information Law*, 2001[325]

17. Every public body shall, in the public interest, publish and disseminate in an accessible form, at least annually, key information including but not limited to:

(a) a description of its structure, functions, duties and finances;

(b) relevant details concerning any services it provides directly to members of the public;

(c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;

(d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;

(e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;

(f) any regulations, policies, rules, guides or

[323]Murray Rankin also wrote a decade ago that a reformed *ATIA* would still need to preserve the right of requesters to appeal the redactions of portions in proactively published material. - *The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada*. A report for the federal Information Commissioner's office, *Ottawa, June 2008*

[324]Dean Beeby, Speech to annual CAPA conference, Ottawa, Nov. 25, 2019

[325]Regarding one draft FOI bill, Article 19 asserts that, on the question of what counts as genuine access, "The mention in paragraph 4 that some of the material is available for a fee would seem to contradict the requirement to publish proactively. Either one has to request the material, and pay a fee to access it, or the public body should be required to publish it proactively, in which case it may not charge a fee." - Sierra Leone's draft Access to Information Bill Statement of Support. Article 19, London, 2005.

manuals regarding the discharge by that body of its functions;

(g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and

(h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.

• African Union, *Declaration of Principles of Freedom of Expression in Africa*, 2002:

Public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest.

• Council of Europe, *Recommendations on Access to Official Documents*, 2003:

A public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003:

The law should impose an obligation on government to routinely and proactively disseminate information of general relevance to citizens, including updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation [....] This is a particularly important aspect of access laws because often the public has little knowledge of what information is in the possession of government and little capacity to seek it. A larger supply of routinely published information also reduces the number of requests made under access to information laws.

• United Nations Development Agency (UNDP), *Right to Information Practical Guidance Note*, 2004.

Key questions: Is there a policy that obliges the government and or individual departments to publish information on a proactive basis, even in the absence of a formal right?

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(3.1) Public bodies should be required by law to publish and disseminate widely a range of key information in a manner that is easily accessible to the public. Over time, the amount of information subject to such disclosure should be increased.
(3.2) Public bodies should be required to develop publication schemes, with a view to increasing the amount of information subject to automatic publication over time.
(3.3) Public bodies should make use of new information technologies so that, over time, all information that might be the subject

of a request, and that is not covered by an exception, is available electronically [....] (3.4) Where information has been disclosed pursuant to a request, that information should, subject to third party privacy, be routinely disclosed.

• World Bank, *Legislation on freedom of information, trends and standards*, 2004:

Freedom of information is usually associated with the right to request and receive information. But it is now commonly understood as requiring public bodies to actively disseminate key types of information even in the absence of a request. This includes, for example, information about the public body's structure, finances, services, rules and regulations, decisions, and policies, as well as a guide to the information it holds and mechanisms for public participation.

• Open Society Justice Initiative, *Ten Principles on the Right to Know*, 2006:

15. Every public body should publish certain routine information on a regular basis even absent any information requests. Many FOI laws require that bodies covered by the law publish information such as an annual report and accounts, and make them easily available to the public even in the absence of any information requests.

• Transparency International, *Tips for the Design of Access to Information Laws*, 2006:

Proactive transparency: It is increasingly common to find that access to information laws contain provisions requiring public bodies – and private bodies to the extent that they are covered by the law – to make certain types of information available proactively, such as by posting the information on websites and/or having printed reports available in the reception of the institution.

Activities of the state with reference to public procurement can be made available automatically (on the Internet and in the national gazette or similar publication), which means that everyone has an equal opportunity to know about upcoming tenders and about contracts that have been awarded. Such measures are needed to overcome traditions of keeping business-related information secret, even where the so-called "business secrecy" relates to the spending of the tax-payers money as part of public-private partnerships and service contracts.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information recommendations*, 2007:

Government bodies should be required by law affirmatively to publish information about their structures, personnel, activities, rules, guidance, decisions, procurement, and other information of public interest on a regular basis in formats including the use of ICTs and in public reading rooms or libraries to ensure easy and widespread access.

• Council of Europe, *Convention on Access to Official Documents*, 2009:

Article 10 – At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in

matters of general interest.

• Organization of American States (OAS), *Model Law on Access to Information*, 2010:

9. (1) Every public authority shall adopt and disseminate widely, including on its website, a publication scheme approved by the Information Commission, within six months of: - [...] (b) in making information available proactively so as to minimize the need for individuals to make requests for information.

12. (1) The following are the key classes of information subject to proactive disclosure by a public authority: (a) a description of its organizational structure, functions, duties, locations of its departments and agencies, operating hours, and names its officials; (b) the qualifications and salaries of senior officials; [much more follows]

• House of Commons [United Kingdom] Justice Committee *Post-legislative scrutiny of the UK Freedom of Information Act 2000*. First Report of Session 2012–13:

2. While proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible for public bodies to anticipate the information that will be required. Nevertheless, proactive publication is important in achieving the primary objectives of the Act of openness and transparency. [....]

29. So too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions.

• African Union, *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013:

7 Proactive disclosure. (1) Each public body and relevant private body must publish the following information produced by or in relation to that body within 30 days of the information being generated or received by that body: [....]

(e) whether meetings of the public body or relevant private body, including its boards, councils, committees or similar other bodies, are open to members of the public and, if so, the process for direct or indirect engagement; but where a meeting is not open to the public, the body must proactively make public the contents of submissions received, the process for decision making and decisions reached;

(f) detailed information on the design and execution of any subsidy programmes implemented with public funds, including the amounts allocated and expended, the criteria for accessing the subsidy, and the beneficiaries;

(g) all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body;

(h) reports containing the results of surveys, studies or tests, including scientific or technical reports and environmental impact assessment

reports, prepared by the public body or relevant private body; [much more follows]

OTHER NATIONS

Pro-active publication and routine release are amongst the FOI issues on which the world has left Canada farthest behind.

Most other nations from Albania to Zimbabwe prescribe such information release in sections of their FOI statutes, and many of these are exhaustive, sometimes running to over 400 words each; the longest is that of Kyrgyzstan with 1,800 words. As well, proactive publication can also be mandated in statutes other than the FOI law.

This topic is so large that it ideally requires its own report, and there is space below only to note several of the more recommendable examples, many of which could at least be considered for a reformed Canadian ATI Act:

Commonwealth nations

• The United Kingdom's FOI law, Section 19, imposes a duty on every public authority to adopt and maintain a "publication scheme," which must be kept current and approved by the Information Commissioner.

• In India, all public authorities must proactively publish and disseminate a very wide range of information, including their decision-making norms and rules, opportunities for public consultation, and recipients of government subsidies, licences, concessions, or permits. Public authorities must also maintain indexes of all records and over time computerize and network their records

• In Pakistan, public bodies must disclose transactions involving acquisition and disposal of property and expenditures undertaken by a public body in the performance of its duties

• In Uganda, a public authority shall publish details of any process that exists for consultation with, or representation by, members of the public in relation to the formulation of policy in, or the administration of, the public authority; or the exercise of the powers or performance of duties, by the body; a description of all remedies available in respect of an act or a failure to act by the body

• In Trinidad and Tobago's FOI law, proactive publication is mandated in Section (9) for: "a report prepared for the public authority by a consultant who was paid for preparing the report," and "an environmental impact statement prepared within the public authority."

• The democratic process is an important factor in the "duty to publish" section of Antigua and Barbuda's FOI law:

> 10.1 [...] (g) the content of all decision and policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
>
> (h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the information of policy or the exercise of powers by that public authority

• The FOI Code of Wales (which is subject to the United Kingdom's FOI law) states: "We will continuously seek opportunities to publish information unless it is exempt under this Code. We will publish the facts and factual analyses behind policy proposals and ministerial decisions, unless they are exempt under this Code." Compare this proactive spirit to that of Canada, where some officials file lawsuits to block FOI requests that could reveal facts and analyses related to policy advice.

Non Commonwealth nations

• A stronger default right to records exists in Finland's FOI law as compared to the *ATIA*: "1.1 Official documents shall be in the public domain, unless specifically otherwise provided in this Act or another Act."

• Public bodies must make computers available to the public to facilitate access (Mexico, Poland, the Philippines)

• All statutes and internal regulations must be published (Columbia and other nations)

• Courts and other bodies are required to publish the full texts of decisions, and the Congress is required to publish weekly on its web site all texts of "projects of laws" (Ecuador)

• Public bodies must publish information on a government activity's influence on the environment (Armenia)

• In Poland's law, Article 6. 1, "Public information shall be accessed, in particular on: (1) internal and foreign policy, including on: a) intentions of legislative and executive authorities, b) draft legislation." (This last type of record is strictly barred from disclosure in the FOI laws of most Commonwealth nations.)

• In Serbia, the National Council is required to publish the data of sessions, minutes, copies of acts and information on the attendance and voting records of MPs.

• The Swedish FOI law makes it possible for ordinary citizens to go to the Prime Minister's office and view copies of all of his correspondence. (In Canada by contrast, the Prime Minister's office claims to be exempt from the *ATIA* and sued the information commissioner on this point.)

• The state must publish contracts including a list of those who have failed to fulfill previous contracts, budgets, results of audits, procurements, credits, and travel allowances of officials (Ecuador); and information relating to public tenders (Croatia)

• In Estonia, national and local governments must post online: statistics on crime and economics; information relating to health or safety; budgets and draft budgets; information on the state of the environment; and draft acts, regulations and plans including explanatory memorandum. They are also required to ensure that the information is not "outdated, inaccurate or misleading" (The Estonian FOI law cites 32 types of public records to be published in Section 28)

• Information on the "granting of special or exclusive rights to market operators, private organizations and private persons" must be published (Hungary)

• Institutions are required to make documents available directly through an electronic register, especially legislative documents and those relating to the development of policy and strategy (Kosovo) Much of this would likely be withheld by Canadian FOI laws' policy advice sections.

• In Brazil, government must publish on the internet a list of the information which has been declassified in the last 12 months, and a list of information classified in each level of secrecy

• In Palestine's draft FOI bill, Article 8 requires both public and private "industrial institutions" to publish six-monthly reports providing information on the location, nature and associated hazards of toxic materials used by them, the volume of materials released into the environment as a result of manufacturing processes and waste disposal methods and mechanisms used by them.

• The FOI Ordinance of China of 2007 (RTI-ranked #87) appears conceptually ambitious in Article 9 which prescribes that state organs should take the initiative in releasing government information that "1. Concerns the vital interests of citizens, legal persons or other organizations. 2. Requires the broad knowledge or participation of the public." Article 11 is far more specific, wherein information for release by local governments "should include":

> 3. Information on overall land-use planning for villages and townships, and the state of examinations
>
> 4. Information concerning the requisition or use of land, eviction and demolition of homes and compensation, the allocation of subsidies and the circumstances of their use;
>
> 5. Information concerning the state of creditors rights and TK,
>
> 6. Information on allocations for emergency rescues and disaster relief work, veteran benefits, social relief, charity contributions and other funds.
>
> 7. Information concerning contracting, leasing or auctioning activities involving collective enterprises of townships or villages, or other economic bodies of townships or villages;
>
> 8. Information on the state of reproduction policies.

According to one scholar, "Shanghai and other local governments . . . are breaking additional new ground in terms of public participation and open government generally."[326]

• Indonesia's FOI law prescribes the immediate release of some information (in terms reminiscent of the public interest override):

> Article 10. (1) Public Agency shall announce immediately any information that might jeopardize the life of the people and public order.
>
> (2) The obligation to disseminate Public Information as referred to in paragraph

[326] *Shanghai Advances the Cause of Open Government Information in China*, by Jamie P. Horsley The China Law Center, Yale Law School April 15, 2004

> (1) is delivered in a manner that is easily obtained by the people and in a simple language.

• Kyrgyzstan's FOI law prescribes the release of certain information on foreign affairs (an often overlooked topic in proactive publication regimes):

> Article 20. (10) information about official visits and business trips of the heads and official delegations of state body and local self-government body; [...]
>
> (29) information about interaction of state body and local self-government bodies with other state bodies and local self-government bodies, public unions, political parties, trade unions and other organizations, including international organizations; [etc.]'
>
> (21)(5) information about received and used grants, provided by a foreign state, international or foreign organization and (or) fund.

• The Polish FOI law in Article 6 mandates public accountability on "programmes on the realization of public tasks, method of their realization, performance and consequences of the realization of these tasks."

• In the United States, the *Executive Order on Classified National Security Information* requires that all information 25 years and older that has permanent historical value be automatically declassified within five years unless it is exempted. Individuals can make requests for mandatory declassification instead of using the FOIA.

CANADIAN COMMENTARY

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

6.6. The Committee recommends that once a document has been released to a particular applicant, subsequent applicants should be able to review this record in the reading room of the government institution. A list of records released under the *Access to Information Act* should be available in the reading room and in the Annual Report of the government institution. Should a copy be desired by subsequent applicants, they should be required at most to pay reasonable photocopying expenses without any additional expense for search and preparation.

• *The Access to Information Act*: A Critical Review, by Sysnovators Ltd., 1994:

Recommendation 19: Add a section to the Act which would place an obligation on government institutions to make accessible in open digital systems that majority of information that is not exempt and assure that any databases falling into categories one and two of the taxonomy are actively disseminated and are made available through public systems mandated by Act or consequent regulation. Institutions should be required to maintain an open database of information already released under the *Access to Information Act*.

Recommendation 35: The government should be encouraged to issue a policy which states that no exemptions will be applied to results of public opinion research; that a listing of such research, updated no less frequently

than each two months (60 days), must be maintained in the office of each institution's Access to Information Coordinator; and that the listing and public opinion results must be provided upon informal request by the public.

• Information Commissioner John Grace, *Toward a Better Law: Ten Years and Counting*, 1994:

Recommendation 9. Government institutions be required to maintain a public register of all 29 records which have been released under the access Act.

Recommendation 10. Government institutions be required to release routinely all information which describes institutional organizations, activities, programs, meetings, and systems of information holdings and information which tells the public how to gain access to these information resources.

Recommendation 11. Government's duty to disseminate should also extend to all information which will assist members of the public in exercising their rights and obligations, as well as understanding those of government.

• *A Call for Openness*, report of the MPs' Committee on Access to Information, chaired by MP John Bryden, 2001:

3. We recommend that the *Access to Information Act* be amended to include a 'passage of time' provision requiring institutions to routinely release records under their control thirty years after their creation. This provision would over-ride all exemptions from release contained in the Act.

• Treasury Board Secretariat, *ATIA* Review Task Force report, 2002:

7-3. The Task Force recommends that the Co-ordination of Access to Information Request system (CAIR) be redesigned to make it more user-friendly, and that its component containing information on completed requests across government be made available to the public on a government Web site.

7-4. That government institutions be encouraged to post summaries of the information they have released which may be of interest to others, in addition to depositing a hard copy of the documents in their reading rooms.

8-3. That government institutions more systematically identify information that is of interest to the public and develop the means to disseminate it proactively. These means should include regular publication, and the use of Web sites, or special arrangements or partnerships with the private sector, where appropriate.

8-5. That government institutions: routinely release information, without recourse to the Act, whenever the material is low-risk, in terms of requiring protection from disclosure; and establish protocols for use in identifying information appropriate for informal disclosure.

• *Bill C-201*, introduced by NDP MP Pat Martin, 2004:

The enactment [...] (b) requires government records that are more than 30 years old to be automatically opened except where

specifically exempted for reasons of national security, public safety or international obligations.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005 (underlined parts are Mr. Reid's amendments to the existing Act):

3. The Act is amended by adding the following after section 2:

2.2 Every government institution shall maintain a public register containing a description of every record disclosed in response to a request made under this Act.

[Re: 68. This Act does not apply to (a) published material or material available for purchase by the public; etc.] **41. Paragraph 68(a) of the Act is replaced by the following**:

(a) published material or material available for purchase by the public <u>if such material is available at a reasonable price and in a format that is reasonably accessible</u>;

• British Columbia Freedom of Information and Privacy Association (FIPA), 2008:

We propose that the *ATI Act* be amended to mandate the proactive governmental internet publication – or at least the free release to anyone who asks for them outside of the *ATIA* process - of these record types listed in the British Columbia FOIPP Act, sec. 13(2):

> **13**(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> (b) a public opinion poll,
>
> (c) a statistical survey,
>
> (d) an appraisal,
>
> (e) an economic forecast,
>
> (f) an environmental impact statement or similar information,
>
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
>
> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for

making a decision or formulating a policy

• Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

The (CLD-AIE) RTI Rating does not cover proactive publication, even though this is a key element of a strong RTI regime. The underlying reason for this is that in many countries, actual practice on proactive publication has gone so far that the minimum requirements set out in the law are no longer really relevant. Trends towards e-government and open data have rendered this even more the case. Many Canadian jurisdictions exemplify this. . . .

Canada's provincial and territorial laws contain almost no requirements for proactive disclosure, but across every jurisdiction in Canada public authorities have policies and practices of putting information in the public domain on a proactive basis.

• Information Commissioner Suzanne Legault, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, March 2015:

Recommendation 6.1 - The Information Commissioner recommends that institutions be required to proactively publish information that is clearly of public interest.

Recommendation 6.2 - The Information Commissioner recommends requiring institutions to adopt publication schemes in line with the Directive on Open Government.

Recommendation 6.3 - The Information Commissioner recommends including within publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.

Recommendation 6.4 - The Information Commissioner recommends including within publication schemes a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

[Recommendations 27 to 30 replicate those of the Information Commissioner above.]

• Information Commissioner Suzanne Legault, *Failing to Strike the Right Balance for Transparency. Recommendations to improve Bill C-58*. September 2017:

Recommendation 7

Impose a timeline to proactively disclose mandate letters and revisions to mandate letters, consistent with the timelines currently under the *Act*.

Recommendation 8

Remove section 91 in order for the Information Commissioner to have jurisdiction over proactively disclosed materials.

Recommendation 10

Allow requesters to request under the *Access to Information Act* information that has been proactively disclosed by ministers' offices.

Recommendation 11

Subject ministers' offices proactive disclosure obligations to oversight from the Information Commissioner.

Recommendation 12

Subject all "government institutions", using the definition that is currently found in the *Act*, to consistent disclosure obligations.

Recommendation 13

Maintain requesters' right to request under the *Access to Information Act* information that has been proactively disclosed by government institutions.

Recommendation 14

Subject government institutions' proactive disclosure obligations to oversight from the Information Commissioner.

• Canadian Environmental Law Association (CELA) and Ecojustice, Joint submission to Senate review of Bill C-58, December 2018:

Recommendation 9: The Act should include a proactive disclosure requirement for environmental enforcement information.

CANADIAN PROVINCES

Nearly every provincial and territorial FOI statute lists a few types of records - mostly manuals and a directory of records - that must be published, and these prescriptions are almost as weak and limited as those of the *ATIA*'s Section 5 (at least when compared to other nations).

At first glance, it may seem the *ATIA* has moved ahead of the provinces in *Bill C-58* by prescribing the proactive release of mandate letters, briefing note numbers, hotel and travel expenses and contracts - features missing from provincial FOI laws. However these new *ATIA* "rights" are so heavily undermined by conditions described by the Information Commissioner above (to the point of their amounting to "regressions") that it hardly seems to matter.

***Epilogue* – Bait and switch:**

The dangerous diversion of faux transparency

Liberal Prime Minister Justin Trudeau announced with pride the proactive publication measures in *Bill C-58*. B.C.'s former premier Christy Clark, like him, was also a keen advocate of the new era of digital government, such as with the posting of datasets of information online, as well as the use of social media like Twitter and Facebook. Yet the unexamined consequences to our FOI laws must be understood.

The B.C. government created DataBC, a catalogue of 2,500 data sets, while (in the previous Conservative federal government) Treasury Board president Tony Clement hosted a so-called "Twitter town hall" to discuss using social media to make government more transparent. In all these

discussions there was no mention of FOI law reform.

Of this latter event, Vincent Gogolek, head of the B.C. Freedom of Information and Privacy Association (FIPA) told CBC: "Everyone thinks it's so cool that the minister tweets, and talks about 'crowdsourcing' and other techie buzz, but it's like the government's saying: 'Look at the shiny new gee-gaws that we have here, and ignore the smell coming from the access to information system.'" Similarly, information commissioner Suzanne Legault wrote to the Treasury Board in 2014, to reiterate the point made by others that "that open data is becoming privileged at the expense of other areas of open government...."

Over the decades we have faced many threats to the FOI system, but in a curious way this one may be one of the most harmful of all. The other problems (e.g., subsidiary companies, oral government) remain recognizable as problems. But this one is so damaging because it convincingly passes as a solution to the open government dilemma while actually, unnoticed, making it worse. Why? Because it can pacify or tranquillize the public with an illusion of transparency and empowerment, while its legal rights to obtain records through FOI laws are quietly regressing *at the same time*.

Yet a new deluge of self-selected and self-serving government internet filler is no substitute for urgently needed FOI law reform. So, ironically, it may be that the pro-transparency rhetoric of open data activists is being dexterously exploited by governments for anti-transparency ends, making their efforts even worse than useless. The defense that this outcome was not the digital activists' intent makes it no less dangerous. (There is a positive alternative: if they focused all their social media energies on mounting campaigns to gain needed FOI law reforms, this could indeed be a great public service.)

In most nations, as with this one, transparency advocates must wage hard uphill campaigns for at least two decades to have an FOI law passed - ever since B.C. NDP MP Barry Mather introduced the first draft FOI bill in Ottawa in 1965 - and then work over official obstructionism and in court battles to make it function – realities that most digital activists know or care nothing about. The mere fact that the state would so quickly and avidly embrace their "e-government" solutions should be indicator enough to any politically aware person that this digital route signifies almost no concession of real power.[327]

With FOI advocacy, the road of least resistance is almost never the best one. Techno-utopians and digital-toy enthusiasts are dazzled and dazed by new technologies, first mistaking quantity of information for quality, then form for content, and finally

[327] This point was most starkly illustrated in Newfoundland in 2012 when the government eviscerated its FOI law in Bill 29. Then, during the debate on that bill, government members boasted as proof that "we are committed to openness" that they were starting a program to digitize and post historical deeds, and more such gift boxes of info-candy. Likewise, Ottawa's online posted datasets are mostly (felicitously named) "document dumps," useful for commercial data-miners or app developers, and a delight for trivial pursuit players everywhere, including, for instance, a registry of all Canadian civil aircraft, as well as a history of federal ridings since Confederation.

the means for the ends. As one critic put it, "technology is now driving government policy, not visa versa." Contrarily, FOI advocates in their view may appear a little as outdated fogeys or Luddites.

One fatal delusion is that format alone somehow creates "value added" content. But common sense tells us that a cabinet report on a public disease risk that is 95 per cent blanked out due to a defective FOI law (such as with the gaping policy advice exemption), and then all those blank pages are instantly posted to Open Government websites, or all the blogs and twitter feeds in the world, does not make readers a bit more informed as they gaze at their whited-out screens; such is a case of "garbage in, garbage out."[328]

As well, the online data set and social media solution is not nearly so democratic as its boosters claim, for (as Kwantlen University criminology academic Mike Larsen said) one needs technical expertise to process and understand data sets, expertise that much of the public does not have. Environmental activist Gwen Barlee also noted the limitations of generic data sets, insofar as they tell you what decisions were made, but not how, or why.

Furthermore, how many homeless persons can afford iPhones and laptops? On this point, although enhanced democracy was the professed goal, one may see a growing class split between the techo-rich and the so-called "techno peasants" – all of which leads not to more socio-political equality, but less.[329] Moreover, as noted above, *Vancouver Sun* reporter Chad Skelton explained that most of the database stories produced at the *Sun* were based on data sets that the newspaper had to obtain by FOI requests and not by governments' routine release.

In sum, with such new-age "e-government," we drift ever further from reality into the cyberspace fantasyland of instant gratification where all things appear possible with no effort. Governmental social media and datasets would ideally be a useful supplement to - but not a substitute for - strong FOI laws, as a sugary dessert is advisable only after a full nutritious meal and not in place of it.

[328] Yet I concede to e-government advocates that not all new governmental online postings are entirely inconsequential; for example, in March 2015 the B.C. Legislature began posting MLA expense receipts. "We asked for this for six years and it finally happened," said the Canadian Taxpayers Federation.

[329] Ministers also announce they democratically seek "input" on issues through social media. But where is evidence that they will be at all influenced by that public input, any more so than to the power-brokering of backroom lobbyists?

Speaking Truth to Power

CHAPTER 12 - WHISTLEBLOWER PROTECTION AND FOI

Does the FOI law include whistleblower protection, or is there a good separate whistleblower protection law?

The subject of government transparency encompasses a much broader field than freedom of information statutes. Closed municipal meetings, access to court records, "libel chill," official secrets laws, and other topics – anything which potentially blocks the public's and media's right to know the truth - are all subjects within the mandate of transparency advocates. Yet you may still fairly inquire: Why raise whistleblower protection statutes in a book on FOI law?

For one reason, such protections can encourage the good functioning of the FOI system if access processing staff and record holders feel they can seek and release records per requests under the access law, without fear of retaliation from political leaders or their aggressive supporters.

Although there are whistleblower sections placed within many FOI laws themselves for this purpose, an additional stand-alone whistleblower statute may help psychologically bolster a staffer's confidence still further. It may also help encourage them to release politically sensitive records proactively in the letter and spirit of the FOI law's public interest override section.[330]

We shall try to stay focused, for how whistleblowing should function in general beyond FOI is a vast topic, beyond the scope of this report (and there is abundant literature on that subject already). Yet it is also helpful to first place FOI's relationship to whistleblowing into an overall context.

General context

A "whistleblower" can be an employee, former employee, or member of an organization, who reports misconduct to people or entities that have the power and presumed willingness to take corrective action. Generally the misconduct is a violation of law, a rule, a regulation and/or a direct threat to public interest, such as fraud, health or safety violations, and corruption.

Whistleblowing has a long and varied history, and one report summed up its main characteristics:

[330]Even with a strong FOI law, "It is often unclear whether disclosure of information on wrongdoing is warranted under the law, even if that law includes a public interest override, and individuals seeking to disclose information in the public interest cannot be expected to undertake a complex balancing of the different interests which might come into play. Providing them with [whistleblower] protection helps foster a flow of information to the public about various sorts of wrongdoing." - Toby Mendel, *Freedom of Information: A Comparative Legal Survey*. Revised and Updated. UNESCO: Paris, 2008

> Whistleblowers have been held up as conscientious heroes and scorned as traitors and malcontents. Thus, it is not surprising that whistle blower protection – whether it be in the form of common law doctrines, government policy, legislation or collective agreement provisions – will inevitably try to strike a balance. On the one hand, it will try to protect freedom of expression and disclosure in the public interest. On the other hand, it will try to protect the basic duty of loyalty owed by employees to their employers.[331]

The most common type of whistleblowers are *internal*, who report misconduct to another employee or superior within their company or public agency. In contrast, external whistleblowers report misconduct to outside persons or entities. (These are both distinct from *leakers*, who externally release information anonymously.) In such cases, depending on its severity and nature, they may report the misconduct to lawyers, the media, law enforcement or watchdog agencies. Some whistleblowers feel they have no option but to leak or resort to the external route when the internal one fails.

Speaking on Ottawa's first whistleblowers bill *(C-11)* in 2005, information commissioner John Reid reflected on the 22 years that his office had witnessed government wrongdoings and the attempts to conceal them:

> There are some lessons to be drawn from this experience. First, loyalty to superiors is more valued and rewarded than is loyalty to law or the public interest. Second, senior level response to instances of wrongdoing is too often designed to reinforce the value of loyalty by ensuring that superiors survive and subordinates suffer consequences. Third, in most cases of wrongdoing those responsible for addressing the matter are informed in a timely manner but do nothing until the matter becomes public.[332]

It is well known that the consequences for revealing information without authorization can be grievous indeed. These can include disciplinary actions, civil lawsuits, criminal charges, blacklisting, lost employment, demotion or suspension, damaged reputations, slander, social isolation, physical ailments, divorce, family breakup, and bankruptcy. (Or worse: during the Somalia-Airborne Regiment scandal that wracked the Canadian military in the 1990s, the government assigned bodyguards to a whistleblowing army physician.)

Despite all that they suffered, several surveys have found that most whistleblowers say they "would do it all again," even in the absence of a protection law. *With* such a law in place, however, still more potential whistleblowers, wavering on a making a choice, might feel empowered to speak out, and this would greatly enhance the public interest.

---

[331]Chris Rolfe and Rodney Wilts, *Whistleblower Protection: Strategies for B.C.* West Coast Environmental Law, Vancouver, 2002 http://www.wcel.org/wcelpub/2002/13961.pdf

[332]Information Commissioner of Canada, *Annual Report 2004-05*

In designing a whistleblower protection law, many important questions arise, such as: What should its scope be, that is, upon which subjects may one speak out? Should there be separate protections both within an FOI statute as well as a stand-alone whistleblower act? Should whistleblowers be entitled to a portion of the funds saved by the state as a result of their actions? What should the penalties be for those who improperly retaliate against employees? Should the law cover the private sector as well as the public? Several of these topics are discussed below.

Protections within the FOI law

One hallmark of our democracy is the separation of powers between politicians and civil service; hence there must be no political influence on the FOI request process, which should be solely the bureaucracy's responsibility.

The inclusion of whistleblower protection provisions within an FOI statute is a distinct topic. These provisions typically bar retaliation against FOI directors and staffers, as well as public servants who speak to information commissioners or other appellate bodies on FOI issues. These persons would not commonly be defined as "whistleblowers" *per se*, for they should be perceived as simply doing their jobs, that is, releasing information within the authorized legal channels. Yet, sadly, they can still suffer reprisals nonetheless.

It was seen as necessary to place these provisions within FOI statutes in Canada instead of in a more general whistleblower law, because enactment of a such a law was too slow in coming (i.e., all Canadian FOI laws were passed, starting in 1977, long before the national whistleblower law arrived in 2005), and the needs regarding the FOI subject may be somewhat specialized.

The calls for such protections were not unexpected, for FOI officials are often amongst the least trusted or respected officials in an agency; assuming the role can be seen as a dead-end, career stalling job, one entailing considerable stress and a high turnover rate. For an article in the *FIPA Bulletin* in 1999, I asked then deputy federal information commissioner Alan Leadbeater if Ottawa access officials faced political pressures, and he replied:

> Very much. When our office investigates complaints, we see the co-ordinator is trying to persuade senior officials to fulfill the *ATI* request. Those officials want to do other work, and the *ATI* users are very hard to please. So the co-ordinators are stuck in the middle, and if they become very activist and try to insist the *ATI* role gets well handled, sometimes they do suffer.
>
> Some come up against the glass ceiling of career, or simply get reorganized out of the department. I think most access coordinators want to move on after they've been there a couple of years because it is rather stressful. Some of them decide to save their sanity and careers by simply become apologists for the department, and some are almost flaks who will go to any lengths to defend the secrecy of the department. And then some are very, very brave employees who stand up and do whatever they think their

job is under the Act.[333]

When performing their tasks diligently and to-the-letter, FOI officials might be misperceived by some as being overzealous or officious, too keen to assist an antagonistic FOI applicant. In trying to extract records from some very recalcitrant bureaucrats, they may appear almost like semi-external FOI applicants themselves, and the process not unlike pulling teeth.

Then, politicians and their zealous aides, businesspeople or other bureaucrats may want to obstruct or punish the staffer for the embarrassing release of information by figuratively "shooting the messenger," *i.e.*, punishing the FOI official, and to discourage likeminded others. This tension can be onerous enough in large agencies or cities but far worse in smaller, remote or close-knit communities.

For officials, FOI requests for one's "private" memos can raise discomfort enough, yet far less welcome are those for topics such as travel and expense accounts, bonuses and personal benefits, for some such requests can be read as rude personal affronts. In fact, such requests for the expenses of Prime Minister Brian Mulroney (1984-1993) were one major reason he cooled towards the *ATIA*.[334] The FOI official who presses politely but firmly for the applicant's legal right to these records is rarely received with the warmest regard. But such is the nature of the state's accountability to taxpayers who must foot the bills.[335]

Canada's Access to *Information Act*, 1982:

Within this *Act*, there is protection for the commissioner and his/her staff from legal proceedings, but not for other employment-related retaliation.

> **Protection of Information Commissioner. 66**. (1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.
>
> **Libel or slander** (2) For the purposes of any law relating to libel or slander, *(a)* anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged [...]

There is no other employee protection in the *ATIA*, *per se*. The *Public Servants Disclosure Protection Act* was passed by Parliament in November 2005 and came into force in April

[333]*FOI Directors Caught in Crossfire*, by Stanley Tromp. Bulletin of the B.C. Freedom of Information and Privacy Association. Vancouver, November 1999

[334]Grace, John, Information Commissioner of Canada. *Annual Report*, 1993-94. Ottawa

[335]One major problem is that some officials in crown corporations have been appointed due to their business expertise in their private sector work, but unfortunately some cannot accept nor even understand that the same degree of confidentiality should not apply in the governmental sector, a situation that often leads to bitter conflict with the media and other external information seekers.

2007.[336] The Conservative government's *Federal Accountability Act* of 2006 amended the *ATIA* to prohibit the disclosure of certain information, through the mandatory sections below (ones with no time limits, harms tests or public interest override):

> ***ATIA*. 16.4** (1) The Public Sector Integrity Commissioner shall refuse to disclose any record requested under this [*Access to Information*] *Act* that contains information
>
> > (a) obtained or created by him or her or on his or her behalf in the course of an investigation into a disclosure made under the *Public Servants Disclosure Protection Act* or an investigation commenced under section 33 of that *Act*; or
> >
> > (b) received by a conciliator in the course of attempting to reach a settlement of a complaint filed under subsection 19.1(1) of that *Act*.
>
> **Exception** (2) Subsection (1) does not apply in respect of a record that contains information referred to in paragraph (1)(b) if the person who gave the information to the conciliator consents to the record being disclosed.
>
> **16.5.** The head of a government institution shall refuse to disclose any record requested under this Act that contains information created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act.

THE NEED FOR WHISTLEBLOWER PROTECTION IN FOI

• In 2003 Toronto city hall's fired FOI director Rita Reynolds filed a wrongful dismissal suit seeking $5 million in damages. "When somebody is fired, your career is ruined," she said, while expressing alarm at a "dramatic move in favour of secrecy and in-camera meetings" at city hall. During 12 years with the city, Rita Reynolds handled more than 14,000 FOI requests.

When she divulged that key documents used to select the successful bidder to renovate Union Station had been destroyed, she alleged she was berated for not protecting the interests of her superiors over her duties as the city's FOI director. She added that when she refused to go along with attempts by the same bureaucrats to mislead council and the public, she was castigated for not being "a team player."[337]

[336] *Public Servants Disclosure Protection Act* - https://laws-lois.justice.gc.ca/eng/acts/p-31.9/

[337] *Former privacy chief sues city over firing*, by Vanessa Lu. Toronto Star. July 18, 2003

• In 1999 an FOI official in Langley Township in British Columbia resigned because of what she called interference from administrators and stonewalling by municipal staff. Sheila Callen said that after a series of documents embarrassing to the administration were released, her superiors began to take a more active role in deciding what should be made public.

Ms. Callen added that "in many cases, I found it very difficult to get the records from staff in order to review them. . . . The time finally came where I could no longer continue in good conscience to be only a puppet just to collect a paycheque." The official who held the FOI post before Ms. Callen said she also faced difficulties in releasing municipal documents.[338]

"When I walked into city hall, people would look at me like I was the enemy," Cullen told the FIPA bulletin. After leaving, Callen said she had been negotiating with other municipalities but doubted she would be hired due to the bad press. "I wouldn't do it again – not because of the quitting part, which was easy, but because of the press. . . The township tried to discredit me in the Langley papers. The sad part is that it put my family through hell for a week. Because [the chief clerk and FOI head] is a lawyer we had totally different philosophies. I didn't take any sides. I just did my job and applied the *Act*." [339]

• It was *ATIA* requests by Globe and Mail reporter Daniel Le Blanc that helped expose the advertising sponsorship scandal and prompted the Gomery inquiry in 2006. But the access officials faced a dilemma, as he recalled:

"Unbeknownst to me, the request caused a commotion within Public Works. An official in the office of then-minister Alfonso Gagliano tried to block the release of the complete list of $144-million in sponsorship funding since 1996. Instead, a second list of sponsorship projects worth only $82-million was put together to send to me. Some of the projects deleted from the full list included contracts later proved fraudulent in court."[340]

---

[338] *Information official quits over Langley interference: Sheila Callen says that staff stonewalled her requests*, by Chad Skelton. The Vancouver Sun. July 20, 1999

[339] *FOI Directors Caught in Crossfire*, op.cit.

> Fortunately, the bureaucrat in charge of the *ATIA* branch at Public Works, Anita Lloyd, refused to sign off on the second list. "I thought it wasn't legal, and I thought it wasn't ethical," she told the Gomery inquiry about the attempt to give an incomplete list to the *Globe*. "With that stance, Ms. Lloyd allowed me and a colleague, Campbell Clark, to get a look at the entire program and eventually dig into specific projects," said Le Blanc.

That the campaign for such protections in Canada has long been an uphill battle is not surprising. Consider an article published in the *Army Doctrine and Training Bulletin* two decades ago. At a 1998 military ethics conference Gen. Maurice Baril, Chief of the Defense Staff, outlined his policy about no reprisals against those who come forward.

Yet Major Brett Boudreau, an army public-relations officer (last seen lambasting the *ATIA* earlier in this report), countered in an article entitled "Surviving in a Whistle Factory - That Leaks" that the leaks of information from "immoral" whistleblowers can focus public attention on relatively trivial matters and cause Defence staff to fritter away their time investigating and responding to such issues at the expense of much greater problems faced by the military. He also framed mildly errant human subjects of whistleblower complaints as the *real* victims.[341]

Public Servants Disclosure Protection Act, 2005

Human rights principles and humanitarian law mandates that whistleblowers should be protected against legal, administrative or employment-related sanctions if they act in "good faith." Yet in global terms, Canadian legislators have been very slow to respond by passing statutes. This was finally partially rectified in 2005 by passage of the *Public Servants Disclosure Protection Act* for the federal public service, a law which can hence also protect *ATIA* staffers.

The *PSDPA* created two new agencies: (1) the Office of the Public Sector Integrity Commissioner and (2) the Public Servants Disclosure Protection Tribunal. Only the Tribunal can provide whistleblowers with a remedy, but access to the Tribunal is controlled by the Integrity Commissioner (a barrier that has been much criticized).

Sections 16 to 18 concern our primary interest, in regards to information release:

> 16. (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those

[340] Daniel Le Blanc, *The secret caller who exposed Adscam*. Globe and Mail, October 21, 2006

[341] *The Military's View of Whistleblowers*, by David Pugliese, Ottawa Citizen, Oct. 17, 1999

sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that

> (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
>
> (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

(1.1) Subsection (1) does not apply in respect of information the disclosure of which is subject to any restriction created by or under any Act of Parliament, including the *Personal Information Protection and Electronic Documents Act*.

(2) Nothing in subsection (1) affects the rights of a public servant to make to the public in accordance with the law a disclosure that is not protected under this Act.

[....] 18.1. Nothing in this Act relating to the making of disclosures is to be construed as affecting any obligation of a public servant to disclose, report or otherwise give notice of any matter under any other Act of Parliament

Subsections above referring to any other Act of Parliament would of course include the *Access to Information Act*. Most deplorably, it appears that Section 16 (1.1) – "information the disclosure of which is subject to any restriction created by or under any Act of Parliament" – would bar a whistleblower from releasing records that would be sealed under the 1982 *ATIA*'s broad, antiquated exemptions, whether an *ATIA* request had been filed for such records or not. (This measure is made even worse by the fact the *ATIA* itself lacks a general public interest override.)

Section 16 (1.1) should be deleted, and the overarching public interest stand paramount, for whistleblowers' rights should generally override FOI law restrictions, not visa versa.

There is another minor point in the Public Servants Disclosure Protection Act, in Section 49 whereby the Public Sector Integrity Commissioner may not disclose information contrary to a range of restrictions such as solicitor-client privilege, personal privacy, any other Act of Parliament (which would include the *ATIA*), and more;[342] and yet there is an exception:

> 49.(2) The Commissioner may disclose any information referred to in subsection (1) if it has already been disclosed following a request under the *Access to Information Act*, or with the consent of the relevant individual or an authorized person in the organization that has a primary interest in the information.

The *Public Servants Disclosure Protection Act* was studied in depth by the House of Commons Government Operations and Estimates Committee. It released its 120 page report on June 17, 2017, which outlined

[342]Also see the note above on how this whistleblower law amends the *ATIA*'s Sections 16.4 and 16.5, to bar the Public Sector Integrity Commissioner from disclosing certain records. Incidentally, Chapter 10 of this book deals entirely with the *ATIA*'s relationship to others laws in regards to the *ATIA*'s Section 24.

a list of recommendations to protect federal public servants.[343] These included giving departments a duty to protect whistleblowers, and reversing the burden of proof from the whistleblower onto the employer in cases of reprisals.

Of the six provinces that have whistleblowing laws, only one (Ontario) provides a mechanism for whistleblowers who have suffered reprisals to seek a remedy, and the report advised this measure for the federal law.

Public Sector Integrity Commissioner Joe Friday expressed his approval to the CBC that most of his recommendations such as the reverse onus were adopted by the committee.[344] He added that another important change noted in the report is granting the integrity commissioner the ability to step outside the boundaries of government when it comes to investigations (for the *PSDPA* does not allow private sector participants to be either investigated or sanctioned).

David Hutton, a senior fellow with the Centre for Free Expression at Ryerson University, also praised the report to the CBC. He cited the Lac Megantic rail disaster, the Phoenix pay system fiasco and the Maple Leaf food recall as mishaps that could have unfolded differently if whistleblowers had felt secure they could come forward.[345]

Yet in the government's response to the report, Treasury Board president Scott Brison pledged only improved procedures - which some might say is better than nothing – and not the required reforms to the law. (This is a bit reminiscent of the Justice Minister's assurances in 2006 that the only reform really needed for the *ATIA* was some "improved training.")

> I agree with the opinion of the Committee and its witnesses that improvements are required to the disclosure and protection regime under the Public Servants Disclosure Protection Act. We will move forward to implement improvements to the administration and operation of the internal disclosure process and the protection from acts of reprisal against public servants, which will include greater guidance for the internal disclosure process, increased awareness activities and training for public servants, supervisors and managers, and enhanced reporting related to the internal disclosure process and acts of founded wrongdoing.[346]

The need for a whistleblower law that

[343]Government Operations and Estimates Committee Report of June 17, 2017. When Democracy Watch co-founder Duff Conacher appeared before the committee, his submission included a petition with more than 21,000 signatures calling for key changes to improve whistleblowing protection.

[344]*Report calls for revamping of whistleblower law*, by Julie Ireton. CBC News. June 19, 2017

[345]Hutton added on a Transparency International blog (May 27, 2016): " Having spent more than a decade actively working in this field, my observation is that Canadian whistleblowers are significantly worse off today than they were twenty years ago despite repeated promises by politicians to protect them, starting with Jean Chretien in 1993. The two agencies created by the Federal Accountability Act in 2007, supposedly to protect whistleblowers, have been in my observation almost completely ineffective. Even the new departmental codes of conduct required by the Act have in many cases been crafted to make it easier, not harder, to fire whistleblowers." https://web.archive.org/web/20150306013638 /http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdpa.pdf

meets the best global standards cannot be overstated, for Canada's public sector integrity commissioner Mario Dion said in 2013 he suspected "thousands" of wrongdoings are going unreported among the 375,000 federal workers covered by the whistleblower legislation he enforced – people all working for the largest employer in the country, one that spends over $1 billion each day.

Whistleblower and FOI laws – Incidental partners

The interplay between the FOI and whistleblowing processes - that is, the approved versus the unapproved release of information - can be intriguing. The two laws' relationship is complementary; if either an FOI law or a whistleblower statute is strongly effective, it might partially compensate for the weaknesses of the other. Rather like two colleagues who happen to share a common foe (baneful state secrecy), their mandates partially and fortuitously overlap.

If Canadian FOI laws were reformed to meet global standards and if they also worked well in practice, whistleblowing might still be necessary, but likely somewhat less so. *If* the same results could be achieved by FOI, how much better for all parties to have information released under that process rather than through the painful, conflict-ridden last resort of whistleblowing.

Yet a conscientious public servant might understandably perceive that Canada's 1982 *ATIA* (or its current application) is often failing to reveal problems of which the public has a need to know. This is especially true with the absence of a strong general public interest override in the *Act*. Even if vital information could be revealed under the Act, the government might never receive an *ATIA* request for it; and even if it did, records may have been improperly altered or deleted (which has occurred in well-known cases), in spite of Section 67.1 barring this.

As well, the *Act* only deals with records; now there is a pernicious trend, often decried by information commissioners, towards "oral government," whereby sensitive information is only relayed orally and not written down, to avert possible disclosure under the *ATIA*. (See Chapter 5) Moreover, even if disclosed, records can sometimes contain errors or omissions: there is a fallacy of placing too much reliance upon records, *per se*, to reveal the whole truth.

Finally, what if offenses such as bribes or assaults occurred but were never recorded - as they rarely would be - in any governmental medium? All the problems noted above can increase pressures on public servants, who might then see no other option but to verbally reveal the wrongdoings.

We might consider the intent of parliament expressed in the purpose clause of the *ATIA*:

> 2. (2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is

[346]Treasury Board president Scott Brison, *Government Response to the Ninth Report of the Standing Committee on Government Operations and Estimates*, 2017

normally available to the general public.[347]

Although parliament intended the *ATIA* to be the "last resort" some public servants may perceive whistleblowing as the genuine final resort. The reason is that disclosure of government records under the *ATIA* commonly takes months or years, and most or all of the records are often blacked out. So journalists, necessarily, often circumvent the Act and turn to sources within the public service to receive more complete and timely information about the inner workings of government. Leaking information to the media and whistleblowing are longstanding traditions while still, of course, not being means of access "normally available to the general public."

FOI release – the least rocky road?

One could ask Canadian senior bureaucrats to please consider this realistic scenario: a consultant to government has produced an internal report – perhaps on the state's failure to heed many clear warnings to avert a preventable health disaster or terrorist attack that occurred; or about a potential future harm, one that would be very costly to prevent.

Imagine that this report, politically very embarrassing, *will* be publicized through one of two routes: (1) by the sudden unauthorized release to the media by a whistleblower, or (2) via an FOI request filed by a journalist. Which of the two options would they prefer?

In the first option, one morning out of the blue, the topic pops up in a newspaper story, with the report posted as a link *in toto* on paper's website; it had been given to the media by a conscientious public servant, highly unauthorized, who has gone public, after perceiving that internal channels that were tried have failed. (This person is willing to confront harsh consequences after the fact yet still hopes the whistleblower law will somewhat curtail these.)

In the second option, via FOI request, officials exercise more control on the report's release mechanism and timing, with ample opportunity to prepare a pre-release public relations plan. If needed, they might apply a few small FOI statutory redactions to protect a truly legitimate public interest - *e.g.*, informants' identities, citizen's privacy - redactions which even some whistleblowers might accept as reasonable if they do not conceal the report's main points.

I expect if this dilemma had to be faced, most officials would prefer the latter FOI option, as the lesser of the two evils. With the latter, they retain some control; with the former, no control at all. In this choice of one pressure release valve or the other, if the semi-anarchic first event occurred, it might leave them belatedly wondering if the report's release could have been relatively less of a

[347]One example is the leaking of governmental information to Ottawa Citizen reporter Juliet O'Neill. In 2006 an Ontario Superior Court judgment Ontario court quashed as unconstitutional three sections of the so-called leakage provisions in Section 4 of the Security of Information Act, in throwing out RCMP warrants used to search the reporter's home and office. If the reporter had applied for the same information through the *ATIA*, it is virtually unthinkable it would have been released by this route, because of the *ATIA*'s broad exemptions. Technically this was a case of leaking and not whistleblowing, but same principle applies. This led, at trial, to important debates on the relationship of other statutes to the *ATIA*. (See Chapter 10)

political nightmare than it needed to be.

Julian Assange said one reason he felt compelled to create Wikileaks was because of the futility of Commonwealth FOI laws. If so, could excessively secretive states be absolutely blameless for their own Wikileaks misfortunes? Moral philosophers, and perhaps FOI law reform advocates, could debate whether his rationale for such direct action is even faintly justifiable (while the question still rages: Is this a hero or terrorist?). In one view, intractable FOI law reform obstructionists may indirectly be the fathers of whistleblowing, who simply reap what they sow.

In sum, in any event, it would surely be best for each nation to reform its FOI laws up to the best accepted global standards. Amongst its many other benefits, doing so might lessen much of the pressure that public servants may feel to whistleblow - or it might not - but is this solution not at least worth trying?

GLOBAL COMMENTARY

• *The Johannesburg Declaration of Principles*, adopted in 1995 by a meeting of experts in international law, national security, and human rights:

Principle 15: No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

• Article 19, *Model Freedom of Information Law*, 2001:

47. (1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

48. No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.

• African Union, *Declaration of Principles of Freedom of Expression in Africa*, 2002:

No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose

a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society.

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

(10.3) Individuals who disclose information pursuant to the access to information law should be protected against sanction and victimization, including for defamation.

• *Privacy International*, Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States, by David Banisar, 2007:

Those outside the government including the media and civil society organizations that receive or further publish information that is classified as state secrets, should not be subject to criminal or civil sanctions if there is a public interest in disclosing the information.

OTHER NATIONS

Whistleblower protection sections in FOI laws

Four freedom of information statutes refer specifically to some form of whistleblower protection within the FOI mechanism itself – those of Liberia, Nigeria, Uganda, and Vanuatu.

• The Liberian provision is fairly limited, and of this section, a CLD-AIE analyst wrote: "[Section 7.5 is] not specifically a whistleblower protection, but it works that way when read in conjunction with the public interest override. Only protects from civil and criminal liability though - not from other sanctions."[348]

> 7.5: Protection from civil and criminal liability: Any person who discloses information or grants access to information in good-faith reliance on the provision of this Act shall be protected from any and all civil and criminal liabilities, even if it is later determined that the information was in fact exempted. Similar protection shall be accorded all persons that receive information pursuant to this Act.

• A broader, more helpful protection is found in the FOI law of Vanutatu:

> 84. Good faith disclosures. A Right to Information Officer or any person assisting the Right to Information Officer is not liable to any civil or criminal action, or any administrative or employment related sanction or detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty under this Act.

In addition, I counted 15 freedom of information statutes with employee protection clauses covering wrongdoing far beyond the FOI process (or they are silent on whether the protection is confined to activities related to that statute). These provisions' interaction with the nation's stand-alone general whistleblower law, if any, would require more research.

[348]https://www.rti-rating.org/country-data/Liberia

• For instance, in Afghanistan's FOI law, Article 36, "An individual who discloses information in good faith, if proved so, shall have appropriate legal, administrative and job protection and shall receive necessary support in accordance with the laws."

• Nigeria's FOI statute is unique in the world insofar as its whistleblower provisions can explicitly override the nation's Official Secrets Act, a feature unimaginable in other Commonwealth nations (such as Australia or the United Kingdom):

> 28. (1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official of Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Bill, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Bill, if care is taken to give the required notice.
>
> (2) Nothing contained in the Criminal Code or the Official Secrets Act shall prejudicially affect any public officer who, without authorization discloses to any person, any information which he reasonably believes to show –
>
> (a) a violation of any law, rule or regulation;
>
> (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or
>
> (c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Bill.
>
> (3) No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.

• The in-depth whistleblower provision in Kenya's FOI law is so exemplary that it merits quotation in full. Unique amongst access statutes, it states that contravening this section shall be "actionable as a tort," and it applies to the private and even the voluntary sector – a very broad coverage that would be valuable for Canada and elsewhere too:

> 16. (1) A person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.
>
> (2) For purposes of subsection (1), a disclosure which is made to a law enforcement agency or to an appropriate public entity shall be deemed to be made in the public interest.
>
> (3) A person shall make a disclosure under subsection (1) or (2) where such person has reasonable belief in the veracity of the information.
>
> (4) Any person who provides false

information maliciously intended to injure another person commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(5) Disclosure of information under subsection (1) and (2) includes information on—

(a) violations of the law, including human rights violations;

(b) mismanagement of funds;

(c) conflict of interest;

(d) corruption;

(e) abuse of public office; and

(f) dangers of public health, safety and the environment.

(6) For the purpose of this section, a person is penalized if the person is dismissed, discriminated against, made the subject of reprisal or other form of adverse treatment or is denied any appointment, promotion or advantage that otherwise would have been provided or any other personnel action provided under the law relating to whistle blower, and the imposition of any such penalty in contravention of this section shall be actionable as a tort.

(7) Any term of any settlement arising from a claim under this section, insofar as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is accurate and which was or was proposed to be disclosed, shall be unenforceable.

(8) In any proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information, it shall be a defence to show that —

(a) in the circumstances, the disclosure was in the public interest; and

(b) where the offence is alleged to have been committed by a public officer or Government contractor and involves the disclosure of information obtained by the person in the person's position as such, the defendant had, before making the disclosure, complied with the provisions of subsection (3).

While general purpose, stand-alone whistleblower statutes are outside the scope of this chapter, it is just worth noting that at least 27 nations have such laws (which are all worth comparing to Canada's *Public Interest Disclosure Act*) - Albania, Armenia, Australia, Austria, Bangladesh, Brazil, Ghana, India, Ireland, Israel, Jamaica, Japan, Luxembourg, Mexico, Morocco, Mozambique, the Netherlands, New Zealand, Romania, South Africa, South Korea, Sweden, Switzerland, Uganda, Vietnam, the United Kingdom, and the United States (as well as many sub-national states).

Hutton said "Canada has the reputation internationally of being the Titanic of

whistleblower legislation,"[349] and that this nation is *decades* behind other jurisdictions such as the U.S., Britain and Australia.

CANADIAN COMMENTARY

• John Grace, former Information Commissioner of Canada, *Toward a Better Law: Ten Years and Counting*, 1994:

A new section, 73.1, be added as follows:

Sec. 73.1(1) It is the Access to Information Coordinator's duty to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially.

(2) The Access to Information Coordinator shall promptly report to the head or deputy head of the institution any instance which comes to his or her knowledge, involving interference with rights or failure to discharge obligations, set out in this Act.

(3) The Access to Information Coordinator shall take all reasonable precautions not to disclose the identity of an access requester, the reason for a request or the intended use of requested information except: (i) to the extent reasonably necessary for the proper processing of the access application; (ii) with the consent of the requester; or (iii) if disclosure is permitted by section 8 of the Privacy Act. [....]

Access to Information Coordinators may, at any time, seek the independent advice of the Information Commissioner concerning compliance with this section and no coordinator may be penalized in any way for so doing [....]

• Open Government Canada, *From Secrecy to Openness: How to Strengthen Canada's Access to Information System*, 2001:

Recommendation 46: The federal government should enact a whistleblower protection law that has the following characteristics: applies to public servants and political staff; creates an entity that has full investigative powers and adequate resources, and that reports only to Parliament; gives whistleblowers the right to complain anonymously to the entity about violations of laws, regulations, government policies or guidelines; protects whistleblowers who reveal their identity from retaliation of any kind if their complaint is proven true; and rewards whistleblowers whose claims are proven true with a portion of the financial penalty assessed against the violators of whichever law has been violated.

Recommendation 47: In accordance with the above recommended enactment of a whistleblower protection law, the federal government should change its guidelines for public servants to replace the principle of 'loyalty' with a duty "to obey the law."

• West Coast Environmental Law, *Whistleblower Protection: Strategies for BC*,

[349]Hutton added on a Transparency International blog (May 27, 2016): " Having spent more than a decade actively working in this field, my observation is that Canadian whistleblowers are significantly worse off today than they were twenty years ago despite repeated promises by politicians to protect them, starting with Jean Chretien in 1993. The two agencies created by the Federal Accountability Act in 2007, supposedly to protect whistleblowers, have been in my observation almost completely ineffective. Even the new departmental codes of conduct required by the Act have in many cases been crafted to make it easier, not harder, to fire whistleblowers." https://web.archive.org/web/20150306013638 /http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdpa.pdf

2002:

Any whistleblower protection legislation should include the following:

• Prohibitions on release of information that is publicly accessible: No civil servant should be disciplined for passing on information records that are accessible through Freedom of Information.

• Coverage should extend to all persons, not just government employees: Government provisions should apply to contractors where they are carrying out functions analogous to the civil service.

• A duty to disclose illegality: Switching disclosure from a personal initiative into a positive duty will encourage potential whistle blowers to come forward, and should help strengthen protection for whistle blowers.

• Realistic statute of limitations: Too often in other jurisdictions the statute of limitations has been 30 to 60 days. A more realistic limitation would be closer to a year.

• No limitations on the common law. Legislative protection should specifically add to and not detract from common law rights or protections.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005:

37.1 Notwithstanding any other Act of Parliament, a person does not commit an offence or other wrongdoing by disclosing, in good faith to the Information Commissioner, information or records relating to a complaint under this Act.

• Justice Gomery report, *Restoring Accountability*, 2006:

Parliament should be congratulated for passing Bill C-11 before its dissolution on November 28, 2005. [*Public Servants Disclosure Protection Act*] This bill marks the first time that federal legislation has included any protection for public service whistleblowers. While the passage of this type of protection is a positive step, the Commission has concerns about whether this new legislation will achieve what parliamentarians wanted. [....] The Commission takes the position that the new Act could be significantly improved if it were amended. It suggests that

• the definition of the class of persons authorized to make disclosures under the Act ("public servants") should be broadened to include anyone who is carrying out work on behalf of the Government;

• the list of "wrongdoings" that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;

• the list of actions that are forbidden "reprisals" should also be an open list;

• in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;

• there should be an explicit deadline for

all chief executives to establish internal procedures for managing disclosures; and

• the *Act*'s consequential amendments to the *Access to Information Act* and to the *Privacy Act* should be revoked as unjustified. The Commission agrees in general with the scheme for disclosure, which has employees disclosing the information to their supervisors or to designated persons in their public service "units." Disclosure to the Public Sector Integrity Commissioner or to the public is permitted only in exceptional (listed) circumstances.

• From the Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

In addition to effective sanctions, it is important to offer protections to anyone who wrongly discloses information in good faith, or who might otherwise risk incurring liability by complying with their responsibilities under the access law [....]

One of the chief overarching problems is that most [FOI] frameworks rely exclusively on internal systems, where employees are protected if they disclose improper behavior to the information commissioner (or some other accountability mechanism) but not if they go public with their concerns. This sort of system, which encourages public authorities to deal with problems internally, cannot address certain types of more widespread of sensitive wrongdoing, and better whistleblower regimes also recognize a need to protect external disclosures in certain situations.

• Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 32 - That as part of its review of the *Access to Information Act*, the Government conduct a study of the role that Access to Information Coordinators play within government institutions in order to ensure that they have the necessary independence and autonomy.

CANADIAN PROVINCES

There are five provincial access statutes with whistleblower protection sections – in British Columbia, Manitoba, Saskatchewan, Alberta and Prince Edward Island – but only with respect to FOI processes. These are still broader than Section 66.(1) of the *ATIA*.

Commendably, in Saskatchewan public employees cannot be penalized for performing their duties under Section 66(1) of the FOI law for "the giving or withholding in good faith of access to any record pursuant to this *Act*." This clause is highly advisable for the federal *ATIA*.

The lengthiest section is found in B.C.'s statute:

Whistle-blower protection. 30.3 An employer, whether or not a public body, must not dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee of the employer, or deny that employee a benefit, because

(a) the employee, acting in good faith

and on the basis of reasonable belief, has notified the minister responsible for this Act under section 30.2,

(b) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the commissioner that the employer or any other person has contravened or is about to contravene this Act,

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene this Act,

(d) the employee, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention of refusing to do anything that is in contravention of this Act, or

(e) the employer believes that an employee will do anything described in paragraph (a), (b), (c) or (d)

The FOI laws of Alberta and PEI provide that anyone who takes "any adverse employment action" against an employee who provides information to the information commissioner can be fined a maximum of $10,000. Many provinces have passed separate general whistleblower laws, most recently British Columbia's *Public Interest Disclosure Act* of 2018.[350]

There are also many such protections spread amongst other provincial statutes, such as Ontario's *Securities Act*, *B.C.'s Forest Practices Code*, and New Brunswick's *Employment Standards Act*.

The patchwork of Canadian federal whistleblower protection

Beyond Canada's *Public Interest Disclosure Act* and the *Access to Information Act* discussed above, there are whistleblower protection provisions in other federal statutes and regulations, all making for such a confusing patchwork that public servants who consider speaking out had best consult a lawyer first, for the most recent statutes and precedents.

• The rarely-used Section 425.1 of the Criminal Code states that employers may not threaten or take disciplinary action against, demote or terminate an employee in order to deter him or her from reporting information regarding an offence he or she believes has or is being committed by his or her employer to the relevant law enforcement authorities. Yet this section applies to employees who report to law enforcement officials only, and not to employees who report wrongdoing to other parties such as media sources or outside agencies or advocacy groups.

• There are also whistleblower protections found in:

- ***Canadian Environmental Protection Agency Act, Sec. 16.***
- ***Canada Labour Code, Sec. 147***

[350]B.C. Ombudsperson Jay Chalke has requested a larger staff to oversee the B.C. whistleblower law when it takes effect in December 2019, due to higher expected need. Canadian jurisdictions that already have such legislation have reported big increases in whistleblowers' claims. There has been a two-thirds increase in disclosure complaints in Alberta and sharp upticks elsewhere. The second factor is the general awareness of whistleblowing has dramatically increased over the past year, Chalke said. - Whistleblower law will require more resources, by Les Leyne. Victoria Times-Colonist, Oct. 30, 2019

- ***Canadian Human Rights Act, Sec. 59***
- ***Pest Control Products Act, Sec. 47***

• A number of other assurances are currently available to whistleblowers. These can include common law and statutory protection from being disciplined or fired without "just cause"; collective agreements that often include provisions allowing whistleblowing and protection from harassment, usually in narrow circumstances; and government policies to allow whistleblowing (such as the anonymous safety violation SECURITAS reporting system in the *Transportation Safety Board Regulations*).[351] Yet statutory law is the indispensable guarantee of protection.

• One might hope or expect that whistleblowers would be legally assisted by the freedom of expression provision in Section 2(b) of the *Canadian Charter of Rights and Freedoms*, but such a prospect seems very uncertain at this time.

In one case using a *Charter* analysis, the court held that the freedom of expression of a public servant was "restricted only to the extent necessary to achieve the objective of an impartial and effective public service."[352] However, the court relied primarily on pre-*Charter* common law in defining the balance between freedom of expression and duty to employers. As one legal analyst summarized it:

Thus, the *Charter* does not clearly expand the right of government employees to speak out. (The *Charter* applies to government only, and does not prohibit limits to freedoms that exist under contract or common law. Thus, any protection by the *Charter* to whistle blowers only applies to public servants). The *Charter* may have symbolic value, and would likely block any attempt to remove common law protection through legislation. In the appropriate case, it may be possible to expand the scope of *Charter* protection.[353]

CANADIAN WHISTLEBLOWERS AT RISK

Three well-known examples vividly illustrated the need for a strong whistleblower law, and the first one influenced the passage of the *Public Servants Disclosure Protection Act* in 2005:

• The federal privacy commissioner George Radwanski was forced to resign in 2003 over extravagant expenses; he and his former chief of staff were later charged with fraud and breach-of-trust.[354]

[351] Rolfe and Wilts, *op.cit.*

[352] *Haydon v. Canada*, Docket T-200-99 (F.C.T.D.)

[353] Rolfe and Wilts, *op.cit.*

[354] *RCMP charge ex-privacy czar with fraud, breach of trust*, by Kelly Patrick, with files from Kathryn May. The Ottawa Citizen. March 16, 2006

A Commons committee concluded Radwanski misled MPs about his expenses and altered a document. The Auditor General - who described the commissioner's stint as a "reign of terror" - later issued a scathing report on his financial practices, and called in the RCMP. The committee heard that Radwanski told a staff meeting that any whistleblowing "rat" in the office would find his or her career in the civil service was over. He denied making the comment and all wrongdoing.

In June 2003, about 50 employees signed their names to a letter that was hand-delivered to Radwanski at his desk, asking him to step aside until the storm of controversy over his conduct was settled. Then, in a hitherto unimaginable spectacle in Ottawa, they staged a street protest calling for whistleblowing laws to protect them. Many wore scarves across their mouths to symbolize being gagged without the protection of such legislation.[355]

• Allan S. Cutler is a former Canadian civil servant notable for his role in the advertising sponsorship scandal by acting as the whistleblower who detected some irregularities in the Canadian sponsorship program. Cutler both helped trigger the scandal revelations and lost his job.

He had been working for the Ministry of Public Works and Government Services, where he was responsible for negotiating the terms and prices of federal advertising contracts. At the 2005 Gomery Commission inquiry, Cutler claimed that commissions were paid to agencies for no apparent services, contracts that were approved by a senior official who was later imprisoned for fraud in the matter.

• In 2004 the *National Post* revealed a secret audit that detailed the misuse of millions of dollars by the RCMP of its own members' pension fund. The day the story was published, RCMP Commissioner Giuliano Zaccardelli announced the force would pay back the millions misused to the pension fund. An investigation by the Auditor-General found millions of dollars inappropriately charged to the pension and insurance plans. No one was subsequently charged.

A subsequent investigation conducted by a former head of the Ontario Securities Commission strongly criticized the management style of Commissioner Zaccardelli, and found that RCMP employees who had tried to address the pension fund issue suffered "career damage" for doing so. Interim RCMP Commissioner Beverley Busson promised that individuals who the upper ranks attempted to silence would be thanked and recognized.

---

[355] *Privacy workers to Radwanski: Resign: Scandal bringing 'ridicule' to department*, by Kathryn May. Kingston Whig - Standard. June 21, 2003

A Regrettable Necessity

CHAPTER 13 - PENALTIES

Are there penalties in the FOI law for officials destroying or falsifying records, improperly delaying replies, or for other non-compliance?

Although the topic of penalties may be the most dispiriting in a discourse on freedom of information issues, it needs to be faced forthrightly. It appears that many officials do not view this Act of Parliament with the respect it is due, and far too many FOI misdeeds carry no consequences, all of which can render the law ineffectual over time.

The amendment passed in 1999 to the *Access to Information Act* that would penalize those who destroy records was most commendable. Yet, as noted in the commentaries below, transparency laws need to extend well beyond that problem, to also discourage response delays and other means of obstructing the FOI process. The current penalties for obstructing Canada's information commissioner are also too unsubstantial.

In a reformed *ATIA*, deterrence measures must be drafted with sensitivity and caution, for the issues are not black-and-white but require consideration on a graduated scale. There would hopefully be, as well, a careful interpretation of each circumstance; for example, in sentencing, a judicial authority might consider whether an official illegally shredded documents from a genuine belief he or she was serving the public interest (*e.g.*, protecting national security) or merely serving oneself (*e.g.*, destroying evidence of financial misdeeds).

Should it matter, too, if wrongdoing was accidental or deliberate, assuming this can even be established? Should unawareness of the law be a mitigating factor? But if so, how much misconduct could be committed by those pleading ignorance? Should one official or the agency be held responsible for wrongdoing, and who should pay the fine (e.g., only the taxpayers, for the agency's penalty)? These are very difficult questions, upon which my views have evolved much over the past two decades.

As many longtime FOI applicants know, the response of several government agencies to FOI requests are determined not by their legal or ethical obligations, but instead cynical calculations of what one "can get away with," logistically, financially and politically.

Several officials have breached the letter or spirit of the *ATI Act* without remorse, while a very few (who frankly abhor FOI statutes) indeed are even proud of having done so, and may consider it incomprehensible or unjust to be penalized for acting according to their own private vision of "the public interest."

For example, the most powerful bureaucrat involved (and later imprisoned) in the 2005 Quebec sponsorship scandal testified that he

stopped creating records so as to avert their disclosure under the *ATIA*; this nation was at war for its political unity and survival, this former army officer claimed, and "you don't give away your battle plan to the enemy."[356] For some such officials, education or persuasion seem futile, and what else but external constraints could have any effect on their conduct, or act as a deterrent to others?

It has been repeated throughout this report that, beyond statutory changes, a strong message to promote a culture of transparency must come from the top. This is an essential start but can only go so far. Although prison terms for some FOI offenses are prescribed in several nations, this might at times seem too severe. Yet some means of deterrence is indispensable, beyond ineffectual means such as verbal reprimands, or letters of rebuke placed on one's personnel file, or even news media exposure.

Toby Mendel of the CLD does not believe that criminal penalties are effective in deterring mischief:

> Rather, it is hard to treat the common mischief that occurs as a criminal matter (or doing so seems over the top) and, furthermore, it is very hard to secure criminal convictions. I would suggest considering the India approach, which has administrative fines applied by the Commission, or something along those lines. Such sanctions are much easier and realistic to apply than criminal rules, and more appropriately tailored to the gravity of the matter.
>
> But leaving their application to internal disciplinary measures doesn't work, because the public bodies which apply those measures don't really support openness in the first place. So putting this in the hands of the Commission is a good solution (apart from some potential delicacy around the power of such a body to impose fines and the due process it would need to respect in doing so).[357]

Others may plead that justice should be tempered with mercy and warn that a prison term can effectively ruin an official's life. But to forgive everything afterwards means to permit everything in advance. Those who deliberately choose to violate any Act of Parliament must accept some consequences, and others contemplating the same actions need to be discouraged.

• Canada's *Access to Information Act*, 1982. Amendment in 1999:

> 67. (1) No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.
>
> (2) Every person who contravenes this section is guilty of an offence and liable

[356]Such occasions would be an ideal time to recall the words of Information Commissioner John Grace from Chapter 5: "The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions." - Information Commissioner of Canada, *Annual Report 1996-97*

[357]Correspondence with author, Nov. 25, 2019

on summary conviction to a fine not exceeding one thousand dollars.

67.1 (1) No person shall, with intent to deny a right of access under this Act, (a) destroy, mutilate or alter a record; (b) falsify a record or make a false record; (c) conceal a record; or (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

(2) Every person who contravenes subsection (1) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both.

Beyond the Access Act, on a related subject, there are also penalties for those mistreating employees who released government information without the state's approval, in Canada's federal whistleblower protection statute:

• *The Public Servants Disclosure Protection Act*, 2005:

42.3. Every person who knowingly contravenes section 19 [i.e., on reprisals against whistleblowing public servants] or contravenes any of sections 40 to 42 [i.e., on lying to or obstructing the Public Sector Integrity Commissioner, destroying records] commits an offence and is guilty of

(a) an indictable offence and liable to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both that fine and that imprisonment; or

(b) an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both that fine and that imprisonment.

GLOBAL COMMENTARY

• Article 19, *Model Freedom of Information Law*, 2001:

49. (1) It is a criminal offence to wilfully: – (a) obstruct access to any record contrary to Part II of this Act; (b) obstruct the performance by a public body of a duty under Part III of this Act; (c) interfere with the work of the Commissioner; or (d) destroy records without lawful authority.

(2) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.

• The Carter Center, *Access to Information, a Key to Democracy*, 2002:

Key Principles - Are there firm timetables laid down for providing information and strong penalties for failure to meet them?

• Commonwealth Secretariat, *Model Freedom of Information Bill*, 2002:

44 (2) A person who wilfully destroys or damages a record or document required to be maintained and preserved under [sec.44] subsection (1), commits an offence and is

liable on summary conviction to a fine of [……..] and imprisonment for [……].

(3) A person who knowingly destroys or damages a record or document which is required to be maintained and preserved under subsection (1) while a request for access to the record or document is pending commits an offence and is liable on summary conviction to a fine of [……..] and imprisonment for [….]

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003:

The law should impose penalties and sanctions on those who wilfully obstruct access to information. Penalties for unreasonably delaying or withholding information are crucial if an access law is to have any real meaning.

• Commentary by Article 19 on draft Paraguayan FOI bill, 2004:

Article 19 is of the view that, absent a deliberate intent to obstruct access to information, individuals should not be singled out for fines and other penalties, as this can lead to scapegoating within an institution. Rather, the relevant public authority should bear responsibility as an entity.[358]

Article 19 supports criminal penalties for those who obstruct access, but only where such penalties respect the basic criminal rule requiring mental, as well as physical responsibility (mens reas). We therefore recommend that this article be amended to provide for liability only where the obstruction was willful or otherwise done with the intention of obstructing access.[359]

• World Bank, *Legislation on freedom of information, trends and standards*, 2004:

Other key measures include … sanctions for obstruction of access.

• Transparency International, *Tips for the Design of Access to Information Laws*, 2006:

Sanctions for secretive institutions: Sanctions should penalize the institutions that have failed to respond to requests for information, along with the heads of these agencies, to avoid the possibility of individual, lower rank civil servants being penalized – the burden of responsibility should rest with those with the power to make change.

• Organization for Security and Co-operation in Europe (OSCE), Access to information recommendations, 2007:

There should be sanctions available in cases where it is shown that an official or body is deliberately withholding information in violation of the law.

From the Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

[358] *Memorandum on the Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002*. By ARTICLE 19, London, 2004

[359] *Memorandum on the draft Paraguayan Free Access to Public Information Law*. By ARTICLE 19, London, 2004. Nepal's draft FOI bill also made generous allowances for "good intentions."

The need for strong sanctions for the breach of the right to information is a key component of a strong legislative framework. [....] What is important here is not necessarily the severity of the sanctions, which need only be severe enough to deter noncompliance, but rather the scope of the sanction, which should cover any breach of the right to information.

OTHER NATIONS

I have reserved the penalties topic for near the report's end, because it could be the one FOI subject for which it might be the least necessary for Canada to follow the rest of the world closely. Corrective justice is culturally and political determined in each nation, and styles of judicial interpretation can vary dramatically amongst domestic legal systems.[360]

Several of the penalties in the FOI legislation of other nations may appear extreme or even unsettling to Canadian public servants. I would never suggest that Canadian law should replicate every measure of what appears below, but it is still worthwhile to be aware of the legal reality in the rest of the world.

Other nations (at least in their statutes' texts) take the right to know far more seriously than Canada does. In newer democracies, such as those in Eastern Europe, strict penalties for FOI violations are a clear measure of how seriously their public and legislators value this democratic right. Such penalties are likely set there not so much from punitive intent as from a wish to never again fall backward into the times when oppressive and arbitrary secrecy prevailed.

Out of 128 jurisdictions with freedom of information laws, about half contain some kind of penalties for obstructing the FOI process, such as these:[361]

Forms of penalties:

• The law imposes *fines* for generally obstructing the FOI process.

In the FOI statutes of 57 nations (23 of these Commonwealth)

• The law imposes *prison terms* for generally obstructing the FOI process.

In the FOI statutes of 31 nations (18 of these Commonwealth)

Breakdown of the "obstructionism" concept into six rough categories (some nations appear in more than one category):

• The law imposes penalties for *delaying* replies to FOI requests.

In the FOI statutes of 26 nations (11 of these Commonwealth)

• The law imposes penalties for unauthorized

[360]When comparing penalties for FOI obstructionism, one might consider that a year in a Ugandan jail would be a very different experience than the same period in a Canadian prison. As well, when the level of a certain national fine (after currency conversion) may appear to some readers as far too small to serve as a deterrent, one must consider the relative earnings of other nations, *e.g.*, that the per capita income of the average Romanian citizen is six times less than that of an average Canadian.

[361]Only penalties that are explicitly noted in the statute are counted here, and if the law appears mute on a point, I do not speculate what was meant. Some terms are vague even in original English, and translations only compound the ambiguities.

record *destruction*.

> In the FOI statutes of 40 nations (21 of these Commonwealth)

• The law imposes penalties for *altering* records sought by FOI applicants.

> In the FOI statutes of 25 nations (16 of these Commonwealth)

• The law imposes penalties for *concealing* records sought by FOI applicants.

> In the FOI statutes of 29 nations (15 of these Commonwealth)

• The law imposes penalties for *interference* or non-cooperation with an Information Commissioner or equivalent (e.g., Ombudsman).

> In the FOI statutes of 16 nations (10 of these Commonwealth)

Scope of coverage

When considering the advisability of an FOI law, I have borne in mind the key point made by the CLD that the *breadth* of subjects for sanctions is more important than the penalties' *severity*, *per se*. In this regard, Afghanistan's FOI statute (RTI-rated #1 in the world) is quite well rounded:

> Article 35. (1) The followings are recognized as violation of this law:
>
> 1- Providing such information to the applicant that does not conform to the contents of information request form.
>
> 2- Refusal of information to the applicant without justified reasons.
>
> 3- Providing such information to the Commission that is contrary to reality.
>
> 4- Destroying documents without lawful authority.
>
> 5- Not providing requested information within the allocated timeframe.
>
> 6- Not observing decisions and procedures of the Commission.
>
> 7- Lack of reporting by the Public Information Officer to the Commission within the specified timeframe.

• Commendably, the FOI Code of the Philippines in Rule 11 extends culpability beyond government:

> Private individuals who participate in conspiracy as co-principals, accomplices or accessories, with officials or employees, in violation of the Code, shall be subject to the same penal liabilities as the officials or employees and shall be tried jointly with them.

• In Macedonia, officials can be fined 20,000 to 50,000 denars [$475 to $1,200 Can.] for "having failed to provide requesters with assistance in requesting information."

Delays

This is a vital (but often neglected) topic, because penalties for delaying access responses are missing in all Canadian FOI laws, especially in the federal *ATI Act*, where responses can be extended for an unspecified "reasonable period of time" – a widely-abused free rein that most nations would never accept. Yet in the FOI statutes of 26

nations (11 of these Commonwealth), the law imposes penalties for delaying replies to requests.

• The superb FOI law of India includes fines for delays. In Article 20(1), if the Information Commission decides that an FOI officer "has not furnished information within the time specified," it shall impose a penalty of 250 rupees [$4.65 Can.] for each day until the information is furnished, up to a maximum of 25,000 rupees [$465 Can.]. The law also penalizes those have knowingly given incorrect, incomplete or misleading information, or destroyed it, or "obstructed in any manner in furnishing the information."

• Kenya's FOI statute, in Article 23(3)(c), also contains a penalty for delay (amongst other notable features):

> Article 28(3) An information access officer who –
>
> (a) refuses to assist a requester who is unable to write to reduce the oral request to writing in the prescribed form and provide a copy to the applicant in accordance with section 8(2);
>
> (b) refuses to accept a request for information;
>
> (c) fails to respond to a request for information within the prescribed time; or
>
> (d) fails to comply with the duty to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by a requester with disability in accordance with section 11(3),
>
> commits an offence and is liable, on conviction, to a fine not exceeding fifty thousand shillings [$645 Can.], or to imprisonment for a term not exceeding three months, or both.

In the Kenyan statute, persons can also be fined for charging a fee exceeding the actual costs of making copies, and providing information that is "out of date, inaccurate or incomplete." Private bodies in serious breach of the FOI law will barred from any future contracts with government under procurement laws.

• The FOI law of Sierra Leone contains the strongest penalty for delay of any Commonwealth nation. Here anyone who, without reasonable cause, fails to supply information within the period specified in the Act is liable to a fine of 10 million Leones [$1,370 Can.] and/or six months imprisonment - or 100 million Leones for a corporate body [$13,700 Can.].

• The FOI law of Bangladesh, in Section 27(1)(b), imposes fines on a daily basis for delays, amongst other commendable features:

> 27. Fines, etc.— (1) With reference to the disposal of any complaint or otherwise, if the Information Commission has reasons to believe that an officer-in-charge—
>
> (a) has refused to receive any request for information or an appeal without assigning any reasons;
>
> (b) has failed to provide information to the applicant or to make decision within the time-limit determined by the Act;
>
> (c) has refused to receive a request or an

> appeal with mala fide intention;
>
> (d) has provided wrong, incomplete, confusing and distorted information in place of the information that was sought for;
>
> (e) has created impediments in receiving information;
>
> then, the Information Commission may impose fine for per day 50 taka [75 cents Can.] from the date of doing such action by the officer-in-charge to the date of providing information, and such fine shall not, in any way, exceed more than 5,000 taka [$75 Can.].

Other rare, notable features

• In Mexico's admirable FOI statute, officials can be penalized for "fraudulently classifying information that does not fulfill the characteristics indicated by this Law." (Article 63) The FOI law of Ukraine also imposes penalties for "ungrounded categorization of information as restricted access [classified] data." (Article 47) Such a principle would be welcome in Canada's *ATIA*, e.g., for officials who misclassify cabinet records to exclude them from the *Act*'s scope.

• Several laws state that FOI applicants can be compensated for losses (so far as this can be calculated) due to faulty service, such as in Nepal, Russia and Serbia. In Russia's Article 23 (2):

> If as a result of wrongful refusal in access to information on activities of government bodies and bodies of local self-government, or its untimely granting, or granting of intentionally misleading information or information not corresponding to the content of the request, the information user was caused damages, such damages are subject to compensation according to the civil legislation of the Russian Federation.

• In some nations, salary loss is prescribed for FOI violations - a far more effective measure than just fining a public agency, where the fine is essentially paid by taxpayers. For example, in Ecuador's law, Article 23, "public employees who unlawfully withhold, alter or falsify information can be fined one month's salary or be suspended without salary for that period."

• Several nations go further yet. In the FOI law of Liberia, Section 7.2, a public servant who wrongfully denies an applicant access to information shall receive a fine of between L.$5,000 and L.$10,000 [$30 to $60 Can.] plus a formal reprimand for the first offense. Then, "the person shall be suspended for two months without pay for the second offense, and immediate dismissal for the third time of violation."

• In Romania's FOI statute, Article 21, "the explicit or silent refusal" of an employee to obey that law can prompt an administrative investigation. If the complaint is found well-founded, the applicant will receive an answer within 15 days of the complaint; "the answer shall contain the public information previously requested and the mentioning of the disciplinary sanctions imposed to the person found guilty." (In Canadian FOI laws, all disciplinary records are strictly withheld as "personal" information.)

CANADIAN COMMENTARY

• *Bill C-225*, the *Right to Information Act*, introduced by MP Ged Baldwin, 1974:

10. (1) Every person who violates or fails to comply with any provision of this Act or any order made by a judge pursuant to this Act is guilty of an indictable offence and is liable on conviction to imprisonment for any term not exceeding five years. (Explanatory note: No fine is provided for, as the government would simply pay a fine out of public monies.)

• Open Government Canada, *From Secrecy to Openness*, 2001:

Recommendation 45: The federal government should amend all laws that concern government information management to include an anti-avoidance measure that makes it a violation to fail to uphold the spirit and intent of each law.

• *Bill C-201*, introduced by NDP MP Pat Martin, 2004:

67.2 (1) A person who wilfully obstructs any person's right of access under this Act to any record under the control of a government institution is guilty of an offence.

(2) No person who destroys information in accordance with the Library and Archives of Canada Act commits an offence under subsection (1).

(3) Every person who contravenes subsection (1) is guilty of an offence and liable (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand dollars, or to both; and (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding five thousand dollars, or to both.

• Government of Canada discussion paper, *Strengthening the Access to Information Act*, 2006:

Obviously, there must be a distinction between poor record keeping and intentional, bad (or even criminal) behaviour. Penalties for public servants who fail to create a record could range from disciplinary measures through an administrative monetary penalty to a criminal offence. Whatever sanction is applied, it must be commensurate to the misbehaviour.

It may be appropriate to make it a criminal offence to fail to create a record if that is done for the purpose of preventing anyone from finding out about a particular decision or action (whether that decision or action was itself improper or not), or to prevent anyone from obtaining access to a record of the decision or action through the *Access to Information Act*.

Such a sanction would be in line with the current sanction provision in section 67.1 of the *ATIA* concerning the destruction, altering or concealing of a record for the purpose of denying access. On the other hand, good information management practices must be learned, including rules or standards about when records should be created....

• Justice Gomery report, Restoring Accountability, 2006:

Recommendation 16: The Government should adopt legislation requiring public servants to

document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.

• Democracy Watch, *Submission to Senate review of Bill* C-58, 2018:

Recommendation 5. Severe penalties should be created for not creating records, for not maintaining records properly, and for unjustifiable delays in responses to requests;

Recommendation 6. The Information Commissioner should be given explicit powers under access to information: to order the release of a record (as in the United Kingdom, Ontario, B.C. and Quebec); to penalize violators of the law with high fines, jail terms, loss of any severance payment, and partial clawback of any pension payments, and; to require systemic changes in government departments to improve compliance (as in the United Kingdom)

• Brief presented to the Senate by the Fédération professionnelle des journalistes du Québec (FPJQ) concerning *Bill C-58*, 2019:

Recommendation: That the clauses concerning the Information Commissioner's powers be revised to create genuine powers to oversee and sanction an offending government body or office that follows neither the letter nor the spirit of the Act's provisions.

CANADIAN PROVINCES

As noted by the Centre for Law and Democracy: "Every jurisdiction in Canada contains some sanctions for violating provisions of their access law, but few define the offence sufficiently broadly."[362] Amongst the provinces, Quebec's statute has the widest definition of wrongdoing, followed by a generous escape clause for "good faith":

> 158. Every person who knowingly denies or impedes access to a document or information to which access is not to be denied under this Act is guilty of an offence and is liable to a fine of $100 to $500 and, in the case of a second or subsequent conviction, to a fine of $250 to $1,000.
>
> [...] 162. Every person who contravenes this Act, the regulations of the government, or an order of the Commission, is guilty of an offence and is liable to the fine prescribed in section 158.
>
> 163. An error or omission made in good faith does not constitute an offence within the meaning of this Act.

Yet the fines set are picayune. (Is it possible that bad publicity could aid as a deterrent?)

• The law imposes penalties - i.e., fines and/or prison terms - for unauthorized record *destruction* in nine provinces and territories: Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Ontario, Manitoba, Saskatchewan, Alberta and the Yukon.

[362]Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

• The law imposes penalties for *altering* records sought by FOI applicants in nine provinces and territories – Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, Ontario, and Alberta.

• The law imposes penalties for *concealing* records sought by FOI applicants in five provinces and territories – New Brunswick, Prince Edward Island, Newfoundland, Ontario, and Alberta.

• The law imposes penalties for interference or non-cooperation with an Information Commissioner or equivalent (e.g., Ombudsman) in 11 provinces and territories – New Brunswick, Prince Edward Island, Newfoundland, Ontario, Quebec, Manitoba, Saskatchewan, Alberta, British Columbia, the Yukon, Northwest Territories and Nunavut.

Penalties

Nova Scotia: For record alteration - $2,000 fine and/or six months imprisonment

New Brunswick: For record destruction or alteration or concealment, or obstructing the Information Commissioner - an offence punishable under Part II of the Provincial Offences Procedure Act as a category F offence.

Newfoundland and Labrador: For record destruction or alteration or concealment, or obstructing the Information Commissioner - $10,000 fine and/or six months imprisonment

Prince Edward Island: For record destruction or alteration or concealment, or obstructing the Information Commissioner - $10,000 fine

Quebec: For impeding access to records sought under the FOI law – on second conviction, $250 to $1,000 fine

Ontario: For record destruction or alteration or concealment, or obstructing the Information Commissioner - $5,000 fine

Manitoba: For record destruction, or obstructing the Information Commissioner - $50,000 fine

Saskatchewan: For record destruction, or obstructing the Information Commissioner - $50,000 fine and/or one year imprisonment

Alberta: For record destruction or alteration or concealment, or obstructing the Information Commissioner - $10,000 fine

British Columbia: For obstructing the Information Commissioner - $5,000 fine

Yukon Territory: For record destruction or obstructing the Information Commissioner - $5,000 fine

Northwest Territories: For obstructing the Information Commissioner - $5,000 fine

• By contrast, the federal *ATI Act*'s current $1,000 penalty for obstructing the Information Commissioner is far too anemic. The *ATIA*'s maximum penalty for record destruction and alteration, however, is fairly strong, at $10,000 and/or two years imprisonment.

• There is an exemplary feature in New Brunswick in regards to a neglected topic, whereby penalties for FOI non-compliance also apply to employees of a non-public body who are working in an agreement with government.

• There are time limits in only two provinces – Ontario and Manitoba – whereby a prosecution for an FOI-related offense cannot commence more than two years after the offence was discovered.

• There is a unique feature in the Yukon's FOI law whereby, in Section 67.(1), a person must not "(a.1) destroy or make a record with the intention to mislead any person to believe (i) that something was done, when it was not done, or (ii) that something was not done when it was done."

• Most provincial FOI laws also have penalties for improperly disclosing or otherwise misusing personal information.

• As with the *ATIA*, there remain a few odd provincial gaps that require filling – for instance, there is no penalty for record destruction in the FOI statutes of Nova Scotia, Quebec and British Columbia (ironically, since B.C. has long boasted of having "the best FOI law in the country," at least until Newfoundland's new statute of 2015, which truly merits that title). There are also no provinces with penalties for improperly *delaying* FOI responses, as many nations have.

Creative Avoidance

Some of the artful FOI practices below suggest why strong enforcement and penalties are regrettably required, as a deterrent, because most of these can be performed in Canada today with *no consequences*. Some other nations' FOI laws have penalties for "obstructing" requests generally, but it may be arguable which of these devices below would legally fit that definition; hence perhaps some (such as post-it sticky notes or switching the records' titles) had best be explicitly described and prohibited in the statute.

Besides recalling my own journalistic FOI experiences over 25 years, such cat-and-mouse games have been widely reported from various nations, and from sources such as information commissioners' reports, public inquiry testimony, court rulings, books and news articles. These can include, amongst others:

• Changing the title of a record sought by an FOI applicant, sometimes after a request for it is received, then wrongly telling the applicant "we have no records responsive to your request." The law should make it make it absolutely clear it is only the subject matter that counts, not the record's title per se. (Thankfully some FOI laws prohibit the destruction of a record after a request for it has been received, even if the record had already been scheduled for destruction.)

• Post-it sticky notes. Such notes affixed to documents can contain the most important information on a topic. Yet when an FOI request comes in, some officials have removed the sticky notes, photocopied the denuded original, mailed that copy to the applicant, and then later reattached the notes to the originals – all in the false assumption that the sticky notes are not covered by FOI

[363]In the British Columbia FOI regulations, any marginal note made upon a document transforms that record into "a new record," and a separate photocopy is made of it for FOI applicants: "Marginal notes and comments or 'post-it' notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record." Ideally, such regulations would be placed in FOI law everywhere.

laws, or knowing they are nonetheless.[363] (The B.C. privacy commissioner noted in a 2015 report that the FOI coordinator in the premier's office used disposable post-it notes to avoid generating records.) Officials can also write penciled notes that can be easily erased.

• Many officials, often at the most senior level, now do the public's business on private, non-governmental email addresses, to bypass an official message trail that can be accessed through FOI requests. This problem has been reported around the world, and despite information commissioners' pleas to stop it, this stratagem is so alluring that it stubbornly persists.

• In its report on *Bill C-58*, the Senate recommended an amendment to Section 67.1(1)(b.1) to defeat a newly emerging device of *ATIA* request avoidance: "New offence to prohibit, with the intent to deny the right of access, the use of any code, moniker or contrived word or phrase in a record in place of the name of any person, corporation, entity, third party or organization." (The House of Commons rejected this fine amendment.)

• Incorrectly claiming that records are in too "fragile and poor condition" to be accessed, or that documents are not available in a readable format

• Storing records offsite - or at a site owned by a private company partnering with government - and so claiming they are not in the state's "custody" and cannot be accessed. (See Quebec's FOI solution.[364])

• Providing only a positive summary of the records instead of the original records sought, offering other information as a compromise, or burying the applicant with positive but not really relevant records

• Mingling exempt and non-exempt records together, then claiming an exemption for them all; for example, incorrectly placing records into files of cabinet or international relations documents

• Misidentifying records, a major problem with FOI requests for cabinet records. (Note the definitional disputes over "memorandum to cabinet" vs. "background papers")

• Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

• Delaying responses until after the applicant's deadline to appeal to the commissioner has run out. With the *ATIA*, this is easier to accomplish ever since the applicant's appeal deadline had been shortened from one year to 60 days

• Mislabeling records as "preliminary" or "investigatory," and so forth; or arguing that the records need not be released under the *ATIA* because they will be published within 90 days, a limit that government can extend indefinitely – and then not publishing them

[364]Quebec's FOI law states on this issue: "1.1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party." Other provincial FOI laws provide that records in the "custody" or "control" of public bodies are subject to the statute.

• Overstating claims that searching for records would "unreasonably interfere with the operations of the government institution" - per *ATIA* Section 9.(1) – which permits the agency to delay responding for an unspecified and unlimited "reasonable period of time" (potentially years)

• Interpreting the wording of an applicant's request too narrowly, or even altering it and then replying to the agency's re-worded version; delaying the release for months with clarifications and re-clarifications until an issue is stale, or until after an election[365]

• Sending illegible photocopies, which can delay the FOI replies for months as the applicant appeals, or applies over again for legible copies of the same records

• Now that *ATIA* fees have been eliminated, this is noted just for historical interest: inflated fee estimates, which have blocked many an FOI request. This was detailed during the 1997 inquiry on the Canadian military scandal in Somalia, along with established cases of improper document alteration.[366]

• *ATIA* Section 4.(3) prescribes that an agency must produce a record for an applicant if this can be done "using computer hardware and software and technical expertise normally used by the government institution." But some agencies exaggerate the difficulty of doing this, and so refuse to create records (or overstated fees, back in those days it was allowed).

• Still other methods were detailed by former Australian FOI official Don Coulson. These included: "Pumping applicants for extra information to find out why they want documents, before briefing ministers and advisers; delaying the release by saying an application has been overlooked, the department is overloaded with requests and is under staffed; hiding behind the excuse that requests are too voluminous or time-consuming to process, often without helping applicants to narrow down exactly what they want; others did not notify applicants of their rights of appeal."[367]

Yet Ken Rubin, Canada's most prolific *ATIA* requestor, simply refuses to be defeated by creative avoidance games, as he said in a speech: "Should some bureaucrat want to be petty or devious, that only gets me going more. My non-existent job description calls for toughness but being civil too – most of the time. . . . I try to show others that you can daily test institutions however tough the going is. Seeing justice win is what keeps me going."[368]

---

[365]In 2007 Alberta's privacy commissioner ruled the provincial government for political purposes wrongly withheld information about the government's use of aircraft until after the 2004 provincial election.

[366]http://www.dnd.ca/somalia/somaliae.htm

[367]Chris Tinkler, *The FOI's bag of dirty tricks*. Sunday Herald Sun (Australia), November 10, 2002

[368]Ken Rubin, *Reflections of an information rights warrior*. Speech to FIPA Awards event, Vancouver, Nov. 19, 2001

THE WIDE SCOPE OF MEXICO'S FOI LAW

The freedom of information law of Mexico (RTI-ranked #2 in the world) is an outstanding model to follow, in many ways. Although it is not clear from below what the exact penalties would be, the scope of the subjects is the widest I have seen in an FOI statute so far.

Article 206. The Federal Act and those of the States will set forth as penalty causes for breach of its obligations under the terms of this Act, at least the following:

I. The lack of response to requests for information within the time specified in the applicable regulations;

II. Acting with negligence, willful misconduct or bad faith in the substantiation of requests regarding access to information or by not disseminating information concerning the transparency obligations under this Act;

III. Not meeting the deadlines under this Act;

IV. Using, removing, disclosing, hiding, altering, mutilating, destroying or rendering useless, totally or partially, without legitimate cause, according to a relevant authority, the information in the custody of the regulated entities and their Public Servants or to which they have access or knowledge by reason of their employment, office or commission;

V. Delivering incomprehensible, incomplete information, in an inaccessible format or a mode of shipment or delivery different from the one requested by the user in his request for access to information, responding without proper grounds as established by this Act;

VI. Not updating the information corresponding to the transparency obligations within the terms set forth in this Act;

VII. Intentionally or negligently declaring the lack of information when the regulated entity should generate it, derived from the exercise of its powers, duties or functions;

VIII. Declaring the lack of information when it wholly or partly exists in its archives;

IX. Not documenting with intent or negligence, the exercise of its powers, duties, functions or acts of authority in accordance with applicable regulations;

X. Performing acts to intimidate those seeking information or inhibit the exercise of the right;

XI. Intentionally denying information not classified as secret or confidential;

XII. Classifying as confidential, intentionally or negligently, the information without it meeting the characteristics indicated in this Act. The penalty shall apply when there is a prior ruling by the Guarantor Agency, which is final;

XIII. Not declassifying information as secret when the reasons that gave rise thereto no longer exist or have expired, when the Guarantor Agency determines that there is a cause of public concern that persists or no extension is requested by the Transparency Committee; XIV. Not meeting the requirements laid down in this Act, issued by the Guarantor Agencies, or

XV. Not complying with the resolutions issued by the Guarantor Agencies in the exercise of their functions. The Federal Act and those of the States shall establish the criteria to qualify the penalties, according to the seriousness of the offense and, where appropriate, the economic conditions of the offender and recidivism. Likewise, they shall include the type of penalties, procedures and terms for implementation. The penalties of an economic character may not be paid with public funds.

The Best Canadian FOI Law

CHAPTER 14 - THE NEWFOUNDLAND MODEL

If recalcitrant Ottawa officials resist amending our *Access to Information Act* up to the standards of other nations (even Commonwealth ones such as the United Kingdom), they may find it a bit harder to argue against made-in-Canada solutions. Other provinces' far superior provisions in their FOI laws are noted throughout this report - although we should always keep in mind that even the best Canadian statutes are *very* modest achievements in the global context.

The best inspiration comes from Newfoundland. In June 2012, the Newfoundland and Labrador government of Conservative premier Kathy Dunderdale shocked FOI observers by inexplicably and boldly eviscerating its *Access to Information and Protection of Privacy Act*, in Bill 29.

This would render cabinet and companies' records secret, block the information commissioner from viewing documents related to cabinet confidences and solicitor client privilege, raise FOI fees, and allow ministers on their own to bar any FOI request they called "frivolous, vexatious, made in bad faith, trivial, repetitious, systematic or amount to an abuse of process." The justice minister actually claimed the Bill "helps public bodies be more open and accountable."

An uproar of protest ensued, with public rallies on the Legislature lawn in St. John's – an unprecedented public response in Canada to an FOI issue. A dramatic, marathon three day opposition filibuster followed in the House, complete with naps on couches in caucus offices.[369] The bill passed anyways.

Dunderdale stepped down in January 2014, after a year of rock-bottom approval ratings and scathing public criticism - much of it around perceptions of secrecy. After new Conservative premier Tom Marshall assumed office, he commendably reversed his predecessor's outlook, and appointed a panel to review the law. The independent commission was chaired by former premier and chief justice Clyde Wells, who prepared the report with retired journalist Doug Letto and former federal privacy commissioner Jennifer Stoddart.

---

[369]After the Halifax-based Centre for Law and Democracy issued a strong critique of the Bill, the Newfoundland justice minister launched crude, heated verbal attacks upon the CLD, of a kind the Centre said it had not encountered even in less democratic nations of the developing world. Later, a bit more temperately, the minister pleaded that it was absurd to compare Newfoundland with regimes that, while they may have fine FOI laws on the books, are also accused of extreme human rights abuses (a point worth some discussion).

The report that resulted gave 90 recommendations on how the province could improve the *Act*, and the commission even went so far as to write draft legislation of its own. Steve Kent, the minister responsible for the Office of Public Engagement, said the proposed changes would make his province's system among the best of the world, and most FOI experts agreed it was the best FOI law in Canada.[370] He told the CBC the review was more than just an assessment of Bill 29. "We're not just tweaking," said Kent. "What's being proposed here is a brand-new piece of legislation."[371]

In a new *Act* that came into force on June 1, 2015, the government repealed all the worst features of *Bill 29* and adopted the commission's draft law directly (a point that other jurisdictions may wish to contemplate for their FOI statutory reviews). Below are superior features of the 2015 Newfoundland law, which are advisable for a reformed *ATIA*, upon adjustments for the federal context.

[Newfoundland *ATIPP Act*] From DEFINITIONS

(x) "public body" means

(i) a department created under the Executive Council Act , or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister, [....]

(vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility,

[In the ATIA, coverage is only set for ministries, bodies listed in Schedule 1, and Crown corporations and their subsidiaries; this is not criteria-based coverage as above, on ownership level, etc.]

[Newfoundland *ATIPP Act*] Public interest

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

---

[370]https://www.cbc.ca/news/canada/newfoundland-labrador/new-access-to-information-changes-to-make-n-l-a-world-leader-advocate-1.3049934

[371]Report summary: http://ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol1.pdf / Full report: http://ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol1.pdf

(c) subsection 30 (1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

[The Newfoundland law also has a general public interest override. The ATIA has no general public interest override, nor the added features above.]

[Newfoundland *ATIPP Act*] Anonymity

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

[In the ATIA, the feature above is absent; applicants' identities can be revealed more freely.]

[Newfoundland *ATIPP Act*] Transferring a request

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it [.....]

[In the ATIA, such a transfer may be done within 15 days.]

[Newfoundland *ATIPP Act*] Time limit for final response

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18 , without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23 .

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

[In the ATIA, the initial time limit is 30 days, with an unlimited extension. See the new extension rules, below, which are stricter than in Ottawa.[372]]

[Newfoundland *ATIPP Act*] Extension of time limit

23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.

---

[372] "That is a reasonable compromise between the need for some flexibility and the problem of abuse of extensions by public bodies," said Toby Mendel on Newfoundland's law, "although I prefer the absolute limits found in many laws, i.e., 30 days + another 30 and that's it."

(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16 (1) without delay and in any event not later than 20 business days after receiving the request.

[Newfoundland *ATIPP Act*] Cabinet confidences [mandatory exemption]

27. (2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

[In the ATIA, cabinet records are excluded from the statute entirely.]

A note on New Brunswick

In the 2008 edition of this book I wrote: "What is indisputably the most ill-fated FOI statute in Canada, that of New Brunswick – the only one with no time limits or public interest override, few harms tests, and every exemption mandatory – is ironically the only provincial law bearing the title Right to Information Act."

Then in 2017, Liberal premier Brian Gallant actually kept his electoral promise to improve the province's FOI law. This movement, which candidly I had never expected to see, had a much lower profile than Newfoundland's, and yet was still not insignificant, considering the law's 1978 starting point. (Some remain very skeptical of the impact of having discretionary exceptions and a public interest override in a province where the bureaucratic culture is so hostile to transparency.)

• For nearly four decades, the FOI law's exemptions were all mandatory. After the reforms, these ones below are discretionary, albeit most with no time limits:

24. Disclosure harmful to relations between New Brunswick and a council of the band; 25. Local public body confidences (20 years); 26. Advice to a public body (20 years); 27. Legal privilege; 28. Disclosure harmful to an individual or to public safety or in the public interest; 29. Disclosure harmful to law enforcement or legal proceedings; 30. Disclosure harmful to

economic and other interests of a public body; 31. Tests, testing procedures and audits; 32. Confidential evaluations; 33. Information that is or will be available to the public.

Yet if, as lawyer Rob Botterall said in the B.C. chapter, "discretionary exemptions have in effect been converted into mandatory ones," one may wonder how much difference this change will make in practice.

• A public interest override was added. This one is not general, but topic specific, covering just two important concerns, while the others are absent, e.g., human rights, financial corruption. Still, in the New Brunswick context, this measure is some improvement over nothing at all. (What excuse can there be for Ottawa to do any less than this one for its ATIA, with its own inconsequential Section 20 and 19(2)(c) overrides?)

Mandatory disclosure – risk of significant harm

33.1(1) Despite any provision of this Act, whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

• The cabinet confidences exemption remains mandatory, with no time limit. Yet the revised law added a small (perhaps token) gesture to openness: "17(2). With the approval of the Executive Council, the Clerk of the Executive Council may disclose information referred to in subsection (1) if a record is more than 15 years old."

• Aid was extended to less able applicants, in Canada's only officially bilingual province: "8(3) An applicant may make an oral request for access to a record if the applicant (a) has a limited ability to read or write in English or in French, or (b) has a disability or condition that impairs his or her ability to make a written request."[373]

Yet the many gaps that remain in the New Brunswick law remain so grievous – such as the lack of order power and few time limits or harms tests – that it is still low-ranked by the Centre for Law and Democracy amongst provinces. The province added a provision to review the law every four years, and hopefully that may someday change.

[373]Yukon's FOI law goes a step further: "6. (2) A request for access to a record may be made orally or in writing verified by the signature or mark of the applicant and must provide enough detail to identify the record."

A Promise Betrayed

CHAPTER 15 - FOI IN BRITISH COLUMBIA

What can Ottawa learn from the B.C. experience?

We will bring in the most open and accountable government in Canada. I know some people say we'll soon forget about that, but I promise that we won't!

- Newly elected B.C. premier Gordon Campbell, victory night speech, 2001

Never in my wildest dreams did I expect that foot dragging and a penchant for secrecy would prevail to the extent that it has. No matter how good the law might be, it won't work if people in power are out to subvert it.

- Former B.C. Attorney General Colin Gablemann, who introduced B.C.'s FOI law, 2007 speech

When it was enacted in 1992, British Columbia's *Freedom of Information and Protection of Privacy Act* was hailed by some FOI commentators as "the best in North America." Yet since then, in practice, several flaws and shortcomings have become apparent, and the urgent need for certain amendments are obvious. While it remains overall amongst the best FOI laws in Canada, it is still a very modest achievement within the world context.[374]

In fact, it is even not the best in Canada in every aspect, for some provinces' transparency statues (e.g., those of Quebec and Ontario) have several sections much advanced over B.C.'s law, and all are well surpassed by Newfoundland's new FOI law. Yet Ottawa has much to learn on both FOI theory and practice from its most distant province, as we shall see below.

The Halifax-based Centre for Law and Democracy ranked B.C.'s statute second in Canada only to Newfoundland's law, with a qualitative score of 97 out of a maximum 150. Writing for the CLD, lawyer Michael Karanicolas wrote:

> This law is relatively strong by Canadian standards, with a reasonably broad scope and a well-empowered oversight body. While this law came out at the top of our

[374]For a fuller account of this topic, please see The Vanishing Record. A report on needed improvements to British Columbia's Freedom of Information and Protection of Privacy Act. With 67 recommendations for reform. A presentation by Stanley Tromp to the B.C. Special Legislative Committee to review the FOIPP Act. 140 pgs. 2016, posted at: http://www3.telus.net/index100/thevanishingrecord News from the FOI advocacy group BC Freedom of Information and Privacy Association appears at www.fipa.bc.ca

> limited provincial study, there remain significant problems with it, including several overly broad exceptions and a somewhat threadbare promotional regime. It is worth noting that, compared against the international ratings, B.C. would only come in tied for 25th. So a good score for Canada, but from a global perspective there remains significant room for improvement.[375]

The three most urgently required reforms for B.C.'s *FOIPP Act* today are the same basic ones needed for the *ATIA*: the gross overuse of the policy advice exemption (for facts and analysis), FOI-excluded quasi-governmental entities, and oral government.

One longtime legislative columnist called B.C.'s record on FOI "the shame of the province."[376] For the past two decades, the BC Freedom of Information and Privacy Association and many other groups and I have been working with little success to change that record into one of pride.

With the B.C. Liberals in power, the prospects for FOI reform were - and almost surely would remain - absolutely hopeless. We had, perhaps naively, hoped for better with the B.C. NDP, who when in opposition had introduced private members bills (voted down) that would have solved these very problems. Our faith was boosted in the last B.C. election campaign, when the NDP, in a questionnaire to FIPA on April 27, 2017, pledged to solve the three main problems.

In July 2017, after two months of a suspenseful post-election limbo, the NDP attained a minority government by just a single seat with the support of the Green Party. The bureaucrats' briefing notes to the incoming minister state on FOI: "Further review and consultation is required." The authors must be well aware that public bodies already have had 20 years of opportunities to consult through four legislative reviews. Worse, there was - and is - no deadline set, which encourages this needless new activity to expand ad infinitum. Indeed some new public consultations were then held - all of which led to nothing.

Deeply worrisome is a comment from the Premier while he was a candidate in the 2011 B.C. NDP leadership race. The Vancouver Sun reported (on February 11, 2011) that "Horgan wrote that he supported some changes to the Act, such as making university spinoff companies subject to FOI requests. But he was less enthusiastic about reforming the Act's policy-advice exemption, saying it had 'stood the test of time.'" Yet bad practices are never legitimized merely by time passage.

As matters are going, it seems not impossible that in 2039 British Columbians might be pleading for the same reforms, with the outstanding recommendations - some dating from 1998 - raised again by our grandchildren. Officials eternally recite the vacuous scripted mantra that "these are very complex questions, which need more consultation, due to the risk of unintended

[375] https://www.law-democracy.org/live/rti-rating/canada/ The CLD also advised B.C. to delete FOI Section 16, which shields information about intergovernmental relations, as being unnecessary.

[376] *One journalist's failed (so far) efforts to reform B.C.'s FOI law. Stanley Tromp's recommendations have been ignored by successive review committees.* By Vaughn Palmer, Vancouver Sun. Nov. 17, 2015

consequences." Incorrect. The needed reforms are simple, they have been studied to death and other nations have not been harmed by passing them.

For Premier Horgan and his cabinet, to break the NDP's specific written FOI reform pledges of April 2017 would amount to nothing less than a shameful betrayal of the public interest.

Section 13, Policy Advice

The most widely misapplied section of the B.C. *Freedom of Information and Protection of Privacy Act* is surely unlucky number 13, for this section creates a wide opportunity of secrecy for "policy advice or recommendations developed by a public body or for a minister." (This is the general equivalent of the *ATIA*'s Section 21, which was invoked 10,000 times in 2014.)

The B.C. Court of Appeal set a dangerous precedent in 2002 when it ruled on an FOI request dispute: the now-famous "Dr. Doe" case of the B.C. College of Physicians and Surgeons. The court held that Section 13 of *FOIPP* was not limited to recommendations. Instead, the investigation and gathering of facts could be exempted from access pursuant to Section 13, regardless of whether or not any decision or course of action was actually recommended.

In brief, the facts were that an employee of the physician Dr. Doe had complained to the B.C. College of Physicians that he had sexually harassed her and attempted to hypnotise her. During the investigation of the complaint, the College's lawyer obtained the opinions of four experts on hypnosis. The applicant applied to the College through FOI for all documentation on these records. When the College refused, she appealed to the B.C. Information and Privacy Commissioner, who then ordered the records disclosed, because the experts' reports did not constitute "advice or recommendations" as per Section 13.

The College appealed the OIPC ruling to the B.C. Supreme Court, but failed. It thereafter appealed to the B.C Court of Appeal, and won. The court stated the records did constitute "advice," and that "recommendations" includes "the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action."

"This interpretation expands the scope of the s. 13 exception to an alarming degree," wrote lawyer Michael Doherty in a report to FIPA on the case.[377] "The result is that a sweeping new exception to access to information has been created. Legislative action is required if the original intention of the Legislature and integrity of the Act are to be restored."

He also noted that such an amendment was practically invited by the Court of Appeal in its ruling, when it observed that s. 13(2) excludes many kinds of reports and information, and the court said:

---

[377] *A Prescription for "Dr. Doe"- Proposed Revisions to s. 13 of the Freedom of Information and Protection of Privacy Act in Response to the Decision in College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner).* By Michael Doherty, BC Public Interest Advocacy Centre, 2004.

> If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice for the purposes of s. 13, it could have explicitly excluded them.

What is the outcome of this situation?

Doherty noted a few examples in which access to records hitherto available could now be denied to the public (and even individuals directly affected) under Section 13 as a result of Dr. Doe:

> • Injured workers applying for Workers' Compensation might now be unable to obtain copies of opinions concerning the level of post-injury pain that they are experiencing;
>
> • Injured motorists seeking copies of opinions of traffic analysts who have examined their motor vehicle accident sites could be denied access to those opinions;
>
> • Assessments of individual students developed by or for educational institutions could now be withheld from those students and their parents;
>
> • The technical opinions of biologists and foresters about the status of endangered species and their habitat may now be kept secret;

I regularly encounter the problem in my journalistic work. For instance, briefing notes from the Ministry of Advanced Education of the sort that were released to me in full (with all facts and "recommendations" open) before 2004 were by 2012 being mostly withheld under Section 13.

Later, when I applied for records on the human health impacts of Liquified Natural Gas (LNG), the Natural Gas Development Ministry invoked Section 13 to blank out about one hundred pages of facts and analysis.[378] Another journalist was denied access to a technical report on the state of B.C. Place stadium under Section 13.

The worst example concerns the Provincial Health Services Authority (PHSA). This entity oversees the B.C. Cancer Agency, the B.C. Centre for Disease Control, the B.C. Mental Health Society, the Children's and Women's Health Centre, and more, all with $2 billion in annual revenue.

In 2011 I applied though the FOI for summaries of five of its internal audits. The PHSA refused under Section 13, and I appealed to the Commissioner. The office in Order F12-02 ordered two of the summaries released in full, and parts of the other three. The PHSA then appealed to overturn the Order in a judicial review in BC Supreme Court.

The PHSA's lawyers argued the Dr. Doe ruling was binding on Section 13 (in the process billing taxpayers $149,535 to block public access to records on public health). Madame Justice Dardi agreed with the PHSA,

[378]This story had a very rare and agreeable surprise ending. I wrote a newspaper editorial to complain of this discretionary Section 13 application to LNG records, it was published, and later the same day the Ministry released all these records to me. See: *B.C. government is quietly closing down our freedom-of-information system*, by Stanley Tromp. The Province, Oct. 20, 2016

in Ruling 2013 BCSC 2322[379]. This precedent further emboldened other agencies to withhold records. And so it goes.

A crucial point is that Section 13 is discretionary, which that means the agency may but not must withhold the records, and is called upon here to exercise its own judgment.

In fact, all the other five B.C. health authorities granted me full access to their internal audits to me in full under FOI and did not claim Section 13. Meanwhile, Vancouver City Hall posts its internal audits online. In the LNG case, the ministry responsible for promoting the industry chose to withhold records on health impacts under Section 13, whereas I filed an identical request to the Health Ministry and it did not apply the section. (On reflection, these might have been ideal times to apply Section 25, the Public Interest Override.)

This may suggest the choice is often not a legal question, but a political attitudinal one. It seems apt that Rob Botterell, the senior public servant who had developed the FOIPP Act, told the 2015 B.C. legislative review that in practice in B.C., "discretionary exemptions effectively have been converted into mandatory exceptions" - as though the term "may withhold" is now being routinely misread by officials as "must withhold."

A robust protest against the impact of the Dr. Doe ruling on Section 13 came from one well versed on the matter, former NDP Attorney General Colin Gablemann, who had introduced the FOIPP Act in 1992, and who told an FOI conference in a 2007 speech:[380]

> There has been an incredibly astonishing perversion in the last few years of the plain language meaning of the words: "advice and recommendations." This has resulted in the reversal of the legislature's intent, as originally expressed in the legislature and in the Act.
>
> The wording and intent was clear -- at least we thought it was. In Section 13. . . . we meant that to mean -- and I believe it does mean -- that "advice or recommendations" was limited to those parts of documents or reports that advocated that government choose a particular course of action or make a particular decision.
>
> Section 13 was so clear and obvious that there was not a word spoken by any member of the House on it during the committee stage debate. Not a word! . . . .I have to tell you that the Appeal Court quite simply failed to understand our intention -- the intention of the legislature -- when using these words as we did. A government which believes in freedom of information would have introduced amendments in the first session of the legislature after that Appeal Court decision to restore the act's intention. . . . This is an outrage and must be remedied.

In a bold power grab, B.C. officials and crown lawyers grotesquely overextended this

[379] https://www.oipc.bc.ca/orders/1197

[380] *Fight Against Secrecy Failed - Why BC's 'open government' laws need fixing*. By Colin Gabelmann. TheTyee.ca. October 15, 2007. http://thetyee.ca/Views/2007/10/15/FOI/

one ruling on a private hypnotism dispute to conceal background facts on public policy creation across government on any topic they chose (health, education, policing, finance, etc.). From the Dr. Doe case, the bureaucracy pulled off a legal coup with arcane, ingenious arguments that bare facts somehow implicitly prompt a policy direction, and the two are inseparably "intertwined." This ruling buoyed officials, but created incalculable havoc for B.C. FOI applicants over the past 17 years, as hundreds if not thousands of pages in the public interest have been newly sealed.

By now officials across this nation utilize the policy advice exemption as a de facto all-purpose master key that can lock up almost any FOI door, or a catch-all net hanging beneath all the other exemptions, for officials have nothing to lose by trying it as a last resort, in endlessly flexible and creative ways. (Presumably Ottawa officials can do so with *ATIA* Sec. 21. A full discussion of this problem, with world standards and solutions, can be found in Chapter 3 of this book.)

While Section 25 is known as the Public Interest Override, I would describe Section 13 as, in effect, "the Bureaucratic Interest Override," in ways almost an inverted Section 25, except this former one's usage never expressed the will of the legislature but the contrary. It is rather like Section 13 versus Section 25, with the former applied thousands of times more often than the latter. Although such a match is no contest, I do not call for this balance to be reversed entirely, just more equitably distributed, for in the difference between the politician's continual inner counsel (internal advisors) and outer one (the public), the former is far too influential.

Why is this situation occurring? Perhaps because records such as internal audits reveal serious internal failures and the need for costly solutions, but these more often can generate political embarrassments and inconveniences, and (as former Information Commissioner John Reid said) secrecy is a tool of power and control.

How to reform Section 13

Clearly the *Act* needs to be amended to clarify and emphasize that Section 13 cannot be applied for background facts and analysis. As Michael Doherty wrote, "We propose that s. 13 be amended in such a way as to clarify that factual materials are subject to access, while recommendations about proposed or alternative courses of action are exempt from access until after the government decision on the appropriate course of action has been made."

He also proposed that that expert reports, which are really a means of establishing facts, be specifically indicated to be treated like other factual information in this regard, unless they do, in fact, make recommendations about proposed or alternative courses of action.

The NDP wrote to FIPA in April 2017: "The BC Liberals' use of section 13 to deny even factual information has led to widespread call for reform, including by the Information Commissioner, and we support the Commissioner's advice, reflected in the May 2016 report of the Special Committee to Review the Freedom of Information Act, that the meaning of this section should

be restored to its original, pre-BC Liberal, intent."

I also strongly believe that Section 13 requires a harms test, whereby a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), and the United Kingdom (Sec. 36).

Regarding time limits, one province has a shorter limit for withholding records under the policy advice exemption than the 10 years prescribed in the B.C. FOIPP Act – Nova Scotia's FOI law in Section 14 permits the records' release in 5 years, and this is advisable for our Act also. I wrote:

> Recommendation: Amend Section 13 to include a section on the model of Quebec's FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.
>
> If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years. If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years.

Meanwhile, the B.C. government hides behind the Dr. Doe ruling - and any FOI ruling it favours, such as the Justice Leask ruling on SFU's FOI-exempt companies, below - with faux helplessness, a false posture of legal impotence, pleading "The court has spoken and we must obey it." Courts do interpret the law *as written*, indeed. But Section 13 is poorly written, and so it can be rewritten, and must be. (This is a very common ruse among governments across Canada.)

The B.C. Commissioner tried to appeal the Dr. Doe ruling to the Supreme Court of Canada to overturn it, but he was denied leave to appeal without explanation. *The Richmond News* reported in May 2007 that the minister for B.C. FOI policy rejected the need for reform by saying "the government disagrees with [the Commissioner], and agrees with a court decision that upholds the government's right to deem policy advice confidential."

Officials may try to reassure us with: "The policy advice exemption is well drafted, yet in some cases it may have indeed been misapplied. But if so, just trust us to correct such misapplications on a case-by-case basis, and we can also provide better regulations and guidance for it." This view is mistaken, for the problem is now far too systemic and widespread in practice for such ineffectual measures, and so the section needs to be re-worded.

I expect it will be politically the most difficult section to change, the FOI privilege most treasured by unelected bureaucrats, who far outlast elected politicians. I emphasize that I am not calling for the repeal of the policy advice exemption but only its reform, so its usage is constrained and sensible, unlike today.

Why does it matter? Because the section is now akin to an omnivorous black hole that may soon swallow up more and more, until our FOI laws are rendered almost meaningless. To most British Columbians, this issue may appear to be a dry and obscure point of administrative law, and so it falls under the public radar, which is how the government prefers it. Yet the potential of Section 13 to quietly close down the B.C. FOI system cannot be overstated.

Peering through "the Corporate Veil"

The second major B.C. FOI problem is that public bodies - particularly universities and crown corporations - have been creating wholly-owned and controlled puppet companies to perform many of their functions, and manage billions of dollars in taxpayers' funds, whilst claiming these companies are not covered by FOI laws because they are private and independent – a form of *pseudo-privatization* that FIPA has referred to as "information laundering." (A full discussion of this problem, with world standards and solutions, can be found in Chapter 4 of this book.)

When is a public body not "a public body"? Which public records are "public records"? How should these concepts be legally defined for freedom of information purposes?

In 2015, the B.C. government proudly stated: "British Columbia's Act provides the broadest coverage in Canada. At our last estimate there are 2,900 public bodies that are covered under the legislation." This statement, per se, might appear impressive at first glance, but it is in one sense misleading, i.e., many of those 2,900 bodies have been added to the law's schedules – voluntarily and purely at the government's whim - but not in *defining criteria*, by which Newfoundland's FOI law, and much of the world's, is far broader in scope than in B.C.

On the potential for such entities to multiply (as a result of the SFU and UBC legal victory), lawyer Dan Burnett acting on behalf of FIPA told the media: "When you think about it, the potential for abuse is huge. It could be the black hole that swallows up FOI."[381] One expects this arises because B.C. legislators in passing the Act in 1992 did not foresee this quandary.

The kind of accountability that these entities need can only come from public transparency.[382] After the Vancouver School Board's private companies lost public money in failed overseas business adventures, the education minister in 2007 sent out a press release pledging to add these companies to the FOIPP Act's coverage, but this was never done. Yet B.C. local municipalities'

[381]SFU and UBC seek to shield commercial info, by Charlie Smith. The Georgia Straight, May 28, 2009. http://www.straight.com/article-223466/sfu-and-ubc-seek-shield-commercial-info

[382]I emphasize that I am not arguing here against the decision to privatize some public services - a choice that might work well or not, on a case by case basis - only the harmful loss of public transparency that too often accompanies that decision, but should not. Privatization of public functions has occurred in other countries also, but the global standard is to include them under the FOI laws.

subsidiaries are covered by the Act (although regrettably the level of "ownership" is not specified there; I urge that it be set at a 50 percent minimum).[383]

Today, BC Hydro claims that two of its wholly owned companies are FOI-exempt, and so they denied my FOI request for their records: Powertech Labs (which specializes in clean energy and engineering consulting) and Powerex (a trading partner, buying and supplying physical wholesale power, natural gas, and environmental products across North America).

There have been frequent complaints that even B.C. parent crown corporations are too little accountable to their respective ministers in Victoria (much less the media and public); now, their FOI exempt companies move that secrecy to a new level, from semi-opacity to total opacity. Under the accepted global FOI standards, these two BC Hydro companies could never escape coverage as they now do.

As well, the B.C. government excluded 2010 Olympics Organizing Committee (VANOC) from FOI coverage, even though a similar entity that managed the 2012 London Olympics, the Olympic Delivery Authority, was covered by the British FOI law. Two more vital FOI-exempt entities are Providence Health and the federal-provincial First Nations Health Authority.

The problem was heavily underlined in 2006 when I filed a request to the University of British Columbia under the FOI law. I asked for meeting minutes, annual reports and salary records of three of UBC's wholly-owned corporate entities.

The first was UBC Properties Investments Ltd. (which controls the UBC Properties Trust), whose self-described mission is to "acquire, develop and manage real estate assets for the benefit of the University." It has a monopoly on all development that happens on campus, manages private rental housing for non-students, and is the landlord for most of the commercial space.

The university's 100 hectares of public land was once managed by a real estate committee of the UBC Board of Governors, then devolved to the new private company in 1988. Ever since then, students and staff have bitterly complained about its secrecy, in regards to the new mini-city arising on site, the mass cutting of trees to make way for it and UBC's mass construction of high-priced condos for sale instead of student rental housing.

The second company, UBC Investment Management Trust, acts as investment manager of UBC's huge endowment fund and its staff pension assets, making decisions worth billions of dollars. The third, UBC Research Enterprises Inc., takes research developed at UBC and creates spinoff companies.

---

[383]One new problem is that cash-strapped local public bodies are encouraged to become more "entrepreneurial" in seeking new funds. Hence, they develop fantasies of becoming global business wheeler-dealers; but as they forge international business partnerships (as did the VSB), they are often hopelessly out of their depth in the global corporate "shark tank." Unlike inept gamblers at casinos who believe they can win by throwing good money after bad, and incur staggering losses, their failures are paid for by taxpayers - hence it is so vital that these entities are open to external scrutiny by FOI requests, which might even avert such losses.

The university denied my FOI request, claiming that the entities are all "independent," and so not under the "custody or control" of UBC as required by the *Act*. I appealed to the Office of the Information and Privacy Commissioner.

In 2009 the Commissioner's delegate Michael McEvoy ruled that I should have access to the records, writing, "UBC is found to have control of the requested records.... All three bodies were entities created and owned 100 per cent by UBC and accountable to it."[384] The case was won mainly because had I quoted from a dozen of UBC's own official websites, which in fact boasted that UBC had a high degree of control over its entities and had appointed their boards.[385]

Students celebrated the outcome. But it was too good to last. UBC appealed the McEvoy ruling to judicial review, as did Simon Fraser University in a similar case. Then B.C. Supreme Court Justice Peter Leask ruled that such entities were not covered by the *FOIPP Act* because one must not "pierce the corporate veil." UBC's lawyers argued that the Commissioner's office is "an inferior court," and so the Justice Leask ruling should now be regarded as "the law of the province."[386]

Upon the SFU ruling, the Commissioner Elizabeth Denham sent a letter on October 20, 2011 to the minister responsible for FOI, urgently pleading that the law be amended to cover such entities: "I write to request that the Ministry draft amendments to the *Freedom of Information and Protection of Privacy Act* to ensure that FIPPA covers subsidiary corporations of local public bodies.... It is vital for open and accountable government that, whatever the form of the entity, if it is carrying on public business, it should be subject to FIPPA." Five days later in the legislature, NDP MLA Doug Routley presented a Bill to fix the problem, but it was voted down. Such entities' FOI coverage was also urged by B.C. legislative review committees of the *Act*.

The world standard, and solutions

The global standard for subsidiary coverage is detailed at length in Chapter 4 in this book. Since the first edition in 2008, amongst Canadian provinces, Newfoundland has partly caught up to the world with its reformed 2015 access law, in which these entities are FOI-covered: "a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown."

The amendment must be very carefully worded, to remove ambiguities and any potential escape hatches - which some public bodies, unfortunately, will endlessly search for.

Initially I thought there were two options – [a] general overriding principles, and

[384]Order F09-06 – https://www.oipc.bc.ca/orders/993

[385]UBC then promptly deleted these key official websites, and then in the appeal stages UBC's lawyers belittled them as items "*allegedly* found on the internet." (Emphasis added.) Fortunately, I had already saved these UBC websites to hard-drive and had printed them as evidence, and later swore affidavits for their veracity through a notary - a sadly necessary cautionary tale for any FOI applicant in the digital age.

[386]See my chronicle of this issue at: http://m.thetyee.ca/Opinion/2012/01/18/FOI-Court-Ruling/?size=

[b] specific criteria. There are plusses and minuses to both approaches; for example 50 percent has the benefit of clarity, but if an agency has control through other means (special share class, holding shares through other subsidiaries) it means its subsidiaries are not captured. Then I realized that both options could and should be present, that one need not choose only one or the other.

After contemplation and peer discussion, I arrived at this solution: Amend the B.C. *FOIPP Act* to state that the Act's coverage extends to any institution that is:

[1] controlled by a public body; or

[2] performs a public function, and/or is vested with public powers; or

[3] has a majority of its board members appointed by it; or

[4] is 50 percent or more publicly funded; or

[5] is 50 percent or more publicly owned.

It is absolutely crucial that such entities be at least 50 percent publicly owned, and not "fully owned," for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as a dextrous way to escape FOI coverage. In fact, it might best be set to a degree less than 50 percentage, since in some cases 20 percentage ownership could mean control.

Contracting Out

In 2004 the B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that "outsourcing" initiatives by the B.C. government were eroding the B.C. FOIPP Act. He recommended that the law be amended to clarify that records created by or in the custody of any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The Special Committee of the B.C. Legislature reviewing the FOI law in 2004 and 2010 agreed.

The B.C. government claims it has resolved the issue with 2011 amendments to the B.C. *FOIPP Act*'s Section 3(1)(k), i.e., prescribing that the Act does not apply to "(k) a record of a service provider that is not related to the provision of services for a public body." Yet this section is insufficiently clear and strong as to exactly what records the Act does apply to. (The problem is often closely related to that of excluded companies above.) Again, the problem is the wiggle room; if there is space to define records out of the scope of the FOI law, governments will find and use it.

Contracting out services can also lead to lost transparency. For example, in 2003, BC Hydro privatized the services provided by hundreds of its employees in its Customer Service, Westech IT Services, Network Computer Services, Human Resources, Financial Systems, Purchasing, and Building and Office Services groups.

These services were then provided under contract by Accenture, a private foreign company. Although the B.C. government obviously does not have the power to place a foreign company under our *FOIPP Act*, it should guarantee to the public that any of Accenture-held records regarding British Columbians will be accessible by FOI, or not

enter into such a contract.

The Debate on Subsidiary Coverage

What are the prospects for reform? One might imagine this should not be so politically onerous to achieve - unlike, say, policy advice or duty to document – for such subsidiaries are relatively remote from the core government in Victoria, and so FOI coverage of them has little chance to embarrass it with disclosures.

To date, the public has had to wage a steep uphill struggle against political indifference, and a provincial bureaucracy that is far more sympathetic to the entities' indefensible (and private) pleas than to the broader public interest. Victoria bureaucrats wrote in memos that because the various subsidiaries have different corporate structures and ownership levels, this makes it very "complex" to design one standard for FOI coverage. Yet other nations manage to do it well; if they also pleaded "complexity" as an excuse for timeless inaction, then none of their subsidiaries would ever be covered, which they all are.

What are Canadian governments' usual argument against FOI coverage of such subsidiaries? The plea of "competitive harms." Yet it does not matter whether they face competition or not, for they are already fully protected from such harms in the B.C. FOI law in Sections 17 and 21.

The first one begins: "The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body [. . .]" Then Section 21 repeats the same principle for private sector third parties. (Section 17 is discretionary while 21 is mandatory.) Those sections were placed in the law for that very purpose, why else?

If this indefensible claim of "competitive harms" was accepted, then no federal or B.C. crown corporation would be covered by any FOI law, and yet they all are. Indeed, even the most secretive prime minister in memory, Stephen Harper, amended the federal *Access to Information Act* to cover all national crown corporations and their subsidiaries (and even some government-created foundations); these would be the federal equivalents of BC Hydro's Powertech and Powerex.

All of the foregoing shows that vague, dark warnings of so-called "unintended consequences" of FOI coverage are (with respect) absolute nonsense. The sole purpose of the call for further study is an eternal stalling tactic, which is the graveyard of reform – as is already shown from the VSB coverage that was promised 12 years ago and never done.

Governments speak of the "risks" of subsidiary FOI coverage. Yet one could just as well turn this logic around and ask – "What then about the risks of *non*-coverage?"

For example, we should consider that FOI-exempt companies owned by B.C. crown corporations were related to two financial scandals of the 1990s: Hydrogate, by which B.C. Hydro formed a subsidiary, IPC International Power Corp., to invest in a Pakistani power project, and B.C. Ferries' massive $500-million fast-ferries loss

through its subsidiary, Catamaran Ferries International. (After BC Ferries itself was privatized in 2003, its FOI coverage was dropped, but after years of strong protests, the coverage was restored.)

Consider also that UBC Properties Investments manages student residential buildings. What if it had commissioned a consultant's report which found that these structures had fire hazards or chemical fumes? The UBC residents could not obtain that report under FOI, and they would never know. It would stay buried in the vaults forever because this UBC company claims it is FOI exempt.

Keeping the public in the dark as they do is a "risk" also – but on balance, it is a far greater risk than any imaginary commercial harm to these companies (which most likely would not occur, because of their monopoly position, and FOI law sec. 17 and 21 protections).

The outcome is that public bodies today can still "veil" their records in the vaults of these insular walled fiefdoms (what the British call "quangos," i.e., quasi-autonomous nongovernmental organizations), while the secrecy creates potential breeding grounds for waste, corruption, and risks to public health and safety. Such an outrage cannot be blandly rationalized away by crown lawyers.

This exclusion is also contrary to the spirit of *FOIPP Act* Section 25, the Public Interest Override. Apart from the law, UBC students, staff and the general public in a larger moral sense should be regarded as the companies' "shareholders" as much as the legal owner UBC is.

There is much evidence from other nations and Ottawa where such entities have been FOI-covered for decades without significant harms, and they accept such coverage as the world legal norm. Yet our governments usually resist a criteria-based approach because they wish to retain the discretionary power of excluding any entity they wish from the FOI law's scope.

In setting up these FOI-exempt companies, the public bodies wish to hold all the benefits and flexibility of utilizing corporate power, while partially limiting their own moral responsibility or legal liability for their activities via secrecy. But they cannot have it both ways. This trend is quietly and adroitly undermining the whole purpose of the FOI law, and unless the problem is fixed now it will only grow worse.

Oral Government

The B.C. *Freedom of Information and Protection of Privacy Act* grants the public access to "information in records." Yet this right is simply meaningless if records were not created in the first place, were not preserved, or cannot be located. Such a system is as resistant to accountability as any autocracy of the past. (A full discussion of this topic, with world standards and solutions, can be found in Chapter 5 of this book.)

The problem burst onto the public consciousness in 2015 via the worst B.C. FOI scandal to date, one that made national headlines.

The media had filed FOI requests for emails

in the B.C. Ministry of Transportation about the so-called Highway of Tears (in a region of northern B.C. where for years many travelling aboriginal women have gone missing and are presumed killed). Then, as the requests were being processed, whistleblower Tim Duncan revealed that his fellow political aide in the minister's office, George Gretes, at one point grabbed Duncan's computer keyboard and "triple-deleted" key emails on the topic, to scrub them permanently from systems, and so scuttle the FOI process.

This case was probed in depth by B.C. Information and Privacy Commissioner Elizabeth Denham. In her landmark report *Access Denied*[387] she found widespread problems among Liberal staff beyond Gretes, including the premier's deputy chief of staff who mass deleted virtually all her emails daily and the premier's own FOI director who used disposable sticky notes to avoid a paper trail on records searches. For years, millions of emails had been wiped out with officials believing this was nothing wrong.

She and her staff also caught the Liberals: "Deleting emails responsive to access to information requests and preventing others from producing these records. Wilfully or negligently failing to produce records that are potentially responsive to an access request. Failing to keep any sent emails, irrespective of the topic. Failing to clarify a request with an applicant. Implementing a verbal process for responding to access to information requests that avoids personal accountability."

The report emphasized that Gretes was just part of the general norm of hyper-partisan young staffers doing whatever it takes to protect their political bosses. "Taken together, these practices threaten the integrity of access to information in British Columbia," wrote Denham as she called for a broad "change of culture" across the Liberal government.

(In July 2016, Gretes pleaded guilty to lying to the commissioner. He was fined $2,500 - half the maximum under the *FOIPP Act* for obstructing an OIPC investigation - for what the provincial court judge said was "a silly mistake" and "a stupid lie" that was unnecessary because deleting records sought through FOI was not illegal and many other government staffers admitted under oath they did it, too. The Commissioner asked the RCMP to investigate, and it did, but declined to recommend charges. "[Gretes] was the guy that got caught," said Duncan. "There were a lot of others doing that type of thing, and none of that has been addressed."[388])

Shamed by Denham's findings, Liberal Premier Christy Clark finally took action. She banned triple deleting, and ordered a freeze on email deletion until new rules were drafted. Finance Minister Mike de Jong placed non-partisan civil servants in FOI oversight positions in ministerial offices to make sure records are accurately kept and recovered. He also boosted funding for FOI. Yet she stopped short of a duty-to-document law.

---

[387] https://www.documentcloud.org/documents/2475478-ir-f15-03-accessdenied-22oct2015.html

[388] *Former political aide George Gretes fined $2,500 for misleading B.C.'s privacy commissioner*, by Rob Shaw. Vancouver Sun, July 14, 2016. https://vancouversun.com/news/local-news/former-political-aide-george-gretes-fined-2500-for-misleading-b-c-s-privacy-commissioner

Then Denham's predecessor as commissioner, David Loukidelis, was brought in to translate her concerns into a broader plan of action. He supplemented her recommendations with twice as many of his own. His report[389] had exemplary recommendations for future record best practices (all of which should be implemented).[390]

Positively, premier Christy Clark said that "I am announcing that we are accepting all of Mr. Loukidelis' recommendations," and "the practice of 'triple-deleting' will be prohibited, ministers and political staff will continue to retain sent emails and a new policy and specific training will be developed."[391] Yet she pledged only to "study and consider" a duty to document, and kept silent on penalties for improper destruction of records.

Political pressure was mounting to such an extent that the government had to fix the problem (or appear to). So De Jong consulted with B.C.'s acting commissioner, Drew McArthur, who asked for the law to give him oversight powers into any duty to document rules. In March that year, two months before the 2017 provincial election, De Jong proudly introduced Bill 6, which he stated amends the *Information Management Act*[392] so that "British Columbia will become the first Canadian province to legislate a duty to document."

This claim was widely ridiculed. "This creates no duty on anybody," wrote Vincent Gogolek, FIPA executive director. "It's not even half measures. A legal duty uses the words 'must' or 'shall', not the word 'may.' "

Bill 6 only gave the chief records officer - a government appointee who reports to the finance minister - the discretion to bring in "directives and guidelines" on the creation of adequate records. The information commissioner - an independent officer of the legislature – would not be able to review any of these decisions. This runs contrary to the Special Committee's advice, which wanted a mandatory duty placed in the FOI law instead, and Bill 6's small measures did not even apply to all public bodies.

Solutions to the oral government problem are discussed further below, but I will first

---

[389]http://www.cio.gov.bc.ca/local/cio/d_loukidelis_report.pdf

[390]Especially valid is his call for improved training to prevent "semantic games" on how requests are interpreted, and for government to do a better job explaining where records are located, rather than telling requesters there are no files when the files do exist within other ministries.

[391]While it seems lamentable here that only a scandal or crisis prompts positive change, in response, perhaps the tide is finally turning somewhat in Victoria against the arbitrary use of power and more towards the rule of law. Some BC FOI applicants tell me that after the two reports, the ministerial FOI offices (as though in response to these events) seem more helpful than usual, for now. As well, the reports will hopefully effect a powershift, and psychologically empower more whistleblowers, and also help dutiful FOI public servants to push back against aggressive political aides, keyboard grabbers and triple deletors.

[392]In B.C.'s *Information Management Act* (current to July 31, 2019): "6 (1) The chief records officer may issue directives and guidelines to a government body in relation to a matter under this Act, including, without limitation, the following: (a) the digitizing and archiving of government information; (b) the effective management of information by the government body; c) the creation of records respecting the government information referred to in section 19 (1.1) *[responsibility of head of government body]*, including, without limitation, directives and guidelines respecting the types of records that constitute an adequate record of a government body's decisions."

try to establish the background and scope of it, illustrating the urgent need for statutory changes.

Perhaps the apt term for the triple-deletion scandal is "shocking, but not surprising," for the overall practice had been publicly known in B.C. for at least 15 years. (Many of the practices that follow will be very familiar to users of the federal *ATIA* as well.)

In 2003, Ken Dobell, then deputy premier and head of the civil service, startled listeners by his comments at an FOI conference. "I don't put stuff on paper that I would have 15 years ago," he said, declaring frankly his purpose for doing so was FOI avoidance. "The fallout is that a lot of history is not being written down. Archivists of tomorrow will look for those kinds of things, and none of it will be there. It will change our view of history." Indeed.

Mr. Dobell said he ran the government via informal meetings or telephone conversations, seldom keeping working notes of either. He did make thorough use of e-mails - his on-line correspondence with the premier was said to be voluminous - but he said "I delete those all the time as fast as I can."[393] Mr. Dobell continued that the intent is not to hide "necessary information" from the media and public, but to avoid having internal e-mails caught up in media fishing expeditions. *Vancouver Sun* columnist Vaughn Palmer echoed most of those observations:

> Not long after the introduction of freedom of information legislation in B.C., a senior bureaucrat predicted the emergence of a "nothing-in-writing" style of government. Civil servants and political appointees deliver their most important advice and instructions in person or over the phone.... "Never put real policy in writing," was a laughline for politicians and journalists alike.
>
> Within a couple of years, some of the most controversial business of government was being conducted at one-on-one meetings with no notes taken, no minutes kept. Likewise, some of the most powerful officials began to disappear from written documentation, the better to exclude open-ended requests for "all memos written by or addressed to" so-and-so.[394]

Mr. Dobell added that fear of FOI inquiries only marginally hinders the free flow of ideas within the civil service as phone calls and informal meetings make up the gap. "Where FOI permits reasonable access, it's good. Where it allows fishing expeditions and cheap research, it forces the careful handling of information." (The term "reasonable" he left undefined.) After this speech, a verb was then whimsically coined in Victoria: to

---

[393]Recording of panel discussion of conference marking the 10th anniversary of the adoption of the B.C. Freedom of Information and Protection of Privacy Act. Sept. 23-25, 2003, Victoria. B.C.'s information commissioner said he was initially concerned with Mr. Dobell's statement, and raised it with him. Mr. Dobell assured and satisfied him, the commissioner later said, that he only deletes insignificant "transitory" emails, not "important" emails or other records, and that Mr. Dobell had written to all deputy ministers to remind them of the need to ensure that permanent records are kept. It is uncertain how widely this email retention directive is actually followed in the provincial government.

[394]Cynics borne out on 'new era' of information, Vancouver Sun, Sept. 30, 2003

"Dobell" a record, and a noun: the Dobell Doctrine.[395]

Complaints regarding record management in B.C. abound. For example, in 2005 the provincial government initiated a highly (and ironically) secretive review of the FOI law by bureaucrats; due to the growing trend towards oral government, no written report was delivered to government by its consultant George Macauley.

During the BC Rail corruption trial in 2010, former Liberal aide Dave Basi told the court he assured others not to worry about their e-mails to him emerging under FOI, because he just printed out his emails and then deleted them; he quipped that "FOI is for purists."

The 2010 Olympic and Paralympic Winter Games Secretariat - a branch of the B.C. Economic Development Ministry, the entity that politically oversaw the Games – stopped recording minutes of their meetings after being annoyed by FOI requests for them.

Over time, the OIPC said it has investigated hundreds of complaints where government claimed that requested records did not exist because they were never created in the first place, and noted the frequent misapplication of the escape-hatch word "transitory."

Solutions

The main solution is a new structure comprised of three essential and interconnected pillars, each supporting the others: (1) legislated record creation, (2) legislated record retention, and (3) penalties for violating parts 1 and 2. Firstly, there is no point in creating important records if they will not be preserved; secondly, records cannot be preserved if they were never created; and third, neither of these actions can guaranteed if there are no penalties for not doing so.

Positively, in 2015 the B.C. government passed Bill 5, the Government Information Act, with much-needed measures to improve electronic preservation and access to government records. But this new Act was grievously lacking in three key aspects:[396]

[1] Bill 5 failed to bring in a legal duty to document (the first pillar above)

[2] Where the Document Disposal Act created a provincial offence for violations, Bill 5 abolished those penalties (the third pillar above)

[3] Bill 5 does not apply to the broader public

[395]Former federal information commissioner John Grace said some officials boast that they follow the advice supposedly given by a New York Democratic Party boss: "Never write if you can speak; never speak if you can nod; never nod if you can wink." At a recorded panel discussion at the 2003 B.C. FOI conference, Vancouver Sun reporter Jim Beatty elaborated on this idea, and explained the unwritten "Briefing Rule" in Victoria: "The high level and professional people in government just don't write anything down. Bureaucrats are told that 'when you brief the minister, put the good stuff in notes, convey the bad stuff orally. If the information is sensitive, send it by email, if it's more sensitive then fax it. Then talk by cell phone, and then by landline phone. It it's most sensitive, talk only in person.'"

[396]The B.C. Commissioner also related a lack of needed powers to the 2015 legislative FOIPP review Committee: "Currently, in British Columbia, my Office has narrow authority to investigate the destruction of records. We may only investigate if the alleged destruction of records occurred after an access request was made. This lack of oversight runs contrary to the spirit of FIPPA. Effective oversight would permit my Office to investigate any complaint concerning the destruction of records — even in the absence of an access request."

sector (e.g., municipalities and universities).

Governments of all stripes (including the current one) continually obfuscate the issue. In a letter of 2015, Amrik Virk, the minister responsible for FOI policy, wrote to the legislative review committee: "British Columbia has enacted more than 400 'duty to create' requirements within legislation," and attached a list of these examples.

If the ministry's purpose in presenting this list was to plead that a new comprehensive record creation law is unnecessary, then it does not succeed - for many of those examples have absolutely nothing to do with decision making. e.g., one includes including "giving notice of the exclusion zone for abortion clinics" for protesters, while others regard "giving notice of a bylaw." That is not documentation of the policy process; it is advising the public about infringements or their rights or information about where to find enactments.

A better route: In 1999, after a decade of pleas by FOI advocates, B.C. passed the *Local Government Act*; it became the first province to fully prescribe what topics must be discussed in local councils' public and closed sessions, and prescribed that certain types of documents must be generated by civic councils, e.g., records of resolutions and decisions. (Regrettably the later Liberal administration partially curtailed these rules when revising the *LGA* as the *Community Charter*.) Why should we accept any less of senior government?

The review by former commissioner David Loukidelis advised a new legal duty to create records of key decisions. So did the all-party legislative review of the FOI law in May 2016. While in opposition, the B.C. NDP introduced several bills to this end (such as the *Public Records Accountability Act*, 2017), before its promise to pass such a law during the last election, including $50,000 fines for breaching it. Recommendation No. 19 of Mr. Loukidelis' report:

> 19. Government should give the most serious consideration to Commissioner Denham's recommendation that a duty to document be created, specifically, it should seriously consider introducing legislation creating such a duty (with the details being worked out in policy at a ministry, even program, level). Government should consider adopting a risk-based approach, with the nature and significance of decisions, actions and transactions being used to determine which records have to be documented and in what manner.

Record creation may in time become a world FOI standard. Australian jurisdictions and New Zealand have broad legal requirements to create full and accurate records.

Regarding penalties

As the third pillar of information management, penalties are essential to ensure compliance with the law. As many longtime FOI applicants know, the response of several government agencies to FOI requests are determined not by their legal or ethical obligations, but instead cynical calculations of what one "can get away with," logistically, financially and politically.

Beyond statutory changes, a strong message to promote a culture of transparency must come from the top. This is an essential start but can only go so far. Although prison terms for some FOI offenses are indeed prescribed in several nations, to some this may at times seem too severe.

But to forgive everything afterwards means to permit everything in advance: those who deliberately choose to violate the law must accept some consequences, and others contemplating the same actions be discouraged.[397] (The CLD noted that in jurisdictions that have these penalties in place they are very seldom applied - just their presence is enough to deter mischief.)

There is no offence (yet) under the B.C. *FOIPP* Act for wilfully disposing of records in an attempt to evade or frustrate an access request. It is of interest that in more than 30 nations, the FOI law includes some kinds of penalties for obstructing the FOI process, including Ireland, Mexico, Pakistan, India, Russia, Scotland, and the United Kingdom.

In the Canadian *ATIA*, there are penalties for destroying records and obstructing the Information Commissioner, but other nations go much farther. In Canada, Quebec's FOI statute contains the broadest definition of obstructionism.

Alberta's *Freedom of Information and Protection of Privacy Act* includes fines of up $10,000 for anyone who, among other things, destroys records for the purpose of blocking a freedom of information request. The Alberta statute also sets out the unauthorized destruction of records as an offence (as noted in my 2010 report on the Alberta FOI law, The Hallmarks of Fairness.)

In regards to email deletion, the whistleblower in the Gretes case reported that a senior Liberal political official breezily dismissed his concerns with: "It's like in the West Wing. You do whatever it takes to win." But here nobody really wins. Everyone loses. The public was mortified by the spectacle of party officials playing cynical political mischief with a human tragedy; officials may "win" some short term advantage, but the outcome is a long term disaster for the public interest.

Government can indeed legislate some conduct, but it is dangerously naive to assume that it can ever legislate attitudes. Still, external constraints are needed if internal ones are lacking (that is conscience, defined by one philosopher as "obedience to the unenforceable"). Hopefully some good will come from the B.C. email triple deletion debacle, and the culture it revealed will be relegated to a dismal memory.

Section 25 – The Public Interest Override

As with a muscle, the public interest override in an FOI statute requires exercising so it will not wither from disuse. Yet it could be argued that the provincial government

[397]Citizens may inquire: "If we are penalized for late tax filings, breaking traffic rules, or serious wrongdoings - to the point of being pursued by government collection agencies, bailiffs or crown prosecutors - then why is government not also penalized for breaking its own laws, such as the FOI statute? (They might perceive a reply of sorts in the famous quotation of the 1990s by B.C. cabinet minister David Zirnhelt: "Don't forget that government can do anything.")

may have violated *FOIPP Act* Section 25 at least several times each year, when it had a duty to proactively release vital information in the public interest, but did not.

In July 2015, the B.C. Information and Privacy Commissioner released a report[398] on complaints that the provincial government had failed to inform the public, per its duty under Section 25, on the risks leading up to the Mount Polley mine tailings pond dam breach that released effluent into three B.C. lakes.

While finding the government had no information about dam-related risks, Denham also made a finding that reinterprets Section 25(1)(b) to mean that, "urgent circumstances are no longer required to trigger proactive disclosure where there is a clear public interest in disclosure of that information."[399] I applaud this principle and urge it be enshrined in a revised B.C. FOIPP Act.

As well, in 2013, the Commissioner supported a complaint by BC FIPA and the UVic Environmental Law Clinic into the failure of government to carry out their Sec. 25 duty. She called for the government to amend this section to remove the requirement that the issue of public interest be "urgent" or timely, and urged that the government make this amendment - which the 2010 Special Committee Report also advised - "at the earliest opportunity." It has not done so. Former NDP Attorney-General Colin Gablemann spoke of need for proactivity:

> We incorporated into the FOI act the strongest public interest override in Canada. We wanted to ensure that the head of a public body would, "without delay," disclose information that was "clearly in the public interest". I don't think this provision has ever been used, and certainly never by the head of a provincial ministry. That represents a huge failure of intent. Have there been no risks of significant harm to the environment, health or safety in B.C. in the last 15 years? How about "other information the disclosure of which is clearly in the public interest"?

Moreover the NDP wrote to FIPA in April 2017: "We believe the spirit of the public interest override should again be reflected both in the Act and the response from public bodies, and we will act to ensure this." We have yet to see this happen.

Section 12 and cabinet agenda headings

As with Section 13, the *Act*'s Section 12 on cabinet confidences also lacks a needed harms test and is overapplied.

For example, when I applied by FOI to view agendas for government caucus committees meetings, it was refused, with the claims that disclosing the one-line topic headings

[398]https://www.oipc.bc.ca/news-releases/1813 See also https://fipa.bc.ca/commissioner-denham-supports-fipa-complaint-on-public-interest-information-disclosure-4/ on the UVic complaint, 2013. After a fine record in Canada, B.C. Commissioner Elizabeth Denham later moved to London to become the United Kingdom's Information and Privacy Commissioner.

[399]See a legal analysis of this OIPC order by Christopher Guly in Lawyer's Weekly - http://www.lawyersweekly.ca/articles/2463

would somehow reveal the "substance of deliberations." I appealed, and the commissioner's delegate in Orders F08-17 and F08-18[400] refuted the government's claims, ruling: "There is no substance to them, and they contain no deliberations." (FIPA and I also argue that mere caucus committees should not be granted the status of "cabinet committees" for Section 12 coverage.)

The government appealed the ruling to the Supreme Court and lost, in Ruling 2011 BCSC 112.[401] Then, in reply to my latest request for the same records, they simply ignored the ruling, and are still applying Section 12 in the same manner today. (Regrettably, cabinet agendas are excluded from the federal *ATIA* entirely under Sec. 69(1)(c).)

There is a major risk of too many records being placed under the cabinet confidence umbrella, as has often been noted in other countries. As FIPA's submission notes: "It is imperative that BC's FOI laws reflect the proper protection of the deliberations of Cabinet, and not a notion that any document however vaguely related, falls within this mandatory exception."

Section 12 also covers "substance of deliberations" of local public bodies, but here, unlike with cabinet, it is hopeful to see that progress is possible, as the following example will attest. In 1999, I made a request to the Vancouver Police Board for the agenda and minutes of its in-camera meetings. It was denied in full, with the Section 12 "substance of deliberations" claim. I appealed, and in Order 00-14, the Commissioner rejected the VPB's claim and ordered many of the records opened, including agenda headings.

The Board later explained that it had inherited its traditions on meetings from years past, and had simply followed them without reflection. Then, after its careful consideration of the Order, everything changed. Fewer issues were placed into closed session discussions and more into open meetings, and today the Board even proactively posts portions of all its closed meeting agendas online.

This was one of the largest reversals in attitude and practice on an FOI issue I have ever seen, one that I wish all public bodies would follow.[402] While I am aware that cabinet deals with topics on a higher level than those entities above, may we hope cabinet could one day do likewise, after the right time passage?

I recommend that Section 12(2) be amended to state that the Section 12 exemption does

---

[400]See https://www.oipc.bc.ca/orders/971 and https://www.oipc.bc.ca/orders/975

[401]B.C. Supreme Court ruling 2011 BCSC 112 (Jan. 31, 2011). The ruling stated: "In my view, the conclusion of the IPC delegate, that headings that merely identify the subject of discussion without revealing the 'substance of deliberations' do not fall within the s. 12(1) exception, was a reasonable decision." Justice B.M. Joyce also stated that the standards for FOI rulings should not be "correctness" but "reasonableness." The ruling discusses the status of "government caucus committees," and limits how the B.C. government can define cabinet documents to withhold records.

[402]Some do: SFU posts quite detailed "summaries" of its closed session meetings minutes online (http://www.sfu.ca/bog/summaries/2009/september.html); and full minutes of the Langara College Board closed meeting are posted online, after a "Confidentiality Lifted" motion for them is passed at the subsequent meeting.

not apply to agendas or topic headings, including such examples as "items for discussion" and "legislation review." Moreover I endorse this proposal noted in the NDP's response to FIPA of April 2017:

> We also support the position of the Information Commissioner regarding Section 12: the Commissioner has clearly stated that "the importance for our system of government of generally protecting the confidentiality of Cabinet proceedings and deliberations is beyond question" (https://www.oipc.bc.ca/special-reports/1274) but that this should not be applied as a blanket mandatory exemption, as the BC Liberals have done, but rather that "the government can maintain an appropriate and necessary level of confidentiality using a discretionary exception" exercised by Cabinet (https://www.oipc.bc.ca/special-reports/1935m).

TWO JURISDICTIONS – NIGHT AND DAY

In my journalistic work I have found no jurisdiction that manages freedom of information better than American states - where the oldest known public records law in North America that I know of comes from Wisconsin in 1849 - and from whom much can be learned. The starkest contrast in response times can be found by those who make access requests using both the B.C. and Washington state FOI laws.

The American public and media would not tolerate the service found in the B.C. FOI system. I have had records emailed to me by the American government, in full, within three days (and one time *overnight*), that would likely have taken months under our law and have been filled with deletions.

Journalist Sean Holman reported the same results in his work, obtaining much fuller and faster replies from the Washington state FOI system than the B.C. one, regarding records of lobbyist Patrick Kinsella's activities.

Similarly, in 2009, FIPA filed two identical FOI requests on the same day with the offices of Washington Governor Christine Gregoire and B.C. Premier Gordon Campbell and got very different results. FIPA asked for information about intergovernmental meetings related to the new RFID-equipped drivers' licences. Governor Gregoire's office responded in full in less than a month, with copying costs of US $5.30. The Office of the Premier did not provide an initial response

until after the Washington office had sent all the requested documents, but did send a bill for C. $620.

While on the subject of cross-border comparisons, consider the B.C. – American partnership for a regional system to trade greenhouse gas emissions. The Americans published responses to the proposal for emissions trading. Some 90 submissions from corporations, non-profits, interest groups and individuals can be read online at the Western Governors Association website.

By contrast, the B.C cabinet committee for climate action fielded submissions from more than 170 "interested parties" – all were strictly confidential; even a list of who addressed cabinet was not released. New Mexico, California and Washington State have posted vast amounts of material on climate change discussions online – all types of records withheld in B.C.[403]

On such grounds in fact, Canadians often use American FOI laws to find records on Canadian affairs that they cannot obtain here. I have heard visiting American journalists deride Canada's FOI laws as "pathetic" in comparison to their own, and the process of trying to obtain information from Canada on cross-border issues as "shockingly bureaucratic," and I was unable to contradict them.

[403] *Secretive Campbell compares poorly to the wide-open Americans.* By Vaughn Palmer. Vancouver Sun. Jan 22, 2008

Conclusion – Looking Forward

Back in 1993 when NDP Premier Mike Harcourt's *FOIPP Act* came into effect, it worked fairly well for the first two years. Then, likely inevitably, the honeymoon soured when FOI requests began revealing governmental failings. Harcourt's genuine support for transparency was sharply reversed when he was succeeded in 1996 by the NDP's Glen Clark, the only B.C. premier who openly mocked the FOI concept and never even feigned support for it.

In fact, Clark made a joke (or was it?) at a media event that "If I had my way in cabinet, we wouldn't have an FOI Act." On that point, the first Commissioner David Flaherty upon retiring in 1999 disturbingly wrote that he had considered the possibility of the Clark government "abolishing" the B.C. *FOIPP Act* as being "by no means an idle threat."

Next, Liberal premiers Gordon Campbell and Christy Clark promised to create "the most open government in Canada," and then promptly did the opposite, as their offices used mass email deletions and post it notes, and launched court challenges to the Commissioner's orders (amongst countless other games). The direction for the public service regarding FOI came from the top.

Our hopes were boosted in the last B.C. election, when the NDP, in a questionnaire to B.C. FIPA on April 27, 2017, pledged to solve the three worst problems. It is vital to note that in the text, the NDP did not promise to study or modify the problems – they promised to end them, period. It seemed as if Premier John Horgan wished to break the old patterns. Yet the hour is late, for it usually happens that incoming politicians' enthusiasm for the FOI law sags within one year, dampened by officials who will always oppose it (and a few who wish it had never been passed).

In fact the latter group likely produce the strongest opposition. In its submission to the 2004 review, the provincial bureaucracy had claimed that it was only trying to "fine-tune" the Act's language, so that its "original intent" would be better expressed. In response, the information commissioner's aide, in a letter that year, noted "very grave concerns" in a stern reply:

> It is objectionable for appointed public servants who are subject to *FOIPPA* to, a decade after *FOIPPA*'s enactment, purport to be identifying and expressing the 'original intent' of *FOIPPA*, an Act of the Legislature. Talk of fine-tuning the law or returning to its original intent disguises the real effect of the [bureaucracy's] recommendations discussed below - to reduce the public's right of access, and impair openness and accountability.

The FOI training video for B.C. civil servants of 1993 called *Finding a Balance* says, "We must realize that embarrassment is not an exemption. Our culture is changing to one of openness." Yet this point is forgotten by many. In his final annual report, Flaherty wrote that:

> Senior government officials have complained that they were no longer free to give candid advice to their political masters, because of the risks of disclosure of what they write in briefing notes. It

> was almost as if democracy was being undermined by too much democracy.
>
> I was actually told by a senior public servant that the public's right to know was limited to what they could ask for through their elected representatives. When I countered that this sounded too much like the BBC-TV series, *Yes Minister*, there was unabashed acclaim for Sir Humphrey as an outstanding public servant.

Another official outlook was voiced in an editorial by former B.C. Liberal attorney general Geoff Plant (2001-04) in the *Globe and Mail*:

> We say we want open government, but there's ample reason to doubt we would ever actually know what to do with it. Is open government about looking for fun new ways to embarrass politicians, or is it about giving ourselves as citizens the tools to improve how we are governed? . . . . We should not be surprised if the government takes policy discussions back behind closed doors. Not because politicians have easily bruised feelings, but because experience too often teaches them that people don't have much to offer except criticism.[404]

The discussion continues everlastingly and circuitously. The B.C. government is required by law to appoint a legislative committee to review our *FOIPP Act* every six years (while now the *ATIA* must be reviewed by Parliament each five years). Those reviews, as in Ottawa, tend to bear no fruit because government is not bound to implement the recommendations. In fact, the best recommendations of all four BC legislative reviews since 1998 were shelved by premiers and cabinets and never acted upon; one only wishes the committees' power was equivalent to their good will.

I have spoken to every review, and not one of my 67 repeated recommendations for reform have been passed. What else could this situation appear but hopeless?

Yet as I write this in Vancouver, 4,361 kilometres from the nation's capital, I reflect that if it wanted to, British Columbia could provide inspiration for the federal *Access to Information Act*, and even become the world leader on FOI law and practice. It is certainly not so now, but it could be, and the choice is ours.

---

[404]We want an open government, but we're far too critical for it, by Geoff Plant. The Globe and Mail, Dec. 07, 2015. (This plaint prompted one pithy commentator: "Poor babies. If you can't take public criticism, work in the private sector.")

LESSONS FROM THE UBC - COCA COLA FOI DISPUTE

I should like to conclude this chapter on my lifelong province of British Columbia with a rather interesting case study. Free access to public-private contracts is essential to the public interest, yet B.C. *FOIPP Act* Sections 17 and 21 (economic harms to government, and to third parties, respectively) were misapplied in the case below. I became familiar with this issue, after waging a five-year legal battle to view the 1995 University of BC-Coca Cola exclusive marketing contract while I was a student and working at the *Ubyssey* student newspaper - my first FOI legal dispute and a formative influence for my many later cases.

Much was at stake because this contract - meaning only Coca-Cola products could be sold to the 75,000 students and staff on the 993 acre campus - was the first such exclusive public-private marketing deal with a public body in Canada, and I filed the first FOI request to view one. In such a partnership between the two sectors, the question arose - whose culture would prevail, that of corporate secrecy or public transparency?

UBC refused, I appealed to the Office of the B.C. Information and Privacy Commissioner (OIPC), and voluminous arguments were made (while UBC assured us that "the contract itself is securely locked in a Chubb safe"). Then in 1996 a disaster ensued. The Commissioner David Flaherty in Order 126 ordered the contact remain sealed, accepting the university's and companies' Section 17 and 21 claims of harms.

The *Ubyssey* appealed that order in judicial review in B.C. Supreme Court. We were widely expected to lose the case (and even I was not hopeful), for the power and funding was weighted so heavily on the other side, yet we did so anyway on principle. Then to our surprise, we won and Order 126 was overturned, after the newspaper's lawyers demonstrated that at American universities, such exclusive beverage contracts were freely publicized even without FOI requests, and with no demonstrable harms incurring. The judge also stated the first commissioner should have, but did not, consider my pleas on the Act's Section 25, the public interest override.

Mr. Flaherty's term expired, he was succeeded by David Loukidelis in 1999,

and a new inquiry was held. In his influential Order 01-20 of 2001, the new commissioner wrote the contract should be released because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records." (I believe all Canadian FOI laws should be reformed to incorporate this principle.)

He also insisted on specific evidence for potential harms, of which none was produced, whereas his predecessor had just accepted bald assertions of injury from the company. Thus the landmark initial OIPC ruling was followed by a landmark reversal. Henceforth, in a case closely watched across Canada, no public body could withhold such contracts from the public. (UBC also repealed its much-criticized Policy 116, which gave its corporate partners too much influence in FOI decisions.)

The matter then took a darker turn in three unexpected ways. Firstly, in his submission to the first OIPC inquiry, UBC president David Strangway[405] promised that "almost all" of the contract's profits ($8.5 million over 10 years) would be spent on improving disabled access at UBC, and pleaded that my publicizing the contract might scuttle the contract and so imperil their funds. Yet five years later I investigated and reported that UBC had spent *less than 10 percent* of the total contract profits on disabled access. Amongst the incidental beneficiaries, 21 percent - more than $1 million - had instead gone to the contract negotiating firm Spectrum Marketing, led by a former Coca-Cola vice president. (Soon afterwards, drinking fountains began disappearing from UBC buildings, replaced by Coke machines selling French imported bottled water.)

Secondly, there is an important principle in FOI work: old secrecy habits die hard, and no single victory's impacts can be taken for granted. Two years after the Coca Cola contract was liberated from its Chubb safe, the ever intransigent UBC simply refused to accept that precedent, and so denied my later FOI requests to see its similar exclusive supply contracts with a bank, an airline, an internet provider, and Spectrum Marketing. Hence I had to appeal in inquiries

[405]The same President Strangway, who wrote in the Vancouver Sun (Dec. 5, 1985): "Above all, I want the university community and the public to feel that UBC is a place with no secrets and that information about it and its activities is open and accessible. . . If we apply that yardstick to the academic life of the university, why should it not apply equally to its administrative and business life?"

again, whereupon the OIPC ordered those contracts opened too (in Orders 03-02, and 03-03, and 03-04). Such obstructionism on contracts is hopefully *passe* by now.

Thirdly, fallout came from Victoria. In 2006 the B.C. government tried to pass Bill 30 that would have exempted designated contracts and projects with private sector partners, the so called P-3s, from FOI requirements (while many nations would post such records online.) This bill, which had no such statutory precedent in Canada, would have amended the B.C. *FOIPP Act*'s Section 21, so that the government must refuse to release information - *for 50 years* - that was "jointly developed for the purposes of the project," and that was "shared or jointly developed explicitly in confidence," and could harm "the negotiating position of the third party," along with other sorts of supposed harms. Concerted opposition defeated the bill.

That proposal was not surprising, for public bodies such as UBC were obviously vexed at the OIPC orders. In 2004 the B.C. bureaucracy complained to a legislative FOI review that the commissioner's rulings to open up public-private contracts had "undermined fair and open procurement processes that will result in the best deal for the province." The commissioner's office tartly countered: "This serious allegation is a calculated appeal to politics, and we note that no particulars or evidence have been provided to support this sweeping claim."

At educational institutions, not all lessons are to be found in the classroom. In this onerous five-year UBC endeavour (a dispute that likely cost all sides a combined total of over $150,000 in legal fees), students learned to fight for their basic legal rights, including their rights to information. At the time, I was told our court appeal was dismissed in senior UBC executive circles as "mischievous and doomed to fail." In the end, it was neither. The lesson was that on such points of principle - never give up.

Foreign Affairs

CHAPTER 16 - WHO MAY APPLY

Should non-citizens be permitted to use a national FOI law?

As befits the internationalist theme of this book, we should not overlook the question of just who in the world is permitted to file a freedom of information request. Although many writers frankly do not consider this topic the most urgent reform needed for Canada's *Access to Information Act* (and politicians see no domestic political gain from it), it is nonetheless a truly significant one.

The right of all people regardless of their citizenship to make access requests is the international standard, included in the FOI laws of 94 of 128 nations, including that of Canada's parliamentary model the United Kingdom, and all Canadian provinces.

But not in Canada's *ATI Act*. Thus the Polish news media would not be able to file an *ATIA* request to Canada regarding the 2007 death of a Polish traveler in the Vancouver airport following a Taser electrocution by police, yet the Canadian media could do so to Poland if the same tragic fate befell a Canadian traveler in Warsaw's airport, for Poland's FOI law allows "anyone" to access records. This is surely an unjustifiable situation, for actions in one nation often profoundly impact the people of other nations.

Not all endorse the principle. At a parliamentary *ATIA* review panel a few years ago, a government backbench MP strongly objected to amending the *Act* to permit foreigners to use our law. He raised the familiar, obvious warning that foreign terrorists could utilize our FOI law to obtain records so as to endanger Canada's national security and public safety. These claims can be readily invalidated with the application of several facts and common sense:

(1) There are existing exemptions in the *ATIA* - which are very generously worded and broadly applied (e.g., Sections 15 and 16) - to prevent such harmful releases.

(2) If any foreign persons were inclined to harm Canada, they can still today obtain records through our *ATIA* by using an innocent-appearing citizen intermediary to apply for them. Newly granting them the right to apply for records themselves directly from abroad would not remove that ability. If anything, it might even aid our security if some ill-intentioned foreign persons now chose to apply for records in their own names, instead of anonymously through a third party. In sum, there would be no existing security lost here, and possibly a bit gained.

(3) To permit foreigners to file FOI requests is the most common global practice, and damages have not been reported in consequence. If allowing this right could create such dangers, then why has the United

States – perhaps the target nation at highest risk – granted this right to non-citizens in its *FOIA* continuously since its passage in 1966, and never seriously moved to rescind it (even after the September 11, 2001 attacks on New York and Washington)? Would the Americans choose to expose themselves to risk?

There are also worries raised about added costs to our FOI system. Yet the London-based human rights organization Article 19 noted that such broader access might well assist researchers from abroad to reveal information to the overall benefit of people of the FOI host nation, and that governments need not fear costs or hardships due to foreigners' access requests:

> Non-citizens may well play a role in promoting accountable, good government, for example by exposing corruption in the procurement of arms from abroad.... there are few risks or costs associated with extending the right in this way, as evidenced by the experience of the many other countries which do this. In practice, only few non-citizens can be expected to make requests for information, so little burden will be imposed on public authorities.[406]

In a world ever more integrated and interdependent in the context of the internet age, many topics could be a subject for an FOI request to another country. If granted in Canada, the right is likely to be often utilized by prospective immigrants wishing to learn more about their immigration application status (a perfectly justifiable usage).

One obvious request might be for records of unknown pollutants spilled into the river of a neighbouring country, with that river then flowing into the FOI applicant's nation. Others might entail climate change, aquaculture and agriculture, human and plant diseases, the tracking of harmful or endangered animal species, overfishing, pesticide use, internet fraud, election meddling, child exploitation, hate propaganda, drug trafficking, sex slavery, terrorism, arms dealing, international trade, and the treatment of one nation's emigrants, students, workers and tourists abroad.[407] A simple amendment to the *ATIA* to permit "anyone" to file requests would render this possible.

• Canada's *Access to Information Act*, 1982:

Under Section 4(1), the *ATIA* gives Canadian citizens, and individuals who are permanent residents within the meaning of the

[406] *Memorandum on Nepal's Freedom of Information Bill 2063*, by Article 19, London, 2006. Endorsed by the United Nations Education, Scientific and Cultural Organization (UNESCO)

[407] In filing access requests abroad, the applicant often faces the very daunting barrier of exemptions in FOI laws for "disclosure that may harm international relations" (besides the other exemptions), which are frequently over-applied from an abundance of caution and the anticipation of displeasure from the foreign state. All the Canadian provinces' FOI laws have an equivalent of this exemption, and federally the *ATIA* includes the discretionary Section 15 - International affairs and defense - an exemption that requires amendment to include a public interest override and time limits. (Another topic of much current dispute, although beyond the scope of this report, is the very pressing need for more transparency in multinational organizations that can wield great influence in member nations, such as NATO and the World Bank.)

Immigration and Refugee Protection Act, the right to file requests. But Section 4 (2) adds "The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate."

All other individuals and corporations "present in Canada" have been added, by cabinet order, as additional classes of eligible requesters. (Information Extension Order No. 1, SOR/89-206.) Treasury Board states that "present in Canada" means physically situated in the country, at the time the information request is made and access is given. (See Treasury Board of Canada Secretariat, Implementation Report No. 19 - July 6, 1989.) Proof of applicant status is not required. But for now, non-citizens who are not resident in Canada may not file *ATIA* requests.[408]

GLOBAL COMMENTARY

• United Nations *International Covenant on Civil and Political Rights* (1976), Article 19, international law, ratified by 35 states:

Everyone shall have the ... freedom to seek, receive and impart information.

• *The Johannesburg Declaration of Principles*, adopted in 1995 at a gathering of experts in international law, national security, and human rights:

Principle 1: Everyone has the right to obtain information from public authorities.

• Article 19, *Model Freedom of Information Law*, 2001:

3. Everyone shall have the right to freedom of information, including the right to access information held by public bodies, subject only to the provisions of this Act.

• Council of Europe, *Recommendations on Access to Official Documents*, 2002:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

• African Union, *Declaration of Principles of Freedom of Expression in Africa*, 2002:

Everyone has the right to access information held by public bodies. [As well, the 1981 African Charter on Human and People's Rights, states in Art. 9 (1) "Every individual shall have the right to receive information."]

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003:

Any person at all should be able to access information under the legislation, whether a citizen or not.

• Arab League, *Arab Charter on Human Rights*, 2004:

[408]Among the provinces there is one historical curiosity. The Newfoundland FOI law of 1981 - the only one to ever do so - restricted the access right to: "4. (c) a permanent resident of Canada within the meaning of the Immigration Act, 1976, domiciled in the province." But this clause was deleted long ago and today anyone may request records under the Newfoundland law.

Article 32 (a). The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers.

• Open Society Justice Initiative, *International Law and Standards on Access to Information*, 2004:

3. Anyone may request information without having to specify grounds. All persons, whether or not they are citizens of a given country or resident there, should be able to file information requests and should not have to provide grounds or reasons for their request: the right of access to information is a fundamental human right which can be exercised by all, regardless of frontiers.... Information requests shall be treated equally without discrimination with regard to the requestor.

• Organization for Security and Co-operation in Europe (OSCE), *Access to information by the media in the OSCE region: trends and recommendations*, 2007:

All participating States should adopt freedom of information legislation that gives a legal right to all persons and organizations to demand and obtain information from public bodies and those who are performing public functions.

• Council of Europe, *Convention on Access to Official Documents*, 2009:

Article 2 – Right of access to official documents. 1 Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.

• Organization of American States (OAS). *Model Law on Access to Information*, 2010:

5. Any person making a request for information to any public authority covered by this Law shall be entitled, subject only to the provisions of Part IV of this Law.

OTHER NATIONS

As noted above, the right of all people regardless of their nationhood to make access requests is the global norm, found in the FOI statutes of 94 of 128 nations. Of these 128, I counted 18 Commonwealth nations that permit it, while 14 do not. This right is much more accepted in the non-Commonwealth countries, where 76 allow it, while 20 do not (although sometimes the statutory wording is unclear).

• While usually stated simply as "everyone" or "anyone" may make a request, sometimes the right is worded more fully, as in Armenia's *Law on Freedom of Information*, Article 6.2: "Foreign citizens can enjoy the rights and freedoms foreseen by the following law as defined by the Republic of Armenia Law and/or in cases defined by international treaties."

• Several nations allow FOI requests by non-citizens who nonetheless reside in the country – Israel, Malta, Moldova, Mongolia, New Zealand, and Turkey. In South Korea, a separate Presidential Decree allows access by foreigners who are residents, in the country temporarily for education or research, or companies with an office in Korea. In Russia, the law's wording is not fully clear

but contains a clarification that a "citizen" can be a "natural person" not obliged to have Russian citizenship.

• A few FOI statutes such as Israel's go a step further, in respect to rights:

> 12. Applying the law to a person who is neither a citizen, nor a resident. The stipulations of this law shall also apply to a person requesting information who is neither a citizen, nor a resident, with regards to information concerning his rights in Israel.

The law of Vietnam is mainly limited to citizens, although Article 36 similarly gives foreign residents the right to information relating to "their rights and obligations." In this scenario, a prospective immigrant residing outside the country could apply to that state for records regarding his or her immigration application in process, and this right is surely better than none. (In actual practice in Canada, some such foreign applicants have to pay to obtain these *ATIA* records via their Canadian local immigration consultants or lawyers.)

• There is a short-sighted qualification in a very few FOI laws, such as that of Taiwan:

> Article 9. Foreigners may request government information in accordance with this Law only when the laws of their countries do not restrict the nationals of the Republic of China from requesting government information of such country.

For this reason, the CLD-RTI analysts deduct one point. Turkey's FOI law in Article 4 prescribes the same measure for non-citizen residents, on "the principle of reciprocity," as does Malta in Article 2 of its law. It is noteworthy that if the American FOIA statute, for example, had such a restriction, then Canadians could not file FOI requests to the United States (as they so often do), since Canada's *ATIA* does not extend Americans the same right.

This tit-for-tat reciprocity principle might not seem unreasonable at first sight, until one considers the justness of penalizing a would-be applicant for the failings of his or her own government's FOI statute, flaws entirely beyond the applicant's control. It would also create a barrier to the publication by foreign journalists of news that could be of vital concern to the people of the FOI-host country (e.g., on cross-border health or environmental risks), news that is easily read abroad when posted on the internet.

CANADIAN COMMENTARY

• *Bill C-39*, introduced by NDP MP Barry Mather, Canada's first freedom of information bill, 1965:

1. Every administrative or ministerial commission power, and authority shall make its records and information concerning its doings available to any person at his request.

• *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987:

2.9. The Committee recommends that any natural or legal person be eligible to apply for access to records under the *Access to Information Act*. The location of the applicant should no longer be relevant.

• John Reid, former Information Commissioner of Canada, model *ATIA* bill, 2005:

5. (1) Subsections 4(1) and (2) of the Act are replaced by the following: 4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, any person has a right to and shall, on request, be given access to any record under the control of a government institution.

• *Bill C-556*, introduced by Bloc Quebecois MP Carole Lavallée, 2008:

4. (1) Subsections 4(1) and (2) of the Act are replaced by the following: 4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, any person has a right to and shall, on request, be given access to any record under the control of a government institution.

• Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012:

[Upon noting there is no such right in Canada's *ATIA*.] This is problematic since human rights apply to everyone. Furthermore, international institutions and foreigners can play an important role in promoting accountability in Canada.

• Information Commissioner Suzanne Legault. *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, March 2015:

Recommendation 2.3 - The Information Commissioner recommends extending the right of access to all persons.

Standing Committee on Access to Information, Privacy and Ethics: *Review of the Access to Information Act*, chaired by MP Blaine Calkins, report, 2016:

Recommendation 11 - That extending the right of access to all persons be considered in the second phase of the reform of the *Access to Information Act*.

LOOKING IN FROM THE OUTSIDE

Below are some stories I produced by applying for records through foreign FOI laws, which are vastly more effective than Canadian ones. I could cite dozens of such examples by Canadian journalists.

• *Canada lobbied U.S. over TransCanada's Keystone pipeline*. The Financial Post, Jan. 23, 2011

Canada's ambassador to the United States wrote to the head of the U.S. Environmental Protection Agency, urging the EPA to disregard greenhouse gas emissions from Alberta oil extraction as it considered whether to support the proposed Keystone XL pipeline to Texas. As well, one Alberta bureaucrat warned the EPA its greenhouse gas stance could place at risk "the longstanding energy trading relationship between our two jurisdictions."

I obtained this two-way letter exchange promptly, in full, via the EPA's FOI branch. It is highly doubtful I could ever have extracted these through the Canadian *ATI Act*; the foreign affairs *ATIA* branch in Ottawa has a backlog of several years, and exemptions would almost surely have been applied to black out most of these records.

• *U.S. worried about Canada's ability to respond to oil spills*. Globe and Mail, Apr. 28, 2015

"A catastrophic oil spill would set the Puget Sound cleanup effort back decades, and result in billions of dollars in harm to our economy and environment." So Washington State Ecology Department officials wrote about the proposed Transmountain oil tanker traffic through shared waters in memos to their governor Jay Inslee in 2013. They added that the Canadian federal oil response regime is "probably a couple of decades" behind the American one, and "we need to have a level playing field with the Port of Vancouver."

Moreover, U.S. Environmental Protection Agency lawyers discussed suing Canada's National Energy Board for the right to more fully provide input in the Transmountain pipeline hearings. (These are records of active legal advice, of the kind it is unthinkable to be ever revealed via any Canadian FOI process.)

• ***Vancouver's Olympics were a success, but not without shortcomings: U.K. officials.*** **Vancouver Sun, Jan. 3, 2011**

Volunteers at the 2010 Olympic Games in Vancouver were underfed, the Games' colour scheme was "pale and too complex," and drivers became lost due to poor signage. Yet the free Robson Square live sites were "a huge success," the security plan worked well, and the passionate Vancouver public spirit triumphed over the obstacles.

These were the candid observations of British officials from the U.K. Department for Culture, Media and Sport who visited the 2010 Games to provide lessons for planners of the 2012 Summer Olympics in London. I obtained these memos from the Department using the British FOI law.

• Through FOI, I found internal U.S. State Department estimates about who would win Canadian elections (such as a memo saying that Conservative Prime Minister Kim Campbell was surging to victory in the summer of 1993, before her party was reduced to two seats in the fall election).

• Using the *PAIA* of South Africa, I obtained state records relating to apartheid in the 1980s.

• 2019 marks the 30th anniversary of the December 1989 Romanian Revolution, which overthrew the Communist dictator Nicolae Ceausescu, in which about 1,100 people were killed. To prepare for this event, I utilized the FOI laws of three nations - Britain, the United States and Canada - to obtain more than 1,000 pages of diplomatic cables sent from inside their embassies in Bucharest, in the centre of the storm raging outside in the streets. (The American State Department took 10 years to fulfill the request.)

The records, which have not been seen before, are vivid, thoughtful and moving. For the interest of the Romanian people, I digitally scanned all the papers and posted these PDFs on my website – http://www3.telus.net/index100/romania. These received thousands of web visits from that nation.

Appendix - OTHER FACTORS

(1) What price accountability? The true cost of FOI

FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure.

- Post-legislative scrutiny of the UK Freedom of Information Act 2000. UK House of Commons report, 2013

Can one place a price tag upon democratic rights, such as freedom of information? Let us consider that question with an open mind.

Treasury Board statistics in Ottawa show the total cost of the *Access to Information Act* system in 2017-2018 was $69.8 million, while the average cost per request to process was $714.50. When divided into the overall federal government spending in 2017/18 of $332.6 billion, the FOI cost amounts to 0.021 percent of the total national budget. Is this an onerous burden?

Some argue so, such as a public relations official writing in the *Canadian Military Journal*:

> Only cursory efforts have been made by Treasury Board to estimate costs associated with ATI. This is unfortunate, since incremental costs to DND alone would easily be tens of millions of dollars a year. A calculation of the overall cost to government would shock Canadians, and we have not seen, nor are we likely to see in the near future, a call by the OIC to have this issue seriously studied.[409]

Although this was published two decades ago, the same basic complaint persists sometimes today, of FOI as a "waste to taxpayers." In response one could argue that the reverse is true, because public outrage at government misspending – exposed through FOI requests - prompts the state to cut such waste, or even prevent it before it occurs. Hence the modest annual cost of FOI may be an impressive bargain.

Vancouver Sun columnist Vaughn Palmer noted this fact back in 1992, before the B.C. FOI law was passed, while reporting that the government had advanced hundreds of millions of dollars in loans to private businesses, with all the terms secret, even the loan size. In lieu of FOI law, the media had to rely on leaks, which exposed cases of massive waste in the loan program. Today

[409] Lt. Col. Brett Boudreau, *Force for Change or Agent of Malevolence? The Effect of the Access to Information Act in the Department of National Defense*. Canadian Military Journal, Summer 2000

records on such cases could be publicized through FOI requests.[410]

In one case then, a minister tried to push through a loan to an aviation company, at cost to taxpayers of $40 million or $160,000 per job - which the media only knew because a confidential cabinet paper on the proposal was leaked to the Sun. The "loan" died soon afterward, a victim, some said, of premature disclosure, wrote Mr. Palmer, adding:

> That kind of disclosure might have helped to derail other boondoggles - and there are plenty of examples. The recent review of government finances determined that some $300 million worth of government loans have gone bad in recent years. Part of the price tag for not having freedom of information.[411]

Journalist Russ Francis of Monday Magazine made the same point: "How many more fast ferry projects and Skeena Celluloses will never even be proposed for fear their terms will be revealed under FOI?"[412] Conversely, knowing the FOI system is ineffective can enable politicians and bureaucrats to spend in ways that they realize the public would consider intolerable if it knew.

We also too often forget the public paid for the production of these records, millions of them, and so they are for that reason as much the public's *property* as are road, schools, and bridges. (The public hence should not have to pay for their production twice, through FOI fees.)

Even a very traditionalist Canadian government report, entitled *Access to Information: Making it Work for Canadians* (2002), found that the entire federal FOI system cost less than $1 per Canadian per year:

> This is a modest cost, in light of the significant public policy objectives pursued by the Act: accountability and transparency of government, ethical and careful behaviour on the part of public officials, participation of Canadians in the development of public policy, and a better informed and more competitive society.[413]

Yet some officials try to thwart reforms to the FOI law and discredit it by telling politicians (in private) that the process is too often used by "frivolous and vexatious" applicants, such as some journalists seeking sensational information that they can use to "sell papers"- all of which causes the state to waste funds and labour to process FOI requests, resources that are more needed to "provide core services to the public," and so forth.

---

[410]Or sometimes perhaps not. In such cases of government loans, I could easily envision the government inappropriately applying B.C. *FOIPP Act* exemptions to deny access, such as Sec. 12, Sec. 13, Sec. 17, Sec. 21, and others. This in turn might prompt appeals to the Commissioner, two years for a ruling, an order that the government might then appeal to judicial review, etc. Woeful as all this is, still better overall to have the *Act* than not.

[411]Cry *freedom of information* this week. By Vaughn Palmer. *The Vancouver Sun*. March 30, 1992.

[412]Stanley Tromp, *The Vanishing Record. A report on needed improvements to British Columbia's Freedom of Information and Protection of Privacy Act*. Vancouver, 2016

[413]*Access to Information: Making it Work for Canadians*. Report of the Access to Information Review Task Force. Ottawa, 2002. Appended with 29 research reports

Yet even if such problems had ever occurred, this would not invalidate the FOI law. Moreover, if a very few persons were truly misusing the FOI system, the B.C. government - and now the federal one under the *Bill C-58* amendments of 2019 – have option of blocking "frivolous and vexatious" applicants.

In 2007 Ian Paisley, the First Minister of Ireland, indicated he would like to limit FOI enquiries aimed at the Executive. "On occasions," he argued "the requests are of a wide-ranging and detailed nature that requires many hours of research, and are sent in by lazy journalists, who will not do any work, but who think that we should pay them and give them the information that they want."[414]

But on the contrary, the opposite is generally true, for journalists who research, design and file access requests are amongst the hardest working, as they need to be when the process is so increasingly onerous; and surely less indolent than those who rely upon press releases for story inspiration (as the state infinitely prefers they would).

Regrettably, these specious claims may be influential. A preferable outlook was voiced by B.C. premier Mike Harcourt, who told the Webster journalism awards dinner in 1993 that "our government passed an FOI law so you fellows can do more stories."

As regard to claims of the media being driven solely by profit, the notion that information obtained through FOI requests sells more newspapers these days is quite amusing. If only it were so! When the Canberra Times of Australia sought information on various programs through FOI, the government proposed hefty charges, justifying these by claiming the paper would gain a commercial benefit. The editor replied:

> I would dearly like to see the research to back up that claim. Sadly, to my knowledge, there is no evidence that newspapers publishing serious articles for the public benefit gain anything in circulation or advertising revenues. If anything, such revenues are more likely to be threatened. Circulation is more likely to be boosted by the most superficial superstar reporting tripe. [415]

Indeed does anyone really believe that a background report to cabinet on proposed sales tax reform would "sell more newspapers" than tales of illicit Hollywood romances? Moreover, it is well known that traditional media are in dire financial straits (particularly newspapers, such as with Postmedia's bankruptcy, and I can attest that no journalist becomes affluent by filing FOI requests).

In 1997 the minister in charge of FOI administration in B.C. raised a furore when he complained that the FOI fee schedule was "an explicit subsidy to major media conglomerates," and asked "why should the taxpayer subsidize research" for the nation's largest newspaper chain?

---

[414]'Lazy Journalists,' by Mark Devenport. The Devenport Diaries. BBC News. Oct. 9, 2007

[415]Cabinet briefings must be kept private to ensure sound advice. Canberra Times, Nov. 25, 2007

I have seven responses to this complaint.

(1) As noted above, media FOI requests often reveal government waste, spurring it to prevent or reduce such waste. As well, the media usually account for only five to ten percent of FOI requests.

(2) Media FOI requests were intended to serve the public by providing it with vital information, and the higher fees then being planned would most impair not chains but smaller community, student, and alternative media who could least afford to pay them.[416]

(3) If government wanted to save money on the FOI process, it would stop resisting the release of records, up to Commissioner's inquiries and court challenges to overturn OIPC orders, with the attendant heavy legal fees.

(4) If government really worried about the cost of information processing, it would reduce its vast public-relations apparatus, which costs millions of dollars more annually than the FOI system. Costs also rise when PR branches labour upon "issues management" strategies in response to FOI record releases.

(5) Private corporations are far heavier users of the FOI law than media (i.e., 45 percent of *ATIA* users in 2017/18), yet government never publicly complains of the former applicant category. This is likely because such businesses' FOI requesting creates no political embarrassments, and this despite the fact its usage is driven solely for private profit - often seeking records on their competitors' bids, contracts, etc. - unlike the media's, which at least in principle is co-mingled with the broader public interest.

(6) Government members often forget that their own party's research branch was often amongst the heaviest users of the FOI law when in opposition, and may be again after losing power – whereupon it would then be most grateful for a well-functioning Act.

(7) The government could save money on FOI costs by releasing more records routinely, and not advising the applicant to use the FOI route as a first resort, which is contrary to the intent of the *Act*. As well, time is money, and FOI request processing costs can rise when the records sought are so disordered that it takes officials longer to find them – hence better records management is advisable.

As Canadian Newspaper Association president Anne Kothawala put it: "Freedom of information is not about 'selling newspapers,' as some cynics allege. It's about real people, with real stories, and about real consequences on our lives. It's central to our way of life and the structure of rights and freedoms that underwrites it."[417] These points were echoed in the 2012 British parliamentary review of the UK FOI law:

> While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs

[416] *What Price Accountability? Funding cutbacks and the current financing of the B.C. Freedom of Information process* (1997-2000), by Stanley Tromp, FIPA, 2000

[417] *Lobbying for your right to know*, by Anne Kothawala. The Toronto Star, Sept. 26, 2006

> would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented.
>
> Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through.... Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme.[418]

Regarding *ATIA* fees, in May 2016, the president of the Treasury Board issued a directive barring federal institutions from charging more than the $5 application fee - though this policy is not enshrined in law (which it should be).

This move came in response to a Federal Court ruling that stated government can no longer charge fees for the search and processing of *electronic* government documents covered under the *ATIA*. In his ruling of March 31, 2015, Justice Sean Harrington said the wording of the Act and its regulations are "vague" and that practices under the act "have practically stood still" since the days when computers were rare in the workplace.[419] It is also far easier to search electronic records than paper ones, via topic word search engines.

Although such fees were rarely collected anyways, high fee estimates did force me to abandon several of my *ATIA* requests – but no more. In fact, I was planning to write a chapter for this 2nd edition about the problem, but these changes thankfully render this needless.

Quite obviously, the *ATIA* application fee should be eliminated. In 2009, the OIC estimated that it costs the government $55 to process each $5 cheque. If this $5 fee was set mainly to discourage mischievous applicants from filing thousands of requests, this is no longer a valid rationale, since the government in 2019 was granted the power to bar "frivolous and vexatious" applicants.

FOI as a waste cutter

It is beneficial here to send a clear message via the FOI process that any public spending could be revealed at any time. Conversely, knowing the FOI law is ineffective can induce politicians and civil servants to spend in ways they realize the public would never accept if it knew. There are countless samples of misspending exposure from around the globe:

• The United Kingdom parliamentary expenses scandal that rocked the nation in 2008 was prompted by an FOI request by Seattle reporter Heather Brooke. Several hundred members of the House of Commons and House of Lords were involved in misspending public funds, and six members were convicted and jailed. It resulted in

[418] House of Commons [United Kingdom] Justice Committee Post-legislative scrutiny of the UK Freedom of Information Act 2000. First Report of Session 2012–13

[419] *2015 FC 405*, March 31, 2015

widespread anger among the British public and a large number of resignations, sackings, de-selections, together with public apologies and the repayment of expenses.

• It was *ATIA* requests by *Globe and Mail* reporter Daniel Le Blanc that helped expose the Quebec advertising sponsorship scandal and prompted the Gomery inquiry in 2006. This concluded that $2 million was awarded in contracts without a proper bidding system, $250,000 was added to one contract price for no additional work, and $1.5 million was awarded for work that was never done, of which $1.14 million was repaid. Changes in procurement processes, partly driven by this scandal, were enacted.

• An audit of the Human Resources Development Canada transition jobs program was obtained in 2008 by a Reform Party MP under the *ATIA*. The auditors at HRDC took a random sample of only 459 out of 30,000 projects, worth about $1 billion, for evaluation. They found that 80 percent of the cases did not have adequate documentation, 87 percent had no financial monitoring; 44 firms which were handed millions of dollars went out of business or stopped their projects. In response, funding criteria was tightened and more monitoring was added.

• Federal auditors targeted some of the biggest names in corporate Canada for allegedly overcharging millions of dollars in their contracts with government, heavily censored records released through the *ATIA* showed. There were 62 contracts in dispute as of August 2007, with auditors alleging some corporations have claimed for ineligible costs, excess profits, overpriced goods, incorrect wage rates, and a dozen other problems altogether worth about $9.5-million.[420]

• The Conservative government scrambled to explain a report that the Afghanistan mission would run $1 billion over budget in 2008. Documents obtained under the *ATIA* indicated the mission has cost taxpayers at least $7.5 billion since 2001, double what was budgeted.[421]

• Large corporations scooped up the lion's share of almost $1-billion in federal tax credits designed to stimulate small Canadian film and video productions, said a federal government report released under the *ATIA*.[422]

• In his book on the Canadian military *Tarnished Brass*, author Scott Taylor reports that in several cases, an *ATIA* request, submitted with a detailed account of an alleged fiscal misdeed, has been enough of a warning to force the generals named to make full restitution. "By the time the Defense Department releases the file to the requesting media outlets, included in the file is a cancelled cheque indicating full reimbursement to the Crown."[423]

---

[420] *Federal auditors investigate alleged overcharging by corporations*, by Dean Beeby, The Globe and Mail, January 30, 2006

[421] *War $1B over budget: report; Tories scramble to explain cost overrun of Afghan mission*, by Alexander Panetta, The Toronto Sun, March 12, 2008

[422] *Large corporations receive bulk of film tax credits*. The Globe and Mail, April 14, 2008

[423] Scott Taylor and Brian Nolan, *Tarnished Brass: Crime and Corruption in the Canadian Military*. Toronto: Lester & Orpen Dennys, 2002.

• Stevie Cameron relates in her book *On the Take* that when the Prime Minister travelled to New York in 1985, his large entourage included several siblings who were not on official business and his wife, who spent nearly $2,000 on a rented limousine for shopping trips.

Prompted by journalist Richard Cleroux's *ATIA* requests, the External Affairs task force scrutinized the bills for each member of the delegation. Whenever a dubious charge was found, a task force member chased down the individual and asked for payment. These reimbursements from the PC Canada Fund (the Progressive Conservative party's own fundraising arm) for the high travel expenses occurred several times.[436]

• The chairperson of the Canada Labour Relations Board was terminated in 1998 after the media discovered through an *ATIA* request - and which a probe by the federal Auditor General later confirmed - that he had claimed meal expenses that were five times higher than the standard civil servant rate (e.g., a $730 lunch for two in Paris).

• I created a database in 2019, the *British Columbia FOI News Story Index*, of about 2,000 news stories based on B.C. FOI requests,[425] in which the largest category concerns taxpayers' money.

In 170 articles that may prompt reader groans and/or chuckles, we can read how FOI revealed how the public treasury was sapped as $572,000 went to severance for a former city manager for 19 months service; or $9 million in severance for fired political appointees after the 2001 election (one gaining $177,475 for seven months work); or a PR spin-doctor charging $75,000 in moving expenses to relocate from Victoria to Vancouver; or two university deans gaining $500,000 interest-free housing loans each; and so on.

I could cite dozens of such articles. From these examples, one might reasonably phrase the issue not so much as "Can we afford to have an FOI system?" as "Can we afford to *not* have it?"

(2) The search for a fair legal process

Now that Canada's Information Commissioner in 2019 has finally been granted the legal power to order the release of information (per *Bill C-58*), we need turn our attention to another problem – how to make the FOI legal system more fair and equitable for all.

In disputes upon access rights before an appellate body - such as an information commissioner, Ombudsman, the courts - who is at the greater disadvantage overall, the applicant or the public body? The latter may argue this status, for it bears the burden of proof to prove why the records should be withheld under the law, not the applicant to assert why they should be opened.

Yet it will readily be apparent that such is not necessarily the case, for several reasons.

---

[424]Stevie Cameron, *On the Take: Crime, Corruption and Greed in the Mulroney Years*. Toronto. Seal Books, 1995

[425]B.C. FOI News Story Index - http://www3.telus.net/index100/intro2019

For one thing, FOI applicants (who are sometimes lay litigants) voice all their arguments in the open, where these can be dissected and shredded by expert Crown lawyers. By contrast, the agency often presents its arguments with in-camera affidavits, which the applicant cannot view or challenge, and hence must prepare reply submissions to these in the dark. This pusillanimous mechanism at times runs contrary to procedural fairness.

With in-camera affidavits, the agency can assert virtually anything; these claims may contain inaccuracies, and the whole case can turn upon these (and likely sometimes has).[426] A judge weighs arguments, but how many fact-check that the claims are correct? The permitted usage of such in-camera affidavits should be heavily curtailed - or perhaps after an order for disclosure, some of these could be unsealed.

(One feature of American FOI litigation worth contemplating is the "Vaughn Index." This is a document prepared by agencies that are opposing disclosure under the U.S. *FOIA*. The index must describe each document or portion that has been withheld and provide a detailed justification of the agency's grounds for non-disclosure. This is intended to help "create balance between the parties."[427])

But the largest obstacle is simply financial. The applicant may run out of funds, while the public body has access to the bottomless reserve of the treasury to call upon for legal ventures. In B.C., for instance, several agencies' judicial reviews to overturn FOI disclosure rulings have cost the public (to its rising annoyance) an average of about $150,000 per case in legal fees.

As noted by a *Vancouver Sun* columnist, in 2009 the B.C. information and privacy commissioner sought a $400,000 legal budget to cover the growing number of court challenges to his rulings by the B.C. government and other public bodies, up by 50 per cent over 2008.[428] Noting the premier's reversal of his 2001 openness pledge, and his own office's two court challenges of OIPC orders, the column concluded with a notable idea:

> This hypocrisy is bad enough . . . No wonder [the Commissioner] wants to be able to hire his own high-priced legal help to stand up to all the government-funded lawyers swarming over him and his office.
>
> But from a taxpayers' point of view, I can think of a much better outcome. Let treasury board direct that in future, any government-funded agency hauling [the Commissioner] into court will have its

[426]It is often noted in rulings by the B.C. information and privacy commissioner that the agency's failed arguments for secrecy have relied upon "bald assertions" with no evidence.

[427]https://foia.wiki/wiki/Vaughn_Indices Moreover, if a court finds that an index is not sufficiently detailed, it will often require the relevant agency to provide one that is more detailed.

[428]*A colossal waste of court time*, by Vaughn Palmer, *Vancouver Sun*. Dec. 3, 2009. For example ,the B.C. government spent $125,000 on its failed eight-year FOI legal battle to keep its IBM workplace service contract secret from FIPA, the type of record that would be posted online in other countries.

budget docked threefold. Once to pay for government's legal bills. Once to pay for the commissioner's legal bills. And once to cover the waste of court time.

Upon a court ruling, if the court costs are assessed against a citizen applicant, he or she could be financially ruined (which is why some FOI applicants dare not engage in FOI litigation). By contrast if costs are assessed against government, it feels nothing, for there is a vast reservoir of public funds. FOI laws should disallow the assessment of court costs against citizen applicants.

Yet with all that said, and against all odds, David does sometimes best Goliath in court, and prompt new legal precedents for openness. The best known example is Ken Rubin, a private citizen and likely Canada's most effective and prolific *ATIA* user, who often files his own *ATIA* lawsuits and successfully represents himself in court.

(3) Local FOI: Building open government from the ground up

In our focus on national FOI laws, it should not be forgotten that the world of freedom of information extends far beyond these. Such a manifestation of "people power" is built from the ground upwards, not granted from the top down. A national FOI law is usually passed only after a hard, decades-long struggle, starting at the local level, as every great tree began as a seed. This pattern is universal.

Sometimes a city, unwilling to wait for a provincial FOI law to be passed, implemented its own information transparency code. [429] Edmonton was one of the first, and the city of Vancouver passed such a code in 1986, six years before the B.C. provincial government passed its FOI law. These experiences can serve as a valuable laboratory for the FOI process, and a training ground for FOI staff, who may eventually move up from the local government to the capital. (Even prior to cities, some institutions may have their own FOI codes such as public universities and crown corporations.)

Three provincial FOI laws preceded the 1982 passage of the Canadian *Access to Information Act* – that of Nova Scotia in 1977, New Brunswick in 1978, Newfoundland in 1981 – all of which helped build pressure to enact the national law. On the same principle, in fact, I still cross-reference the federal *ATIA* with the provincial FOI laws, to invoke the many superior features of the latter in hopes of amending the former.

Generally, the higher the level of power, the more secrecy, as a consequence of the federal government's dealing with grave issues of the military, foreign affairs, and security-intelligence. This severe and rarified culture can influence much of the *ATIA* processing in Ottawa. Visa versa, the further distant from the national centre of power, the psychologically freer the FOI process

[429] In Canada all the provincial and territorial FOI laws also apply to civic government records, except for Ontario and Saskatchewan with their separate municipal FOI acts - although these must nonetheless conform to the provincial one. Municipal administrations can still pass their own stronger codes, provided it does not conflict with the senior one (and most records can still be released outside of the FOI process anyways, with the law FOI designed to be used as a last resort on recalcitrant officials). The usual top-down pattern is that after a provincial FOI law is passed and applied to core ministries, a year or two later it is extended by stages to civic governments and quasi-independent public bodies such as universities and crown corporations (some of which fought hard against such coverage, such as Ontario universities and BC Rail).

becomes, and the easier to obtain records, it being perceived that there is less to lose from disclosures; while city hall manages important issues such as land use and policing, it must also settle disputes over drainage ditches and dog licensing.

It is fortunate, by the way, that so many politicians and journalists follow the same career path, moving from civic, to provincial, then to national government, while carrying the culture of openness upwards. Moving in the other direction would likely be disastrous, i.e., to start in Ottawa and transport that secretive culture downwards to civic government.

The national FOI statute is mainly used to access federal-held information, while the provincial law is utilized for provincial-held records. It can be interesting to obtain an exchange of federal-provincial correspondence, by using the separate FOI laws of each, and then to see how the same records are released or not, with very different redactions (at times due to political factors).

Besides the FOI requests sent to other nations (see Chapter 16), it is also not unusual even within a nation, including Canada, for one entity of government to file FOI requests to another entity. These are sometimes sent by officials or lawyers working for a federal, provincial or civic government to another uncommunicative level of government, sometimes for records to be useful in litigation, perhaps on an inter-provincial trade or environmental dispute.

For example, in 1996 the British Columbia Lottery Corporation, a secretive provincial crown corporation, covertly installed two Club Keno VLT gambling machines in Vancouver bars in defiance of a city bylaw. The BCLC refused to tell city staff where these were placed. The city (deeply worried about the impacts of gambling addiction on the poor) then applied through the B.C. *FOIPP* Act to the BCLC to successfully learn which Vancouver bars had the pull-tab games.

The pattern of local and regional FOI laws preceding and exceeding the national one is global.

• In the United Kingdom, Wales and Northern Ireland are subject to the UK FOI Act which applies to the whole of the UK apart from Scotland (which has its own stronger law).

Fifteen years before the national FOI law was passed, the U.K. *Local Government (Access to Information) Act 1985* provided a right of access to "background papers" relating to matters discussed at formal meetings of. It also extended the number of meetings of local authorities and some other public bodies which are open to the public.

• In the United States of America, many states passed their own laws or codes long before the federal *FOIA* in 1966, and in my journalistic work, these are the most open FOI laws and processes I have found in the English speaking world.

• A good Commonwealth example to study is that India, whereby the fine Indian national statute of 2005 (RTI-ranked #7) was inspired by previous legislation from select states.

At the time the national Act was passed, eight states and one territory had passed their own access laws, largely in response to pressure from local activists fighting corruption. Acts were passed in Tamil Nadu, (1997) Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Assam (2003), Madhya Pradesh (2003) and Jammu & Kashmir (2004). Uttar Pradesh and Chattisgarh also adopted Codes of Practice and Executive Orders on Access to Information. With the passage of the national Act, the state laws lapsed or were being specifically repealed.[430]

• In Australia, all six states and two territories have FOI laws.

• In Mexico, FOI laws have been adopted in 28 states and districts and there are pending efforts in the four remaining states. Nearly all of the states have their own independent information commission. There is considerable variation in the laws and many are weaker than the national law (a reversal of the usual situation). There were efforts to develop national minimum standards for the state laws.[431]

• In Japan, nearly 3,000 local governments adopted their own disclosure laws, and over 80 percent of all villages also have these. The first jurisdictions to do so were Kanayama town in Yamagata prefecture and Kanagawa Prefecture in 1982 - that is, 17 years before the national FOI law was passed.[432]

• In the People's Republic of China, the development of its 2007 Ordinance on Openness of Government Information was over some eight years built on experience derived from "open government affairs" programs introduced incrementally throughout the country. These began beginning in the 1990s and from locally-initiated "open government information" (OGI) legislation, adopted since 2002 in over 30 provinces and municipalities throughout China, such as Shantou, Shenzhen, and Beijing.[433]

• In Germany, the states of Brandenburg, Berlin, Hamburg, Nordrhein-Westfalen, and Schleswig-Holstein have also adopted combination FOI and Data Protection laws each with its own commissioner, and efforts were pending in other states.[434]

• The nine Austrian states have FOI laws that place similar obligations on their authorities. There are also laws in the states on providing access to environmental information.[435]

---

[430]http://www.freedominfo.org/countries/india.htm

[431]http://www.freedominfo.org/countries/mexico.htm

[432]http://www.freedominfo.org/countries/japan.htm As of 2007, nine municipalities, mostly on remote islands and in mountainous areas were yet to enact an FOI ordinance partly due to financial difficulties and inadequate document management. The national FOI law cannot force municipal governments to enact the ordinance. Another municipality restricted the disclosure of administrative documents to local residents. - *Nine local govts yet to enact disclosure ordinance*. Daily Yomiuri (Tokyo), March 25, 2008

[433]China Adopts First Nationwide Open Government Information Regulations, by James Horsley. April 27, 2007. Yale Law website. https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/CL-OGI-China_Adopts_JPH-English.pdf

[434]http://www.freedominfo.org/countries/germany.htm

• In Switzerland, many cantons were also working on transparency laws. Before the federal FOI law was passed in 2004, the Canton of Berne adopted its Law on Public Information in 1993 and Geneve in 2002. There were also pending efforts in Jura, Neuchâtel and Sierre-Région.

*In Belgium and Italy, there are also laws implementing access rules at the regional, community and municipal levels.

*In Argentina on the provincial level a number of jurisdictions have enacted FOI laws or regulations (by decrees of the governor), and there were FOI bills pending in the provinces of Neuquen, La Pampa, Mendoza, Santa Fe, Chaco, Tucuman and Catamarca.[436]

Finally, moving from the sub-national to the trans-national, perhaps the most onerous new struggle in the global FOI movement will be achieving transparency in such entities such as NATO and the World Bank. These are highly secretive networks (with their own very weak FOI codes) that can hold more power than some national governments, and whose information management rules override national FOI statutes, not visa versa. For instance, Poland, Macedonia and Romania enacted the Classified Information Protection Act as a condition for entering NATO, a move which caused considerable public controversy in the latter country.

(4) FOI education and promotion

The empowerment of the people by means of the passage of freedom of information laws can only be achieved if the public is aware of its rights and knows how to exercise them.[437]

For some journalists who have been reading access laws for decades and have made hundreds of FOI requests, it is easy to forget how difficult the process can be for one just beginning in the "game" (for such it is) and who has been taught nothing of this democratic right that should be considered as fundamental as voting.

The challenge can be daunting indeed for even experienced applicants to identify the type and location of the needed records, to write and send request letters, and then to follow through, i.e., fight upstream against delays, complex exemptions, and then navigate the appeal routes for months or years, all for the types of records that the citizens have already paid for with their tax dollars and most of which should be routinely releaseable. But when barriers of education, disability and foreign language are added, the obstacles can be insurmountable.

In critiquing the draft FOI bill of

[435]http://www.freedominfo.org/countries/austria.htm

[436]http://www.freedominfo.org/countries/argentina.htm

[437]As noted too by the Commonwealth Parliamentary Association, in Recommendations for Transparent Governance, 2004: "(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. A range of other bodies also have a role to play here, including the independent administrative body that is responsible for implementation of the law, human rights groups, the media (and the broadcast media in particular), public bodies themselves and civil society generally. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information."

Mozambique, Article 19 noted that: "In our experience, a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime."[438] The need is evident; the B.C. Freedom of Information and Privacy Association (FIPA) regularly receives calls from members of the public asking how to exercise their information rights.

Yet, as Canada's information commissioner John Grace wryly reported of the ATI Act in his annual report of 1994/95:

> Another early victim of government timidity in facing up to the rigors of openness was a public education program which might have better informed the public of its new access rights. This task was to be Treasury Board's. The government decided, however, that it could not be undertaken because the risk was too great. Horror of horrors, the campaign might be successful! More Canadians might use the Act to the greater irritation or embarrassment of members of the government.

"Public authorities must also take the initiative, and take positive action to promote and entrench the right to information, creating conditions where a culture of openness can flourish," notes the Centre for Law and Democracy (Halifax). "With the notable exceptions of Newfoundland and Canada, Canadian jurisdictions performed very poorly in terms of imposing legal obligations on various actors to promote the right to information." Several provinces in their FOI laws only oblige all public authorities to create and publish a register of the documents they hold.[439]

Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act*: "5.8. The Information Commissioner recommends that the Act provide for the power to carry out education activities."

In the B.C. FOIPP Act Section 42, the Commissioner "may" monitor and "inform the public about the Act," but this is not mandatory. Ontario's FOI law does not mandate a public education role, but Section 59(e) of FIPPA and section 46(e) of MFIPPA provide that the Commissioner may "conduct public education programs and provide information concerning this Act and the Commissioner's role and activities." Some other provincial laws also permit these functions.

By contrast, in the 128 national FOI laws in the world, I counted 51 with some legislated mandate to promote the law or educate the public. India's transparency statute strongly imposes duties to monitor and promote the Act. Moreover, in Ecuador's FOI law:

[438]Public promotions are necessary in radio and television advertisements, and more detailed "how-to" guides require publication in newspapers and government websites, such as that of Scottish Information Commissioner Kevin Dunion who ran a strong advertising campaign just before Scotland's Freedom of Information Act came into effect in 2005, declaring "I made sure the public was aware of its new rights." - Firm hand with a big stick. The New Zealand Herald, Dec. 22, 2007

[439]Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

> Bodies are required to adopt programs to improve awareness of the law and citizen participation. University and other educational bodies are also required to include information on the rights in the law in their education programmes.

The Mexican FOI law charged the Federal Institute for Access to Public Information - a body of the Federal Public Administration which is independent in its budget and decision-making - with promoting and publicizing the exercise of the right of access to information.

Education is also mandated in the FOI law of Iran, in Section 3, Article 5: "Beside the existing means [in the law for publication of information], the information containing public rights and duties shall be presented to the public through publication and public announcements and media."

It would also be commendable to task the education ministry to include modules on FOI in school curricula, as part of citizenship training. This has been done, for example, in countries such as Nicaragua, Honduras and Ecuador, and in Mexico children are taught in high school how to file FOI requests. Why should Canada do any less?

World FOI promotions

In some nations, information commissioners or governments promote public FOI usage by short inspirational TV messages, as Canada could also. For samples, please click on the links below. (The first two are memorable indeed.)

> From Scotland - https://vimeo.com/8333506
>
> From Morocco – https://www.youtube.com/watch?v=Z4G4CDjGUbY
>
> From Jamaica - https://www.youtube.com/watch?v=5LFM-pNks48
>
> From India - https://www.youtube.com/watch?v=6sVe03GoGio
>
> From Nigeria – https://www.youtube.com/watch?v=aY9E3UwzjZQ

(5) The FOI purpose clause

A purpose section in a freedom of information law is extremely important, because more than just political rhetoric (although it can be that as well), the stated principles can provide general guidance to commissioners or judges in making their rulings.

In Canada in 2019, *Bill C-58* amended Section 2, on the purpose of the *ATIA*, by inserting the following new first paragraph:

> The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

Although a very mild statement in the global FOI context, it apparently improved upon the *ATIA*'s old purpose clause, which is mostly retained elsewhere in the law.[440] Yet in her 2017 special report, the Information Commissioner argues that amending

the purpose clause is unnecessary and in fact "could lead to a more restrictive interpretation of the entire *Act*, and could result in less disclosure of information to requesters."

In the global context, the scope of Canada's *Access to Information Act* is relatively limited. Some of the clauses in other nations are worth contemplating.

• The overall purpose statement of Finland's freedom of information law is amongst the world's best, emphasizing democratic powers:

> Section 3. Objectives. The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.

• The preamble of Indonesia's 2008 FOI law has a unique perspective:

> Considering: a) that information is a basic need of every person to develop their personality as well as their social environment, and is a significant part of the national security; b) that the right to obtain information is a human right and transparency of public information is a significant characteristic of a democratic state that holds the sovereignty of the people in high esteem, to materialize good state management; [....]

• Bolivia's law has common features amongst national FOI purpose clauses in preserving human rights and combatting corruption:

> That access to public information, in a timely, complete, adequate and truthful manner, is an indispensable requirement for the functioning of the democratic system and a fundamental pillar of transparent public management; particularly in access to information necessary to investigate crimes against humanity, human rights violations, crimes of economic damage to the State and acts of corruption.

What arguments could be made against such goals?

(6) Everyone's business: FOI and the environment

Public access to environmental information is an important right and essential support to effective environmental policy. An informed public can contribute meaningfully to decision-making on environmental issues. Moreover, an informed public can act as a watch-dog, supplementing governmental environmental management and supervision efforts. None of this is possible without access to environmental information.

- Public Access to Environmental Information, by Ralph E. Hallo. Report for the European

[440] *ATI Act*, 1982 – That is, "2 (1) The purpose of this Act is to extend the present laws of Canada to provide a 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."

Environment Agency (EEA), 1997

As per the mandate of this book, one could inquire: what other FOI topic could be more internationalist than this? Does water pollution, animal migration, or climate change stop at any political border? Much of the public believe that the state and private sector have no moral right to keep secret the condition of the air we all breathe, the water we all drink, the land we all inhabit. Such issues may be, then, "everyone's business"; so ideally, they would transcend sectoral interests, political parties and ideologies.

Much of the FOI reality today can leave a reader quite despondent, especially regarding the shift to so-called oral government, policy advice overreach, and quasi-governmental bodies exempt from the law. But environmental FOI is a pleasure to discuss, because as I learned more about it, it became the FOI subject that actually gave me the most hope for the future. Of course, in the environmental FOI field, there will always be some setbacks, but I sense those would be more temporary than longterm. This may be because the public demand for it may, ultimately, be irresistible. In the spirit of the age, environmental protection sometimes leads opinion surveys as the top issue of public concern in Canada.

The subject of environmental transparency overlaps and intersects with the subjects of every FOI chapter here. For several people, indeed, this may be their main or sole FOI topic of interest, and good environmental journalism can hardly be produced without it.

Several nations accord the matter such weight that in their FOI statutes, environmental protection is the only public interest clause that overrides all disclosure exemptions. Some have created separate transparency laws for the environment alone, which include mandatory pro-active publication of records beyond a FOI request-driven regime. The environment is one of the very few topics for which international treaties on the public's right to know have been forged.

Nonetheless, the campaign for environmental transparency is not complete; in fact, it has just begun.

To begin, how would the release of environmental information ideally be guaranteed in the Canadian *Access to Information Act*? For one thing, consider the vital question of the public interest override. In the *ATI Act*, there is just one narrow and discretionary case in which the public interest in environmental protection can override an ATI exemption, one regarding third party information (Section 20), and it cannot override trade secrets. Yet the FOI laws of most other nations have much broader public interest overrides, especially for environmental interests, as do our provinces. Many global commentators urge that the override should apply to all the FOI exemptions and be mandatory.

Eastern European nations take the right seriously indeed. In Slovakia, environmental protection can override trade secrets, which might be valuable when, for example, a company will not reveal the toxic chemicals of a formula it has spilled into a lake. In Serbia's FOI law, public authorities must respond to

requests in 15 days except where there is a threat to the environment, which mandates a reply within 48 hours.

As per *ATIA* Section 24, there are information management provisions in several laws listed in Schedule 2 related to environmental issues that override the *ATIA*, e.g., *Canadian Environmental Assessment Act*, *Hazardous Products Act*, *Nuclear Safety and Control Act*, *Transportation of Dangerous Goods Act*. As noted in Chapter 10, most commentators agree that this baneful Section 24 should be abolished.

Apart from the *ATIA*, there are several environmental information disclosure requirements in other Canadian statutes, such as the *Fisheries Act*, Section 79, and the Canadian Environmental Protection Act, Section 44. This appears expansive at first, but could be extended further on several specific items, such as the proactive internet publication of emission databases, records on radioactive waste and genetically modified organisms, time limits for information release, appeal routes for information complaints, and more. For several topics, publication is only discretionary, not mandatory. A few provisions are cited below.

• Canadian Environmental Protection Act, 1999

44. (1) The Minister shall

[...] (d) collect, process, correlate, interpret, create an inventory of, and publish on a periodic basis, data on environmental quality in Canada from monitoring systems, research, studies and any other sources;

(e) formulate plans for pollution prevention and the control and abatement of pollution, including plans respecting the prevention of, preparedness for and response to an environmental emergency and for restoring any part of the environment damaged by or during an emergency, and establish, operate and publicize demonstration projects and make them available for demonstration; and

(f) publish, arrange for the publication of or distribute through an information clearing-house

(i) information respecting pollution prevention,

(i) pertinent information in respect of all aspects of environmental quality, and

(ii) a periodic report on the state of the Canadian environment.

[...] 45. The Minister of Health shall

(a) conduct research and studies relating to the role of substances in illnesses or in health problems;

(b) collect, process, correlate and publish on a periodic basis data from any research or studies done under paragraph (a); and

(c) distribute available information to inform the public about the effects of substances on human health.

[...] 50. Subject to subsection 53(4), the Minister shall publish the national inventory of releases of pollutants in any manner that the Minister considers appropriate and may publish or give notice

> of the availability of any other inventory of information established under section 48, in any manner that the Minister considers appropriate.
>
> [...] 66. (1) The Minister may, for the purposes of encouraging and facilitating pollution prevention, establish and maintain a national pollution prevention information clearing-house in order to collect, exchange and distribute information relating to pollution prevention.
>
> [...] 66. (3) The Minister may, in exercising the powers conferred by subsections (1) and (2), act alone or in cooperation with any government in Canada or government of a foreign state or any of its institutions or any person.

As well, there are environmental factors included in the federal government's whistleblower protection law, but that statute has grievous limitations (as noted in Chapter 12).

There is another problem. The right of all people regardless of their citizenship to make access requests is the accepted international standard, included in the FOI laws of most nations (see Chapter 16). But not in Canada's *ATIA*.

In a world ever more integrated, many environmental issues that overlap political borders could be a subject for an FOI request to another country. One obvious example would be that of unknown pollutants being expelled into the river of a neighbouring country, with that river then flowing into the FOI applicant's nation. Other subjects might include global warming and climate change, aquaculture and agriculture, animal and plant diseases, the tracking of harmful or endangered animal species, overfishing, and more. Canada's *ATIA* should be amended to allow anyone in the world to file requests.

Related to, yet distinct from, FOI laws is the matter of constitutional guarantees. More than half of the nations with FOI statutes explicitly grant the public some right to obtain government information in their Constitutions or Bill of Rights. But Canada does not; it has only been described in court rulings here as a "quasi-constitutional" right. Moreover several countries explicitly mention environmental information, though it is also implicitly included within the general definition of "information" in their constitutions.

For example, the Ukrainian constitution reads, in Article 50: "Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information." It is no surprise that such guarantees are most numerous in Eastern Europe, a region wishing to repair the environmental devastation that was partly facilitated by the secrecy of former authoritarian regimes. But why would the general principle also not be relevant elsewhere, including Canada?

Abroad, there have been many other national gestures towards environmental transparency, some which could be discussed apart from FOI laws. For example, the United Kingdom, Canada's parliamentary model, passed a set of *Environmental Information*

Regulations in 2004. This contains many exemplary features worth replicating, such as a clause that agencies must "progressively make the information available to the public by electronic means which are easily accessible," a 20 day time limit, and strict penalties for those who obstruct or destroy records.

Let us move now from the comparative study of domestic FOI statutes into the realm of international law.

As long ago as 1993, a European Parliament resolution led to a Council Directive that created a right of access to environmental information in every member state of the European Union. These states must ensure that public authorities make environmental information held by or for them available to any applicant, whether a natural or a legal person, on request and without the applicant having to state an interest, within a month, for free or low cost.

After the EU Directive, the Aarhus treaty set a new standard for environmental transparency. The *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, usually known as the Aarhus Convention, was signed in 1998 in the Danish city of Aarhus.

This was ratified by 40 primarily European and Central Asian countries, the United Kingdom, and the European Community. Member states are explicitly welcomed to surpass the EU and Aarhus standards. This Convention has a unique Compliance Review Mechanism, which allows members of the public to relate their concerns about a party's compliance directly to a committee of international legal experts empowered to examine the merits of the case.

These treaties have not been relegated to "paper tiger" status; a genuine political will for their enforcement is evident. In 2005, for instance, the European Commission announced that it was taking legal action against seven countries for failing to implement the 2003 EU Directive.

In a separate case, Germany's *Environmental Information Act* was found several times by the European Court of Justice to be inadequate under the 1990 EU Directive. Summarizing the role of the Arhus treaty overall, the United Nations' then-Secretary-General Kofi Annan declared:

> Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.[441]

To conform to the Aarhus treaty, many European countries passed separate environmental disclosure statutes – some

[441] The Aarhus Convention: An Implementation Guide. Prepared for the Regional Environmental Center for Central and Eastern Europe. Geneva, 2000

incorporating the treaty's provisions verbatim - in addition to their general FOI laws. Several other countries attempt to fulfill their Aarhus disclosure obligations through their national FOI statutes. Portugal added an innovative touch to its legislation by establishing a special body to consider disputes arising from refusals to provide access to environmental information.

We could consider the prospect of introducing an equivalent of an Aarhus treaty in North America, perhaps later expanded to all the Americas.

In Europe, natural environment is less abundant and so taken far less for granted than in Canada, hence such a campaign here might be a more onerous task. Yes, the context is different, but the principles are similar, and some may assert that they also require application in the Canadian context, perhaps in modified forms. As the theory goes, if international trade agreements should be able to override national environmental protections, as many investors urge, why should the same principle not apply for the positive purpose of environmental transparency?

On occasion, environmental transparency can also be regarded as a basic human right in law. The European Court of Human Rights ruled in the 1998 case of *Guerra vs Italy*[442] that governments had an obligation to inform citizens of risks from a chemical factory under Article 8 – that is, protecting privacy and family life - of the European Convention on Human Rights, which Italy had failed to do.

Besides reforming the *ATIA*, Canadian parliamentarians could exercise political imagination and might consider adopting – even in modified versions - several of the more proactive environmental transparency concepts from other nations' FOI statutes, constitutional guarantees, and international agreements, for the Canadian context.

Principle 10 of the Declaration of the U.N. Conference on Environment and Development presented at Rio de Janeiro in 1992, was endorsed by Canada. It reads: "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes."[443]

Canada should have a moral obligation to follow the spirit, if not the letter, of the Aarhus Convention's and Rio Declaration's prescriptions on environmental transparency (particularly on the #1 issue of global climate change). To our parliament and bureaucracy several of these concepts may appear unrealistic, as innovations do at first. Such ideas are seeds that could take years to sprout; yet it seems likely that in time, inevitably, Canadians will accept no less.

[442]http://freedominfo.org/countries/italy.htm

[443]*Principle 10, Declaration of the U.N. Conference on Environment and Development (UNCED), Rio de Janeiro, 1992, endorsed by Canada*

A final thought

What is in a name? The organization Article 19 proposes that a model FOI statute be called *The Right to Information Act*, to express its ideal character, and encourage openness; such is the name of India's FOI law, one of the world's very best. Indeed I hope that Canada's *Access to Information Act* will be re-titled thus.

By some coincidence, however, what was long and indisputably the most ill-fated FOI statute in Canada, that of New Brunswick – the only one with no time limits or public interest override, few harms tests, and every exemption mandatory (before its 2017 improvements) – is ironically the only provincial law bearing the title *Right to Information Act*.

On this point, we might hope the bureaucratic view as voiced by the droll Sir Humphrey[444] would not prevail, as he said when proposals were being raised to introduce a freedom of information statute: "I explained that we are calling the White Paper 'Open Government' because you always dispose of the difficult bit in the title. It does less harm there than on the statute books . . ."

[444]From the private diary of Sir Humphery Appelby. Espisode titled *Open Government*. London: BBC publications, 1981. Meanwhile, some Australian FOI commentators complain that their nation's law is so ineffectual that it should be entitled "The Freedom from Information Act."

Sources for FOI statute comparisons, model FOI laws, and recommendations for best FOI practices cited in this report's chapters (2019)

In 2011 the Halifax-based Centre for Law and Democracy partnered with Access Info Europe to launch an authoritative Global Right to Information Rating system of all the world's FOI laws. The webpages below have links to the CLD-AIE's review of each law, and to the original statute. The country's name is followed by its 2019 RTI ranking.

Commonwealth nations

Antigua and Barbuda (RTI #19) - *Freedom of Information Act*. 2004.
https://www.rti-rating.org/country-data/Antigua/

Australia (RTI #67) - *Freedom of Information Act*. 1982, last modified 2019.
https://www.rti-rating.org/country-data/Australia /

Bahamas (RTI #34) - *Freedom of Information Act*. 2017.
https://www.rti-rating.org/country-data/Bahamas/

Bangladesh (RTI #26) - *Right to Information Act*. 2009.
https://www.rti-rating.org/country-data/Bangladesh/

Belize (RTI #70) - *Freedom of Information Act*. 1994.
https://www.rti-rating.org/country-data/Belize/

Canada (RTI #58) - *Access to Information Act*. 1982, last modified 2019.
https://www.rti-rating.org/country-data/Canada/

Cook Islands (RTI #101) - *The Official Information Act*. 2007.
https://www.rti-rating.org/country-data/Cook%20Islands/

Fiji (RTI #106) - *Information Act*. 2018. https://www.rti-rating.org/country-data/Fiji

Ghana (RTI #46) - *Right to Information Act*. 2019.
https://www.rti-rating.org/country-data/Ghana/

Guyana (RTI #102) - *Access to Information Act*. 2008.
https://www.rti-rating.org/country-data/Guantemala

India (RTI #7) - *Right to Information Act*. 2005. https://www.rti-rating.org/country-data/India

Jamaica (RTI #59) - *Access to Information Act*. 2002.
https://www.rti-rating.org/country-data/Jamaica

Kenya (RTI #20) - *The Access to Information Act*. 2016. https://www.rti-rating.org/country-data/Kenya

Malawi (RTI #33) - *Act No. 13 of 2017*. 2017. https://www.rti-rating.org/country-data/Malawi

Malta (RTI #77) - *Freedom of Information Act*. 2008. https://www.rti-rating.org/country-data/Malta

Mozambique (RTI #114) - *Right to Information Law*. 2014. https://www.rti-rating.org/country-data/Mozambique

New Zealand (RTI #52) - *Official Information Act*. 1982, last modified 1993. https://www.rti-rating.org/country-data/New%20Zealand/

Nigeria (RTI #62) - *The Freedom of Information Bill*. 2011. https://www.rti-rating.org/country-data/Nigeria/

Pakistan (RTI #32) - *Freedom of Information Ordinance*. 2002, last modified 2017. https://www.rti-rating.org/country-data/Pakistan/

Rwanda (RTI #66) - *Law Relating to Access to Information*. 2013. https://www.rti-rating.org/country-data/Rwanda/

Saint Kitts and Nevis (RTI #18) - *Freedom of Information Act*. 2018. https://www.rti-rating.org/country-data/Saint%20Kitts%20and%20Nevis/

Saint Vincent and the Grenadines (RTI #98) - *Freedom of Information Act*. 2003. https://www.rti-rating.org/country-data/Saint%20Vincent%20and%20the%20Grenadines/

Seychelles (RTI #27) - *Access to Information Act*. 2018. https://www.rti-rating.org/country-data/Seychelles

Sierra Leone (RTI #11) - *The Right to Information Act*. 2013. https://www.rti-rating.org/country-data/Sierra%20Leone/

South Africa (RTI #14) - *Promotion of Access to Information Act*. 2000, last modified 2013. https://www.rti-rating.org/country-data/South%20Africa/

Sri Lanka (RTI #4) - *Right to Information Act*. 2016. https://www.rti-rating.org/country-data/Sri%20Lanka/

Tanzania (RTI #91) - *The Access to Information Act*. 2016. https://www.rti-rating.org/country-data/Tanzania/

Trinidad and Tobago (RTI #61) - *Freedom of Information Act*. 1999. https://www.rti-rating.org/country-data/Trinidad%20and%20Tobago/

Uganda (RTI #48) - *Access to Information Act*. 2005.
https://www.rti-rating.org/country-data/Uganda

United Kingdom (RTI #43) - *Freedom of Information Act*. 2000.
https://www.rti-rating.org/country-data/United%20Kingdom

Vanuatu (RTI #15) - *Right to Information Act.* 2016.
https://www.rti-rating.org/country-data/Vanuatu

Non-Commonwealth nations

Afghanistan (RTI #1) - *Access to Information Law*. 2014, last modified 2018.
https://www.rti-rating.org/country-data/Afghanistan/

Albania (RTI #6) - *The Law on the Right to Information for Official Documents*. 1999, last modified 2014. https://www.rti-rating.org/country-data/Albania/

Angola (RTI #80) - *Law on Access to Documents held by Public Authorities*. 2002.
https://www.rti-rating.org/country-data/Angola/

Argentina (RTI #54) - *Ley de Acceso a la información* (In Spanish, no English translation available). 2014, last modified 2016. https://www.rti-rating.org/country-data/Argentina/

Armenia (RTI #41) - *Law on Freedom of Information*. 2003.
https://www.rti-rating.org/country-data/Armenia/

Austria (RTI #127) - *Auskunftspflichtgesetz (Federal Law on the Duty to Furnish Information.* In German, no English translation available.) 1987, last modified 2016.
https://www.rti-rating.org/country-data/Austria/

Azerbaijan (RTI #17) - *Law of the Republic of Azerbaijan on the Right to Obtain Information*. 2005.
https://www.rti-rating.org/country-data/Azerbaijan/

Belgium (RTI #115) - *Law on the right of access to administrative documents held by federal public authorities* (In French, no English translation available). 1994, last modified 2010.
https://www.rti-rating.org/country-data/Belgium/

Benin (RTI #121) - *Loi n° 2015-07 portant code de l'information et de la communication en République du Bénin*. (In French, no English translation available). 2015.
https://www.rti-rating.org/country-data/Benin/

Bolivia (RTI #96) - *Supreme Decree No. 28168 of 2005 - Transparency in the Management of Executive Power.* 2005. https://www.rti-rating.org/country-data/Bolivia/

Bosnia and Herzegovina (RTI #36) - *Law on Freedom of Access to Information*. 2000, last modified 2006

https://www.rti-rating.org/countrydetail/?country= Bosnia%20and%20Herzegovina

Brazil (RTI #28) - *Law No. 12,527.* 2011. https://www.rti-rating.org/country-data/Brazil/

Bulgaria (RTI #57) - *Access to Public Information Act*. 2000.
https://www.rti-rating.org/country-data/Bulgaria/

Burkina Faso (RTI #75) - *LOI N°051-2015*. 2015.
https://www.rti-rating.org/country-data/Burkina%20Faso/

Chile (RTI #51) - *Transparency of public office and access to the information of the State Administration law.* (In Spanish, no English translation available). 2008.
https://www.rti-rating.org/country-data/Chile/

China (RTI #87) - *The People's Republic of China Ordinance on Openness of Government Information*. 2007. https://www.rti-rating.org/country-data/China/

Columbia (RTI #37) - L*aw Ordering the Publicity of Official Acts and Documents.* (In Spanish, no English translation available) 1985, last modified 2014.
https://www.rti-rating.org/country-data/Columbia/

Croatia (RTI #8) - *Right of Access to Information Act*. 2003, last modified 2015.
https://www.rti-rating.org/country-data/Croatia/

Cyprus (RTI #68) - *Law Regulating the Right to Access Public Sector Information*. (In Greek, no English translation available). 2017. https://www.rti-rating.org/country-data/Cyprus/

Czech Republic (RTI #92) - *The Freedom of Information Act*. 1999.
https://www.rti-rating.org/country-data/Czech%20Republic/

Denmark (RTI #105) - *Freedom of Information Act*. 1985.
https://www.rti-rating.org/country-data/Denmark

Dominican Republic (RTI #116) - *Ley No.200-04 - Ley General de Libre Acceso a la Información Pública*. (In Spanish, no English translation available) 2004.
https://www.rti-rating.org/country-data/Dominican%20Republic/

East Timor (RTI #122) - *Decree-Law N. 43*. 2016.
https://www.rti-rating.org/country-data/East%20Timor/

Ecuador (RTI #85) - *Organic Law on Transparency and Access to Public Information*. (In Spanish, no English translation available) 2004.
https://www.rti-rating.org/country-data/Ecuador/

El Salvador (RTI #10) - *Ley de Acceso a la Informacion Publica*. (In Spanish, no English translation available) 2011. https://www.rti-rating.org/country-data/El%20Salvador/

Estonia (RTI #49) - *Public Information Act*. 2000. https://www.rti-rating.org/country-data/Estonia

Ethiopia (RTI #23) - *A Proclamation to provide for freedom of the mass media and access to information*. 2008. https://www.rti-rating.org/country-data/Ethiopia

Finland (RTI #31) - *Act on the Openness of Government Activities*. 1951, last modified 2016. https://www.rti-rating.org/country-data/Finland

France (RTI #107) - *De la liberté d'accès aux documents administratifs et de la réutilisation des informations publiques* (In French, no English translation available) 1978, last modified 2017. https://www.rti-rating.org/country-data/France

Georgia (RTI #45) - *Freedom of Information Code*. 1999. https://www.rti-rating.org/country-data/Georgia

Germany (RTI #120) - *Federal Act Governing Access to Information held by the Federal Government*. 2005, last modified 2013. https://www.rti-rating.org/country-data/Germany

Greece (RTI #104) - *Code of Administrative Procedure*. 1986, last modified 2015. https://www.rti-rating.org/country-data/Greece

Guatemala (RTI #55) - *Ley de Acceso a la Informacion Publica*. (In Spanish, no English translation available) 2008. https://www.rti-rating.org/country-data/Guantemala

Honduras (RTI #69) - *Ley de Transparencia y Acceso a la Información Pública* (In Spanish, no English translation available) 2006. https://www.rti-rating.org/country-data/Honduras

Hungary (RTI #63) - *Protection of Personal Data and Disclosure of Data of Public Interest*. 1992. https://www.rti-rating.org/country-data/Hungary

Iceland (RTI #108) - *The Information Act*. 1996, last modified 2003. https://www.rti-rating.org/country-data/Iceland

Indonesia (RTI #38) - *Public Information Disclosure Act*. 2008. https://www.rti-rating.org/country-data/Indonesia

Iran (RTI #94) - *The Law on Publication and Free Access to Information*. 2009. https://www.rti-rating.org/country-data/Iran

Ireland (RTI #50) - *Freedom of Information Act*. 1997, last modified 2003. https://www.rti-rating.org/country-data/Ireland

Israel (RTI #74) - *Freedom of Information Law*. 1998. https://www.rti-rating.org/country-data/Israel

Italy (RTI #65) - *Reorganization of the law relating to the right to civic access and disclosure requirements, transparency and dissemination of information by public authorities*. 1990, last modified 2016. https://www.rti-rating.org/country-data/Italy

Ivory Coast (RTI #81) – *Freedom of Information Act*. (In French, no English translation available) 2013. https://www.rti-rating.org/country-data/Ivory%20Coast/

Japan (RTI #82) - *Law Concerning Access to Information Held by Administrative Organ*s. 1999, last modified 2003. https://www.rti-rating.org/country-data/Japan

Jordan (RTI #119) - *Law on Securing the Right to Information Acces*s. 2007. https://www.rti-rating.org/country-data/Jordan

Kazakhstan (RTI #113) - *Law of the Republic of Kazakhstan on access to information*. 2015. https://www.rti-rating.org/country-data/Kazakhstan

Kosovo (RTI #30) - *Law on Access to Public Documents*. 2003. https://www.rti-rating.org/country-data/Kosovo

Kyrgyzstan (RTI #39) - *Law of the Kyrgyz Republic on access to information held by state bodies and local self-government bodies of the Kyrgyz Republic*. 2006. https://www.rti-rating.org/country-data/Kyrgyzstan

Latvia (RTI #95) - *Law on Freedom of Information*. 1998, last modified 2006. https://www.rti-rating.org/country-data/Latvia

Lebanon (RTI #97) - *Right to Access Information Law.* 2017. https://www.rti-rating.org/country-data/Lebanon

Liberia (RTI #9) - *Freedom of Information Act*. 2010. https://www.rti-rating.org/country-data/Liberia

Liechtenstein (RTI #126) - *The Information Act*. 1999. (In German, no English translation available) https://www.rti-rating.org/country-data/Liechtenstein

Lithuania (RTI #109) - *Law on the Provision of Information to the Public*. 1999, last modified 2005. https://www.rti-rating.org/country-data/Lithuania

Luxembourg (RTI #111) - *Loi du 14 septembre 2018 relative à une administration transparente et ouverte*. (In French, no English translation available) 2018. https://www.rti-rating.org/country-data/Luxembourg/

Macedonia (RTI #22) - *Law on Free Access to Information of Public Character*. 2006, last modified 2008. https://www.rti-rating.org/country-data/Macedonia

Maldives (RTI #16) - *Right to Information Act*. 2014. https://www.rti-rating.org/country-data/Maldives

Mexico (RTI #2) - *General Act of Transparency and Access to Public Information*. 2002, last modified 2015. https://www.rti-rating.org/country-data/Mexico

Moldova (RTI #25) - *Law on Access to Information*. 2000. https://www.rti-rating.org/country-data/Moldova

Monaco (RTI #125) - *Ordonnance n.3.413 du 29/08/2011 portant diverses mesures relatives à la relation entre l'Administration et l'administré* (In French, no English translation available) 2011 https://www.rti-rating.org/country-data/Monaco/

Mongolia (RTI #64) - *The Law of Mongolian Information Transparency and Right to Information*. 2011. https://www.rti-rating.org/country-data/Mongolia

Montenegro (RTI #60) - *The Law on the Access to Information*. 2005. https://www.rti-rating.org/country-data/Montenegro

Morocco (RTI #88) - *Dahir No. 1-18-15 du 5 joumada II 1439 (22 février 2018) portant promulgation de la loi no 31-13 relative au droit d'áccès à l'informatio*n. (In French, no English translation available) 2018. https://www.rti-rating.org/country-data/Morocco

Nepal (RTI #21) - *Right to Information Act*, 2064 Act to provide for Right to Information. 2007. https://www.rti-rating.org/country-data/Nepal

Netherlands (RTI #73) - *Government Information (Public Access) Act*. 1978, last modified 2016. https://www.rti-rating.org/country-data/Netherlands

Nicaragua (RTI #24) - *Ley de Acceso a la Informacion publica*. (In Spanish, no English translation available) 2007. https://www.rti-rating.org/country-data/Nicaragua/

Niger (RTI #86) - *Ordinance N⁰ 2011-22 of 23 February 2011 on the Charter on Access to Public and Administrative Documents*. (In French, no English translation available) 2011. https://www.rti-rating.org/country-data/Niger/

Norway (RTI #78) - *Freedom of Information Act*. 1970, last modified 2006. https://www.rti-rating.org/country-data/Norway/

Palau (RTI #128) - *Open Government Act*. 2014. https://www.rti-rating.org/country-data/Palau/

Panama (RTI #42) - *Law on Transparency in Public Administration*. (In Spanish, no English translation available) 2001. https://www.rti-rating.org/country-data/Panama/

Paraguay (RTI #112) - *Ley 5.282 De Libre Acceso Ciudadano a la Informacion Public y Transparencia Gubernamental*. (In Spanish, no English translation available) 2014. https://www.rti-rating.org/country-data/Paraguay/

Peru (RTI #53) - *Law of Transparency and Access to Public Information* (In Spanish, no English translation available). 2002. https://www.rti-rating.org/country-data/Peru/

Philippines (RTI #124) - *Executive Order No. 02*. 2016. https://www.rti-rating.org/country-data/Philippines/

Poland (RTI #76) - *Law on Access to Public Information*. 2001, last modified 2011. https://www.rti-rating.org/country-data/Poland/

Portugal (RTI #89) - *Regime de Acceso: Law no. 46/2007.* 1993, last modified 1999. https://www.rti-rating.org/country-data/Portugal/

Romania (RTI #71) - *Law Regarding Free Access to Information of Public Interest*. 2001. https://www.rti-rating.org/country-data/Romania/

Russia (RTI #44) - *Federal Law on Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government*. 2009. https://www.rti-rating.org/country-data/Russia/

Serbia (RTI #3) - *Law on Free Access to Information of Public Importance*. 2004, last modified 2007. https://www.rti-rating.org/country-data/Serbia

Slovakia (RTI #103) - *Freedom of Information Act*. 2000, amended 2008. https://www.rti-rating.org/country-data/Slovakia

Slovenia (RTI #5) - *Access to Public Information Act*. 2003, last modified 2014. https://www.rti-rating.org/country-data/Slovenia

South Korea (RTI #47) - *Act on Disclosure of Information by Public Agencies*. 1996, last modified 2016. https://www.rti-rating.org/country-data/South%20Korea/

South Sudan (RTI #12) - *Right of Access to Information Act*. 2013. https://www.rti-rating.org/country-data/South%20Sudan/

Spain (RTI #90) - *Law on Rules for Public Administration*. (In Spanish, no English translation available) 2013. https://www.rti-rating.org/country-data/Spain/

Sudan (RTI #110) - *Right to Access Information Law*. 2015. https://www.rti-rating.org/country-data/Sudan/

Sweden (RTI #40) - *Freedom of the Press Act*. 1949, last modified 1976. https://www.rti-rating.org/country-data/Sweden/

Switzerland (RTI #79) - *Federal Law on the Principle of Administrative Transparency*. (In German, no English translation available) 2004. https://www.rti-rating.org/country-data/Switzerland/

Taiwan (RTI #118) - *The Freedom of Government Information Law*. 2005.
https://www.rti-rating.org/country-data/Taiwan/

Tajikistan (RTI #123) - *Law of the Republic of Tajikistan on Information*. 2002.
https://www.rti-rating.org/country-data/Tajikistan/

Thailand (RTI #83) - *Official Information Act*. 1997.
https://www.rti-rating.org/country-data/Thailand/

Togo (RTI #99) - *Loi No 2016-006*. (In French, no English translation available) 2016.
https://www.rti-rating.org/country-data/Togo/

Tunisia (RTI #13) - *Loi organique n. 22-2016 du 24 Mars 2016 relative au droit d'Access á l'information*. (In French, no English translation available) 2011, last modified 2016.
https://www.rti-rating.org/country-data/Tunisia

Turkey (RTI #93) - *Turkish Law On The Right To Information*. 2013.
https://www.rti-rating.org/country-data/Turkey

Ukraine (RTI #29) - *The Law of Ukraine On Access to Public Information*. 1992, last modified 2013.
https://www.rti-rating.org/country-data/Ukraine

United States of America (RTI #72) - *Freedom of Information Act*. 1966, last modified 2008.
https://www.rti-rating.org/country-data/United%20States

Uruguay (RTI #56) - *Ley Nº 18.381 Derecho de Acceso a la Información Pública*. (In Spanish, no English translation available) 2008. https://www.rti-rating.org/country-data/Uruguay

Uzbekistan (RTI #117) - *Law on the Principles and Guarantees of Freedom of Information.* 1997.
https://www.rti-rating.org/country-data/Uzbekistan

Vietnam (RTI #84) - *Law on Access to Information*. 2015.
https://www.rti-rating.org/country-data/Vietnam

Yemen (RTI #36) - *Law (13) for the year 2012 regrading the right of access to information*. 2012.
https://www.rti-rating.org/country-data/Yemen

Zimbabwe (RTI #100) - *Access to Information and Privacy Protection Act*. 2002.
https://www.rti-rating.org/country-data/Zinbabwe

Several non-national FOI codes

Bermuda (British Overseas Territory) - P*ublic Access to Information Act*. 2010.
https://www.law-democracy.org/live/wp-content/uploads/2019/03/Bermuda.FOI_.Mar19-1.pdf

Hong Kong (Special Administrative Region of China) - *Code on Access to Information*. 1995.

http://www.freedominfo.org/countries/hong_kong.htm

Scotland (Constitutional monarchy) - *Freedom of Information Act*. 2002. http://www.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm

Wales (One of the four constituent countries of the United Kingdom) – *Wales Code of Practice on Public Access to Information*. 2004. http://www.information.wales.gov.uk/content/code/cop-1204-e.pdf

69 nations without FOI laws yet

Algeria, Andorra, Bahrain, Barbados, Bhutan, Botswana, Brunei, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Congo Democratic Republic, Costa Rica, Cuba, Djibouti, Dominica, Egypt, Equatorial Guinea, Eritrea, Gabon, Gambia, Grenada, Guinea, Guinea Bissau, Haiti, Iraq, Kiribati, Kuwait, Laos, Lesotho, Libya, Madagascar, Malaysia, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Myanmar/ Burma, Namibia, Nauru, North Korea, Oman, Papua New Guinea, Qatar, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Singapore, Solomon Islands, Somalia, St. Lucia, Surinam, Swaziland, Syria, Tonga, Tuvalu, Turkmenistan, United Arab Emirates, Vatican City, Venezuela, West Sahara, West Samoa, Zambia

Canadian provinces

See score sheets at https://www.law-democracy.org/live/rti-rating/canada/

Nova Scotia – *Freedom of Information and Protection of Privacy Act*, 1977, last modified 1993. (RTI-rated 85/150) http://foipop.ns.ca//legislation.html

New Brunswick - *Right to Information Act*, 1978, last modified 2017. (RTI-rated 79/150) http://www.gnb.ca/0073/info-e.asp

Newfoundland and Labrador – *Freedom of Information and Protection of Privacy Act (1981) / Access to Information and Protection of Privacy Act*, 2002, last modified 2015. (RTI-rated 79/150) http://www.oipc.gov.nl.ca/legislation.htm

Quebec - *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, 1982, last modified 2010. (RTI-rated 81/150) http://www.cai.gouv.qc.ca/index.html

Yukon Territory - *Access to Information and Protection of Privacy Act*, 1984 (RTI-rated 91/150) http://www.atipp.gov.yk.ca/

Manitoba – *Freedom of Information and Protection of Privacy Act*, 1985, last modified 2017. (RTI-rated 94/150) http://www.ombudsman.mb.ca/legislation.htm

Ontario - *Freedom of Information and Protection of Privacy Act*, 1987, last modified 2019. (RTI-rated 89/150) http://www.ipc.on.ca/index.asp?navid=4

Ontario Municipal Freedom of Information and Protection of Privacy Act, 1990. http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m56_e.htm

Saskatchewan - *Freedom of Information and Protection of Privacy Act,* 1991, last modified 2018. (RTI-rated 80/150) http://www.oipc.sk.ca/legislation.htm

Saskatchewan municipalities - *Local Authority Freedom of Information and Protection of Privacy Act*, 1991 http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L27-1.pdf

British Columbia - *Freedom of Information and Protection of Privacy Act*, 1992, last modified 2015. (RTI-rated 97/150) http://www.oipc.bc.ca/legislation.htm

Alberta - *Freedom of Information and Protection of Privacy Act*, 1994, last modified 2012. (RTI-rated 79/150) http://www.oipc.ab.ca/foip/read.cfm

Northwest Territories - *Access to Information and Protection of Privacy Act*, 1994, last modified 2014. (RTI-rated 82/150) http://www.justice.gov.nt.ca/ATIPP/atipp.htm

Nunavut - *Access to Information and Protection of Privacy Act* (Nunavut), 2000. (RTI-rated 82/150) http://www.info-privacy.nu.ca/en/home

Prince Edward Island – F*reedom of Information and Protection of Privacy Act*, 2001. (RTI-rated 90/150) http://www.gov.pe.ca/foipp/index.php3

FOI policies and best practice recommendations from world non-governmental organizations

African Union, and African Commission on Human and Peoples' Rights

• *Declaration of Principles of Freedom of Expression in Africa. IV. Freedom of Information*. Gambia, 2002

• *Model Law on Access to Information for Africa*. Prepared by the African Commission on Human and Peoples' Rights, 2013

The African Union (AU) is a supranational union consisting of fifty-three African states. Established in 2001, the purpose of the union is to help secure Africa's democracy, human rights, and a sustainable economy, especially by bringing an end to intra-African conflict and creating an effective common market.

Council of the League of Arab States

• *Arab Charter on Human Rights*, May 23, 2004

The Arab League, also called League of the Arab States, is a regional organization of Arab States in the Middle East and North Africa. It was formed in Cairo on March 22, 1945 and currently has 22 members. The Arab League is involved in political, economic, cultural, and social programs designed to promote the interests of member states.

Article 19

• (1) Toby Mendel, head of the Law Programme of Article 19, *The Public's Right to Know: Principles of Freedom of Information Legislation*. London, June 1999

ENDORSEMENTS – "These Principles were endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 session of the United Nations Commission on Human Rights, and referred to by the Commission in its 2000 resolution on freedom of expression. They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS."

• (2) Toby Mendel, *Model Freedom of Information Law*. London, 2001

ARTICLE 19 is a London-based human rights organisation with a specific mandate and focus on the defence and promotion of freedom of expression and freedom of information worldwide. The organisation takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 is a founding member of the Freedom of Information Advocates (FOIA) Network, a global forum that aims to support transparency.

The Carter Center

• *Access to Information, a Key to Democracy*, edited by Laura Neuman. Chapter: Access to Information: How is it Useful and How is it Used? Key Principles for a Useable and User-Friendly Access to Information Law, by Dr. Richard Calland. Atlanta, Georgia, November 2002

The Carter Center is a nongovernmental, not-for-profit organization founded in 1982 by former U.S. President Jimmy Carter and his wife Rosalynn Carter. In partnership with Emory University, The Carter Center works to advance human rights and alleviate human suffering. The Atlanta-based center has helped to improve the quality of life for people in more than 70 countries. In 2002, President Carter received the Nobel Peace Prize.

The Commonwealth

• (1) Commonwealth Secretariat, *Model Freedom of Information Bill*. London, 2002

• (2) Commonwealth Parliamentary Association, Recommendations for Transparent Governance. Conclusions of the Commonwealth Parliamentary Association. World Bank Institute Study Group on Access to Information. Ghana, 2004

• (3) Commonwealth Human Rights Initiative (CHRI), Open Sesame: Looking for the Right to Information in the Commonwealth. New Delhi, India, 2003

When capitalized, "Commonwealth" normally refers to the 53 member Commonwealth of Nations - formerly the "British Commonwealth"- which is a loose confederation of nations formerly members of the British Empire, including Canada. The (appointed, not hereditary) head of the Commonwealth of Nations is Queen Elizabeth II.

Council of Europe, Committee of Ministers

• *Recommendations on Access to Official Documents.* COE Directorate General of Human Rights. Strasbourg, France, February 2002

• *Convention on Access to Official Documents*, 2009

The Council of Europe, founded in 1949, is the oldest organisation working for European integration. It is an international organisation with legal personality recognised under public international law and has observer status with the United Nations. The seat of the Council of Europe is in Strasbourg in France.

(The Council of Europe is not to be confused with the Council of the European Union, which is the EU's legislature, or the European Council, which is the council of all EU heads of state. These belong to the European Union, which is separate from the Council of Europe, although they share the same European flag and anthem since the 1980s because they also work for European integration.)

The Johannesburg Declaration of Principles on National Security, Freedom of Expression, and Access to Information

• "These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations."

National Security Archive

• *The World's Right to Know*, by Archive director Thomas Blanton. *Foreign Policy* journal, July/August 2002

Sponsor and secretariat for the invaluable www.freedominfo.org website (regrettably deactivated in 2017). A non-profit research and archival institution located within The George Washington University in Washington, D.C., it was founded in 1985 by Scott Armstrong and Thomas Blanton, and archives and publishes declassified U.S. government files concerning selected topics of American foreign policy.

Open Society Justice Initiative

• (1) Open Society Justice Initiative, *Ten Principles on the Right to Know*, 2006.

• (2) Open Society Justice Initiative, *Access to Information, Monitoring Tool Overview: International Law and Standards on Access to Information*. New York, 2004.

The Open Society Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. It has offices in Abuja, Budapest and New York.

Organization for Security and Co-operation in Europe (OSCE)

• (1) *Access to information by the media in the OSCE region: trends and recommendations*. Summary of preliminary results of the survey. With recommendations on FOI laws. Miklós Haraszti, Representative on Freedom of the Media. Vienna, 2007

• (2) OSCE with Privacy International, Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States, by David Banisar. London, May 2007

The OSCE is the world's largest regional security organization whose 56 participating States span the geographical area from Vancouver to Vladivostok. And ad hoc organization under the UN Charter, it serves as a forum for political dialogue, and its stated aim is to secure stability in the region, based on democratic practices.

Organization of American States (OAS)

• *Model Law on Access to Information*, 2010

The OAS is a continental organization that was founded on 30 April 1948, for the purposes of solidarity and cooperation among its member states within the Western Hemisphere. During the Cold War, this meant opposing leftism as a European influence; since the 1990s, the organization has focused on election monitoring. Headquartered in the United States' capital Washington, D.C., the OAS's members are the 35 independent states of the Americas.

Transparency International

• *Using the Right to Information as an Anti-Corruption Tool*. With Tips for the Design of Access to Information Laws. 2006

Transparency International (TI), founded in 1993, is a leading international non-

governmental organization addressing corruption. It is widely known for producing its annual Corruptions Perceptions Index, a comparative listing of corruption worldwide. TI has some 100 national chapters, with an international secretariat in Berlin.

United Nations Development Agency (UNDP)

• (1) *Summary of the presentation at the Regional Workshop on Media and Accountability*, Kuala Lumpur, 27 May 2006. By Patrick Keuleers, Regional advisor, UNDP Regional Centre in Bangkok

• (2) UNDP Democratic Governance Group, *Right to Information Practical Guidance Note*, July 2004. Document developed by Andrew Puddephatt (Executive Director, Article 19) in collaboration with the Oslo Governance Centre, a unit of UNDP's Democratic Governance Group

• (3) *International Mechanisms for Promoting Freedom of Expression. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression*, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression. December 2006

The United Nations was founded in 1945 to replace the League of Nations, in the hope that it would intervene in conflicts between nations and thereby avoid war. There are now 192 United Nations member states, including almost every recognized independent state.

World Bank

• *Legislation on freedom of information: trends and standards*. Washington DC: PREM Notes journal, No. 93, October 2004.

The World Bank, a part of the World Bank Group (WBG), is a bank that makes loans to developing countries for development programs with the stated goal of reducing poverty. The World Bank was formally established on December 27, 1945, following the ratification of the Bretton Woods agreement.

FOI policies and best practice recommendations from Canadian non-governmental organizations and other sources

• ***Bill C-39, An Act to better assure the Public's Rights to Freedom of Access to Public Documents and Information about Government Administration***. 1965

In April 1965, journalist and NDP member of parliament Barry Mather (1909-1982) of British Columbia, introduced the first freedom of information bill (C-39) as a private member's one page bill. It died on the order paper, yet in each parliamentary session between 1968 and his retirement in 1974, he reintroduced identical legislation. Four times it reached second reading, but went no further.

• ***Bill C-225, An Act respecting the right of the public to information concerning the public business.*** 1974

Gerald William "Ged" Baldwin (1907–1991), a lawyer and MP from Alberta, was a Conservative party politician who was known as the "Father and Grandfather" of the *Access to Information Act*. In October 1974, Baldwin introduced a private member's bill, Bill C-225. Though it eventually died on the order paper, it received extensive study by the Standing Joint Committee on Regulations and Other Statutory Instruments. He organized a group of FOI advocates and MPs, called ACCESS.

• ***Open and Shut: Enhancing the Right to Know and the Right to Privacy.*** Report of the MPs' Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the Privacy Act. Ottawa, 1987

In March 1987 the committee released its report. Later the same year, the government released its response, *Access and Privacy: The Steps Ahead.* Subsequently most of the administrative recommendations of the committee report were implemented, but none of the legislative recommendations.

• ***The Access to Information Act: A Critical Review. Ottawa***, 1994.

This report was prepared for the Information Commissioner of Canada by the consultants Sysnovators Ltd. of Ottawa. The opinions and recommendations it presents are those of the authors and do not represent the official position of the Information Commissioner of Canada.

• ***Toward a Better Law: Ten Years and Counting.*** John Grace, Information Commissioner. Recommendations for *ATIA* reform, in Commissioner's 1993-94 Annual Report. Ottawa, 1994

John Grace, a PH.D. from the University of Michigan, was Canada's first Privacy Commissioner being before being appointed Information Commissioner (succeeding Inger Hansen), serving from 1990 to 1998. After teaching at the University of Michigan, he was a journalist for 22 years, as an editorialist and editor for the *Ottawa Journal*.

• ***Blueprint for Reform***. John Reid, Information Commissioner. Recommendations for *ATIA* reform, in Commissioner's 2000-01 Annual Report. Ottawa, 2001

John Reid was Information Commissioner of Canada from 1998 to 2006. (He was then succeeded by Robert Marleau). Mr. Reid was a Liberal MP from 1965 to 1984, and Minister of State for for federal-provincial relations in 1978-79. He worked on issues such as improving the access of MPs to government records, and later represented Canada on the OSCE's mission to Bosnia and Herzegovina.

• ***A Call for Openness.*** Report of MPs' Committee on Access to Information, chaired by Liberal MP John Bryden. Ottawa, 2001

In 2000, backbench Liberal MP John Bryden, formed a special all-party committee to discuss needed reforms to the *ATIA*, and it produced a report. Because he was acting independently of the Liberal government, it explicitly disapproved of Mr. Bryden's committee and forbade civil servants to speak to it. In June 2000, a private member's bill was introduced by Mr. Bryden to overhaul the Act was defeated at second reading by a vote of 178 to 44.

• ***From Secrecy to Openness: How to Strengthen Canada's Access to Information System***. Report by Open Government Canada. Toronto, 2001

Open Government Canada (OGC) was initiated by the Canadian Association of Journalists (CAJ), and designed as a national grassroots coalition that brought together existing FOI organizations across the country, media lawyers, librarians, historians, non-profit groups and individual users. It held a founding conference in Toronto in 2000, and was active with a website and listserve, but became inactive several years later.

• ***Access to Information: Making it Work for Canadians.*** Report of the Access to Information Review Task Force. Ottawa, 2002. Appended with 29 research reports.

In 2000, the Justice Minister and Treasury Board President announced the establishment of the Access to Information Review Task Force, with a mandate to review both the legislative and administrative issues relative to access to information. The Task Force was widely criticized for the secrecy of its processes and meetings.

• ***Bill C-201 An Act to amend the Access to Information Act and to make amendments to other Acts***. Introduced by NDP Member of Parliament Pat Martin, 2004

In 2003, Liberal MP John Bryden attempted to initiate a comprehensive overhaul of the Act through a private member's bill, *Bill C-462*, which died on the order paper with the dissolution of the 37th Parliament in May 2004. A similar bill was introduced by NDP MP Pat Martin in October 2004 as *Bill C-201*. The bills' provisions are virtually identical.

• ***A Comprehensive Framework for Access to Information Reform: A Discussion Paper*** Justice Department of Canada, Ottawa, 2005

In April 2005, Liberal Justice Minister Irwin Cotler introduced this discussion paper, asking the House of Commons Standing Committee on Access to Information, Privacy and Ethics for input on a range of policy questions before the introduction of legislation.

• ***Access to Information Act - Proposed Changes and Notes***. By John Reid, Information Commissioner of Canada, Ottawa, 2005

This draft bill of Mr. Reid, the Open Government Act, was tabled at the House of Commons Standing Committee on Access to Information, Privacy and Ethics on October 25, 2005, at the request of the Committee. Most of this draft bill was endorsed by the ETHI Committee, who advised that it be passed into law. Also see Mr. Reid's 2005 special report on proposed changes to the *ATIA*, at the same website.

• ***In Pursuit of Meaningful Access to Information Reform: Proposals to Strengthen Canadian Democracy***. The Canadian Newspaper Association (CNA), Toronto, 2005

The Canadian Newspaper Association (CNA) is a non-profit organization, representing Canadian daily newspapers (English and French) with daily circulations ranging from 3,500 to more than 500,000. The CNA has pressed for *ATIA* improvements since 1997.

• ***Stand Up For Canada***. 2006 federal election platform statement of the Conservative Party of Canada, led by Stephen Harper, who won.

The Conservative Party of Canada, colloquially known as the "Tories," is a conservative political party in Canada, formed by the merger of the Canadian Alliance and the Progressive Conservative Party of Canada in December 2003. The party has formed the Government of Canada from 2006 to 2015.

• ***Restoring Accountability***. From the Final Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, by Justice John H. Gomery. Restoring Accountability: Phase 2 Report, Recommendations. Ottawa, 2006

The Gomery Commission was a federal Canadian Royal Commission headed by retired Justice John Gomery for the purpose of investigating the Quebec "sponsorship scandal," which involved allegations of corruption within the Canadian government in regards to the awarding of advertising contracts.

• ***Strengthening the Access to Information Act***. A Discussion of Ideas Intrinsic to the Reform of the *Access to Information Act*. Government of Canada discussion paper, Ottawa, 2006

"The Government was in a position to introduce some reforms as part of the proposed *Federal Accountability Act*, as sufficient consultations have been undertaken with the affected entities to allow the development of reforms. The remaining proposals, however, require further consultation, analysis and development before additional reforms can be drafted and introduced." – Justice Department of Canada

• ***A Chance for Transparency: The Federal Accountability Act and Public Access to Information***. Submission to the House committee considering Bill C-2, The *Federal Accountability Act*. The BC Freedom of Information and Privacy Association (FIPA), Vancouver, 2006

FIPA is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. It serves a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

• ***Bill C-556, Act to amend the Access to Information Act (improved access)***. Introduced by Bloc Quebecois Member of Parliament Carole Lavallée, 1st reading, June 2008

On the key points, the *Bill C-556* text is identical to Bill C-554 of NDP MP Pat Martin, introduced at the same time. These bills are updated versions of the *Open Government Act*, a complete *ATIA* reform bill drafted by former Information Commissioner John Reid at the request of the House Access to Information, Privacy and Ethics Committee; the Committee unanimously endorsed the Bill, as did Justice John Gomery, and the Conservative Party then seeking power.

• ***Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions***. The Centre for Law and Democracy (Halifax), 2012

The Centre for Law and Democracy works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association. CLD works collaboratively with NGOs around the world, on a consultancy or small project basis, to carry out projects aimed at boosting respect for key human rights. Prior to founding the Centre for Law and Democracy in January 2010, Toby Mendel was for over 12 years Senior Director for Law at ARTICLE 19.

• ***Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act***. Information Commissioner Suzanne Legault, March 2015.

• ***Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58***. Information Commissioner Suzanne Legault, September 2017

The Office of the Information Commissioner was established in 1983 under the *Access to Information Act*. It strives to maximize compliance with the *Act*, using the full range of tools, activities and powers at the Commissioner's disposal. These include negotiating with complainants and institutions without the need for formal investigations, and making formal recommendations and/or issuing order to resolve matters at the conclusion of investigations.

• ***Review of the Access to Information Act***. Standing Committee on Access to Information, Privacy and Ethics, chaired by MP Blaine Calkins, report, 2016

The Standing Committee on Access to Information, Privacy and Ethics studies matters related to the Office of the Information Commissioner of Canada, the Office of the Privacy Commissioner of Canada and the Office of the Commissioner of Lobbying of Canada, and certain issues related to the Office of the Conflict of Interest and Ethics Commissioner.

• **Canadian Union of Public Employees (CUPE)**, Submission to Ethics Committee on Bill C-58, 2017

The Canadian Union of Public Employees is Canada's largest union, with over 680,000 members across the country. CUPE represents workers in health care, emergency services, education, early learning and child care, municipalities, social services, libraries, utilities, transportation, airlines and more. It has more than 70 offices across the country, in every province.

• **Canadian Bar Association (CBA)**, Submission to Ethics Committee on *Bill C-58*, 2017

The Canadian Bar Association, or Association du barreau canadien in French, represents over 37,000 lawyers, judges, notaries, law teachers, and law students from across Canada.

• **Democracy Watch, Ottawa**, Submission to Senate review of Bill C-58, 2018

Democracy Watch in Canada, established in 1993 and headed by Duff Conacher, is a non-profit, non-partisan, non-governmental

organization. Democracy Watch's Open Government Coalition has been formed to campaign for changes to Canada's *ATIA*. The Coalition is composed of the Canadian Labour Congress, Democracy Education Network, Democracy Watch and Forest Ethics.

• **Privacy and Access Council of Canada (PACC), Calgary**, *Submission to Senate on Bill C-58*, October 2018

The Privacy and Access Council of Canada is an independent, member-based, non-profit, non-partisan and non-governmental national professional association. PACC advances awareness of Access to Information, Protection of Privacy, Data Protection and Information Governance. It promotes ethical and sound privacy, access, and data governance practices, policies, and legislation

• **Canadian Environmental Law Association (CELA) and Ecojustice**, Joint submission to Senate review of *Bill C-58*, December 2018

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization founded in 1970 as well as an environmental law clinic – within Legal Aid Ontario. Ecojustice, formerly Sierra Legal Defence Fund, is a national charitable organization dedicated to defending Canadians' right to a healthy environment.

• **Fédération professionnelle des journalistes du Québec (FPJQ)**. Brief presented to the Senate by the concerning *Bill C-58*, 2019

The FPJQ is a non-profit organization that brings together around 1,800 journalists from more than 250 print and electronic media. This makes it the leading journalistic organization in Canada.

• **Senate of Canada**. Observations to the thirtieth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-58), 2019

The Senate is the Upper House in Canada's bicameral parliamentary democracy. Parliament's 105 senators shape Canada's future. Senators scrutinize legislation, suggest improvements and fix mistakes. When the Senate speaks, the House of Commons listens - a bill must pass the Senate before it can become law. Senators also propose their own bills and generate debate about issues of national importance in the collegial environment of the Senate Chamber, where ideas are debated on their merit. It was created to counterbalance representation by population in the House of Commons.

Senate Amendments to Bill C-58 and House of Commons Response [2019]

Section of Act (or clause of Bill)	Senate Amendment	House of Commons Response
s. 5	Retain Infosource	Accepted
s. 6	Revert section 6 (requirement's to make a request) back to original form	Accepted
s. 6.1	Only ground to decline a request is whether the request is: • vexatious • made in bad faith • an abuse of the right of access. The ability to decline a request because the requester had already been given access (s. 6.1(1)(a)) or the request was of such a volume that processing it would unreasonably interfere with the operations of the institution (s.6.1(1)(b)) were removed	Accepted
s. 6.1	Suspend the time limit to respond to a request while awaiting the Commissioner's decision regarding whether a request can be declined	Accepted
s. 9	Limit time extensions taken under s. 9(1)(a) or (b) to 30 days, with longer extensions available with the prior written consent of the Information Commissioner	Disagree
s. 11	Remove all fees except the initial application fee.	Accepted
s. 30	Remove the ability for complaints to be made to the Information Commissioner on all extensions (consequential amendment)	Disagree
s. 30	Remove the ability for complaints to be made to the Information Commissioner on fees (consequential amendment)	Accepted
s. 30(4)	The Information Commissioner must give the Privacy Commissioner notice that she has ceased to investigate a complaint, where the Privacy Commissioner has been consulted on that complaint	Accepted
s. 35(2)(d) s. 36(1.1) 36.2 s. 37(2)	A package of amendments were made to address the joint letter of the Information and Privacy Commissioner. The Privacy Commissioner is involved in OIC investigations in the following circumstances: • When the Information Commissioner uses her discretionary authority to consult the Privacy Commissioner during an investigation. She may disclose personal information to him during this consultation. • When the Information Commissioner intends to make an order to disclose personal information, she has a mandatory obligation to consult the Privacy Commissioner. • The Privacy Commissioner has a right to make representations during our investigations if the Information Commissioner consults him. • The Privacy Commissioner has a right to receive a copy of a s. 37(2) Final Report where he was entitled to make representations during our investigation and did make representations. This will, in turn, give him rights to apply for or become a party to a review before the Federal Court under s. 41	Accepted

s. 36.1(6)	Allow orders of the Information Commissioner to be filed with the Registry of the Federal Court for the purposes of enforcement	Disagree
s. 37(2)	Final Reports from the Information Commissioner are deemed to be received by the institution on the fifth business day after the date of the report	Accepted
s. 67.1(1)(b.1)	New offence to prohibit, with the intent to deny the right of access, the use of any code, moniker or contrived word or phrase in a record in place of the name of any person, corporation, entity, third party or organization.	Disagree
s. 71.14	The determination of whether proactive disclosure may constitute a breach of parliamentary privilege is to be made by the Speaker of each chamber, and be subject to the rules and orders of each chamber.	Accepted
ss. 77-86	Several minor amendments for proactive disclosure of ministers and government institutions, related to disclosure deadlines and thresholds for disclosures.	Accepted
ss. 90.01-90.25	Major revision to the proactive disclosure requirements for the courts that requires disclosure to now be in the aggregate, based on the Court, rather than by individual judge.	Accepted
s. 91(1.1)	The Information Commissioner shall review annually the operation of Part 2 (proactive disclosure) and include comments and recommendations in relation to that review in her annual reports	Disagree
s. 99.1	The same parliamentary committee that currently reviews the administration of the Access to Information Act will also conduct mandatory legislative reviews of the Access to Information Act. The first is to take place within one year after the day on which this section comes into force and every five years after the review is undertaken.	Accepted
cl. 63	The Information Commissioner's powers to issue orders, and all related amendments, come into force the day the Bill receives Royal Assent. These powers only apply to new complaints	Accepted

SELECT BIBLIOGRAPHY

Access to Information Act, C. A-1. Ottawa, 1982, amendments came into force in 2019

The Access to Information Act and Cabinet confidences: a discussion of new approaches. A study prepared by RPG Information Servicses Inc. for the Information Commissioner of Canada. Ottawa, 1996.

Adie, Robert and Paul G. Thomas, *Canadian Public Administration: Problematical Perspectives.* Scarborough: Prentice-Hall, 1987.

Australian Law Reform Commission, (1995) *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77

BBC TV publications, Yes Minister. From the private diary of Sir Humphery Appelby. Espisode titled *Open Government*. London, 1981

Berger, Carl, Clio's Craft: *A Primer of Historical Methods*, edited by T. Crowley. Toronto: Copp Clark, Pittman, 1988

Bok, Sissela, *Secrets: on the Ethics of Concealment and Revelation*. New York: Pantheon Books, 1982

Boudreau, Lt. Col. Brett, *Force for Change or Agent of Malevolence? The Effect of the Access to Information Act in the Department of National Defense.* Canadian Military Journal, Vol. 1, No. 2, Summer 2000.

British Columbia Freedom of Information and Privacy Association (FIPA), *A Chance for Transparency: The Federal Accountability Act and Public Access to Information.* Vancouver, May 2006

Burgman, Cecelia, *St. Kitts and Nevis Freedom of Information Bill 2006*, analysis by Commonwealth Human Rights Initiative, 2007

Canadian Foundation for the Americas (FOCAL), *Report on Access to Information in Canada.* Civil Society Follow-up of the Quebec City Summit of the Americas Plan of Action. Ottawa, Canada. August 2004

Canadian Newspaper Association, *In Pursuit of Meaningful Access to Information Reform: Proposals to Strengthen Canadian Democracy*, Toronto: CNA, 2004

Centre for Law and Democracy (Halifax), *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, 2012

Conservative Party of Canada federal election platform, *Stand Up For Canada*. 2006

Crawford, Michael, *The Journalist's Legal Guide*. 4th ed. Toronto: Carswell, 2002

Crearar, Catherine, *Access to information; Bill C-43*, paper presented to CPSA annual meeting, 1981

Doherty, Michael, *A Prescription for "Dr. Doe"- Proposed Revisions to s. 13 of the Freedom of Information and Protection of Privacy Act.* BC Public Interest Advocacy Centre, 2004

Douglas, Kristen, *Access to Information Legislation in Canada and Four Other Countries.* Ottawa: Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, 2006

Drapeau, Colonel Michel W., and Marc-Aurele Racicot, *Federal Access to Information and Privacy Legislation*, Annotated 2019. Toronto: Thomson Carswell, 2018

Duplessis, Yvon, and Jean Hétu, *Accès à l'Information, Loi sure l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, Indexée, annotée et commentée, Québec: Les Éditions Yvon Blais Inc, 1991

Flaherty, David, British Columbia information and privacy commissioner, *Annual report 1996-97*

Fortier, Louis, *Législation canadienne sur l'accès à l'information / Canadian Legislation on Access to Information.* Toronto: Carswell, 1996

Gomery, Justice John H., *Final Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities. Restoring Accountability: Phase 2 Report, Recommendations.* Ottawa: Minister of Public Works and Government Service, 2006.

Grace, John, Information Commissioner of Canada. *Toward a Better Law: Ten Years and Counting.* Recommendations for ATI Act reform, in 1993-94 Annual Report. Ottawa

Hajili, Rashid, *Supplementary Human Dimension Meeting on Freedom of the Media: Protection of Journalists and Access to Information.* Vienna, 2006

Hallo, Ralph E., *Public Access to Environmental Information.* Report for the European Environment Agency, 1997

Haraszti, Miklós, Access to information by the media *in the OSCE region: trends and recommendations*, Representative on Freedom of the Media, Organization for Security and Co-operation in Europe. Vienna, April 30, 2007

Hazell, Robert, *Freedom of Information in Australia, Canada and New Zealand - Final Report to the Cabinet Office on the Operation of the Australian Freedom of Information Act 1982, Canadian Access to Information and Privacy Acts 1982 and the New Zealand Official Information Act 1982*. London: Home Office, 1987

Hazell, Robert, *Freedom of Information in Canada - Report to the Cabinet Office (M P O) on the Operation of the Access to Information and Privacy Legislation in Canada*. Ottawa, Treasury Board of Canada, 1987

Hofley, Randall, Craig Collins-Williams, Stikeman Elliott LLP, *A Thematic Comparison of Access Legislation Across Canadian and International Jurisdictions*. A report for the federal Information Commissioner's office, Ottawa, May 2008

House of Commons, *The Access to Information Act: First Steps Towards Renewal: Report of the Standing Committee on Access to Information, Privacy and Ethics*, June 2009, chair Paul Szabo

Jackson, Robert, and Doreen Jackson, *Politics in Canada: Culture, Institutions, and Behaviour in Public Policy*, second edition. Scarborough, Ontario: Prentice Hall Canada, 1990.

Johansen, David, *Federal and Provincial Access to Information Legislation: An Overview*. Parliamentary Information and Research Division. Ottawa, 1997, revised May 2005

Justice Department of Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*. Ottawa, April 2005.

Justice Department of Canada, *The Steps Ahead. The government's respsonse to the report of the Standing Committee on Justice and Solicitor General*. Ottawa, 1987

Justice Department of Canada, *Strengthening the Access to Information Act, a Discussion of Ideas Intrinsic to the Reform of the ATIA*. Ottawa, 2006

Kaufmann, Daniel, and Ana Bellver, *Transplanting Transparency: Initial Empirics and Policy Applications*. World Bank Institute, Washington DC, August 2005.

McKie, David, et.al., Digging Deeper, *A Canadian Reporter's Research Guide*. 2nd ed. Toronto: Oxford University Press, 2010

Mendel, Toby, head of the Law Programme of Article 19, *The Public's Right to Know: Principles of Freedom of Information Legislation*. London, June 1999

Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*. Second Edition. Revised and Updated. UNESCO: Paris, 2008

McNairn, Colin, and Christopher Woodbury, *Government Information: Access and Privacy*, with looseleaf supplements. Toronto: Carswell, 2007

Mitchell, Heather, and Murray Rankin, *Using the Access to Information Act*. Vancouver: International Self-Counsel Press, Ltd., 1984

MPs' Committee on Access to Information, *A Call for Openness*, Ottawa (November 2001). Chaired by John Bryden, MP.

Neuman, Laura, ed., *Access to Information, a Key to Democracy* (Chapter: 'Access to Information: How is it Useful and How is it Used? Key Principles for a Useable and User-Friendly Access to Information Law' by Dr. Richard Calland), Atlanta, Georgia, November 2002

Office of the Information Commissioner of Canada, *Open Government Act: Notes, Sources and References*. Ottawa, January 2008

Open Government Canada (OCG), From *Secrecy to Openness: How to Strengthen Canada's Access to Information System*. Toronto, July 2001

Ouston, Rick, *Getting the Goods: Information in B.C.* Vancouver: New Star Books, 1990

Québec Commission d'Accès à l'Information, *Reforming Access to Information: Choosing Transparency*, 2002

Rankin, Murray. *Freedom of Information in Canada: Will the Doors Stay Shut?* Ottawa: Canadian Bar Association, 1977

Rankin, Murray, *The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada.* A report for the federal Information Commissioner's office, Ottawa, June 2008

Reid, John, Information Commissioner of Canada. *Blueprint for Reform*. Recommendations for ATI Act reform, in 2000-01 Annual Report. Ottawa

Reid, John, Information Commissioner of Canada, *Access to Information Act - Proposed Changes and Notes*. Ottawa, 2005

Right to Know Coalition, *The Right to Information requires a Duty to Document*, Halifax, 2016.

Roberts, Alasdair, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, School of Policy Studies, Queen's University, Ontario, 1998.

Roberts, Alasdair, and Jonathan DeWolfe & Christopher Stack, *An Evidence-Based Approach to Access Reform*, School of Policy Studies Working Paper 22, Queen's University, Ontario, 2001

Roberts, Alasdair, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006

Roberts, Alasdair, *Two Challenges in Administration of the Access to Information Act*.

Roberts, Hon. John, *Legislation on Public Access to Government Documents - The Green Paper.*

Ottawa: Minister of Supply and Services Canada, 1977

Rolfe, Chris, and Rodney Wilts, *Whistleblower Protection: Strategies for B.C.* West Coast Environmental Law, Vancouver, 2002

Rowat, Donald, ed., *The Making of the Federal Access Act: A case study of policy-making in Canada*. Ottawa: Carleton University Press, 1985

RPG Information Services Inc., *The Access to Information Act and Cabinet Confidences - A Discussion of New Approaches* (Ottawa: Minister of Public Works and Government Services Canada, 1996). Report prepared for the Information Commissioner of Canada.

Rubin, Ken, *Reflections of an information rights warrior*. Speech to FIPA Awards event, Vancouver, Nov. 19, 2001

Ruvinsky, Maxine, *Investigative Reporting in Canada*. Toronto: Oxford University Press, 2008

Segal, Hugh, *The Critical Role of Information in a Democracy – A New Approach to Public Disclosure*. Access to Government and Corporate Information Conference, University of Winnipeg, May 2002.

Simpson, Jeffrey, *The Friendly Dictatorship*. McClelland and Stewart, 2001

Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Ottawa: Queen's Printer of Canada, 1987

Snell, Rick, *Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand*. Paper presented at Conference on Freedom of Information - One Year On, St. Patrick's Hall, Dublin, Ireland, April 1999.

Sysnovators Ltd., *The Access To Information Act: A Critical Review* (Ottawa: Minister of Public Works and Government Services, 1994). Report prepared for the Information Commissioner of Canada

Treasury Board Secretariat, *Access to Information and Privacy Coordinators: Their Status and Role*. Ottawa, 1988

Treasury Board Secretariat and Justice Department of Canada, *Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force*. Ottawa, 2002. Appended with 29 research reports.

Tromp, Stanley, *FOI Directors Caught in Crossfire*. Bulletin of the B.C. Freedom of Information and Privacy Association. Vancouver, November 1999

Tromp, Stanley, *The Hallmarks of Fairness: Improving Alberta's Freedom of Information and*

Protection of Privacy Act. FIPA, 2010

Tromp, Stanley, *The Vanishing Record. A report on needed improvements to British Columbia's Freedom of Information and Protection of Privacy Act. With 67 recommendations for reform.* Vancouver, 2016

U.S. Department of Justice, *Freedom of Information Act Guide*, May 2004

Wessels, Leon, *Guide on how to use the Promotion of Access to Information Act of 2000*. Pretoria, Republic of South Africa, 2007

ONLINE RESOURCES

Centre for Law and Democracy (Halifax) - https://www.law-democracy.org

Access Info Europe - http://www.access-info.org/

Right to Know (Halifax) - http://nsrighttoknow.ca

Campaign for Freedom of Information – United Kingdom - https://www.cfoi.org.uk/

Alasdair Roberts' FOI website. http://www.aroberts.us/

FOIANet online listserve - https://foiadvocates.net/

FreedomInfo.org. Collection of national FOI laws - http://freedominfo.org/

Article 19 – Global Campaign for Free Expression. http://www.article19.org/

Freedom of Information Advocates Network. http://www.foiadvocates.net/

Information Commissioner of Canada – https://www.oic-ci.gc.ca/en

Democracy Watch (Ottawa) - https://democracywatch.ca/

Transparency International – Canada. http://www.transparency.ca/

Canadian Journalists for Free Expression. http://www.cjfe.org/

Canadian Association of Journalists (CAJ) - https://caj.ca/

BC Freedom of Information and Privacy Association - www.fipa.bc.ca

BC FOI News Story Index - http://www3.telus.net/index100/intro2019

The Guardian newspaper page of its FOI stories - http://www.guardian.co.uk/politics/freedomofinformation

Ken Rubin, FOI advocate – http://kenrubin.ca/

Canada FOI Resource website of Stanley Tromp - http://www3.telus.net/index100

A NOTE ON THE AUTHOR

Stanley L. Tromp is a graduate of the University of British Columbia Political Science department (B.A., 1997), where he completed the course in international law at the UBC Law Faculty, and won the 1996 essay prize on the Responsible Use of Freedom from St. Mark's College at UBC. He graduated from the Langara College journalism program (Vancouver, 1993), and was awarded the best Langara journalism student prize from the B.C. Yukon Community Newspaper Association (BCYNA).

He has been nominated for a Webster Award (2015), a Canadian Association of Journalists award (1997), a B.C. Newspaper Foundation award (1999), and won a Canadian Community Newspaper Association prize in 2013.

While a reporter for the UBC student newspaper the *Ubyssey*, his freedom of information act request for the UBC-Coca Cola marketing contract in 1995 prompted a five year legal dispute, a successful B.C. Supreme Court appeal, and an influential ruling for disclosure by the B.C. Information and Privacy Commissioner. His appeals have also been the subject of 28 other rulings by the B.C. Commissioner.

For news articles, he has made hundreds of FOI requests, including to foreign countries and American states, and has been called "one of the more diligent and creative practitioners of access-to-information reporting" by columnist Vaughn Palmer. His news stories have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight*, *Vancouver Magazine*, the *Vancouver Courier*, *The Province* (Vancouver), the *Financial Post*, *The Canadian Press*, *The Courthouse News*, and many other publications.

In 2006 and 2009 he gave three oral presentations to the House of Commons and Senate committees in Ottawa considering access to information amendments. He has also made three presentations to British Columbia legislative reviews of the provincial *FOIPP Act* (1998, 2003, 2010), and a submission to the Alberta FOIPP review of 2010.

In 2007-08, as an aid to FOI scholars and advocates, he spent a year compiling the first World FOI Chart, an Excel spreadsheet comparing all the world's FOI laws, with NGO commentaries, posted at his website. The Chart was the foundation of his book *Fallen Behind: Canada's Access to Information Act in the World Context*, a book one reviewer called "by far the most comprehensive comparative analysis to date of Canadian and international access to information laws."

He can be reached at stanleytromp@gmail.com

A POSTSCRIPT - FOI IN THE CORONAVIRUS-19 ERA

While preparations were ongoing for the release of Fallen Behind in March 2020, the world was stricken by the Coronavirus-19 pandemic. The global consequences for the freedom of information system are vast and cannot be discounted.

"I think 2020 will be the lost year of FOI in Canada," said Dean Beeby, one of this nation's premier FOI journalists. "Overwhelmed FOI units will be months in recovery. And responses to substantial FOI requests related to the COVID-19 crisis are likely a year away.'"

Canada's Information Commissioner issued a statement on April 2, calling upon government to try to fulfill its transparency obligations, despite all these challenges. She also posed a range of vital questions:

"Many public servants are working from home, and occasionally, using other private communications channels such as personal telephone or computer..... are minutes of meetings —even those taking place by teleconference or video conference—continuing to be taken and kept? Are all relevant records —such as decisions documented in a string of texts between co-workers—ultimately finding their way into government repositories? Do employees have a clear understanding of what constitutes "a record of business value" and that this record must be preserved for future access?" Indeed, for all these reasons, we must be vigilant that this era does not become a black hole for the historical record.

Some Canadian provinces have altered their FOI obligations, all in different ways. The B.C. information commissioner has permitted public bodies to extend the time to process requests for records received after March 1, 2020, for an extra 30 days. New Brunswick's Ombudsman has ceased processing complaints and suspended deadlines indefinitely. Alberta used the Public Health Act to supersede the FOIP act and extend the time for processing requests to 90 days from 30. Ontario's commissioner expects agencies to comply with the access law, but accepts that many organizations will be unable to meet the 30-day response requirement.

Meanwhile, around the world, some nations are delaying FOI responses, while others have stopped accepting new requests entirely. "We've got, on the one hand, this incredible need for accountability and on the other hand, the institutions of accountability are operating well below their normal levels," said Toby Mendel, executive director of the Halifax-based Centre for Law and Democracy. "So, it's a cocktail for lack of accountability and at this time, the importance of access

to information is much, much greater than ever.'"

Organizations that already struggled to respond to FOI requests will likely make record access "an even lower priority" during a pandemic, said Jason Woywada, executive director of the British Columbia Freedom of Information and Privacy Association. "But it also could push the country's access to information systems to modernize."

In America, a USA Today investigation by reporter Jessica Priest found 35 states have at least temporarily altered their open government laws because of the coronavirus crisis. American media observer Jay Rosen also tweeted: "The battle to prevent Americans from understanding what he [President Trump] did to minimize the danger in January to March is going to be one of the biggest propaganda and freedom of information fights in modern US history."

The United Kingdom's information commissioner issued a statement that her office understands that official resources may be diverted away from usual information rights work; "Whilst we can't extend statutory timescales, we will not be penalizing public authorities for prioritizing other areas or adapting their usual approach during this extraordinary period." She stated the ICO will continue to take new FOI complaints, and will take a "pragmatic" approach to resolving these.

Perhaps there are two kinds of state officials who suspend or curtail the FOI process during COVID-19. [1] Those well meaning, acting from a genuine concern for public health, and whose pleas about restricted FOI resources are indeed legitimate. [2] Those who have always derided FOI on general principles, who may perceive the current crisis as a political opportunity (and whose arguments, sadly, may influence the former group, consciously or otherwise).

A few of the latter group may even vaguely suggest FOI applicants are socially irresponsible, insofar as they drain resources from public health - especially "frivolous" requestors, of whom, regrettably, a very few will always exist – and this despite the FOI system having a stand-alone budget separate from health or unemployment services. (Yet indeed, it was always advisable to file carefully focused FOI requests instead of broad fishing expeditions, and today even more so.)

There are other factors that render this COVID-19 era a dark one for FOI. Newspapers, with much of their advertising vanished, now subsist while facing the iceberg of bankruptcy, laying off staff, and considering government aid. Hence, far fewer journalists file FOI requests – for who would pay them to do so, who would publish the results, and who in the public – all consumed with this health crisis – would have time or interest to read stories on other topics than the coronavirus? This all adds up to a political-economic perfect storm for FOI practice.

"None of this bodes well for government's most important tool in its fight against the coronavirus: public trust," noted Justin Silverman on FOI slowdowns. Yet we should never accept any diminishment of Canadian FOI rights, which we have labored so hard

to implement and improve upon for the past three decades. As Ken Rubin said in a speech to a FIPA event, two months after the September 11, 2001 terrorist attacks on New York:

"I want to continue to stimulate others to go out and dig around, question authority, and act up front. Nothing will make me back down when Ottawa gets overly power-hungry and wants to trash both the access and privacy acts …. This is not the time to be consumed by fear and anxiety." This has a vaguely familiar ring, and I believe all these principles should apply to the this era too.

We cannot yet foresee the full impacts COVID-19 will have on freedom of information practice. After the crisis subsides, will or can or should it return to its former position? Will a longterm FOI powershift have resulted (and not one for the better)? Will FOI law reform be pushed from the back burner into the deep freeze? Must we fight just to regain our pre-existing rights, before pressing for improvements?

It is well known that periods of war and crisis are never the most opportune times for critical inquiry and democratic reform. And yet, these conditions will not last forever, and for now and in the years to come, for the public interest, the need for our persistence and vigilance on FOI rights will surely be more pressing than ever.

- Stanley L. Tromp, Vancouver, May 2020

FOI IN THE ERA OF THE CORONAVIRUS-19 – RESOURCES

[1] ***COVID-19 Update: Tracking Changes to Right to Information Laws.***
https://www.rti-rating.org/covid-19-tracker/

The Halifax-based Centre for Law and Democracy has added a page to the RTI Rating (ranking national right to information laws), which tracks the changes that have been made to FOI laws in response to the COVID-19 pandemic. The aim is to provide a central repository of comparative information on this issue.

This page contains a compilation of legal measures which temporarily alter or even suspend RTI obligations due to COVID-19. The first part contains an alphabetic list of any countries which have adopted formal measures, along with a short description of those measures. The second part contains other relevant information, such as formal measures that have been proposed or are under discussion or reports of such measures that we have been unable to confirm. A third part tracks international responses and statements.

[2] ***Canadian FOI Resource Website.*** By Stanley Tromp. With links to commentaries, and FOI response news in Canada, the U.S., the UK, Scotland, Ireland, Georgia, India, Ukraine, Argentina, Italy. http://www3.telus.net/index100/covid19foi

[3] ***Tips on Making FOIA Requests About COVID-19.*** By Toby McIntosh, Global Investigative Journalism Network. For global, national and local requests. (See links.)
https://gijn.org/2020/04/08/tips-on-making-foia-requests-about-covid-19/

[4] ***Fighting for public records during the coronavirus crisis.*** Resource for American applicants. From the Investigative Reports and Editors (IRE).
https://docs.google.com/document/d/1IuDrRQSwKxZ7U90TRHMAYlxovybMnIKrNpMLy_f-hlQ/edit

[5] Freedom of Information Act (FOIA) Processing Changes Due to COVID-19. U.S. Congressional Research Service useful guide. Notes on 'expedited' process.
https://fas.org/sgp/crs/secrecy/R46292.pdf

NEWS AND COMMENTARIES

Canada

[6] ***Freedom-of-information requests shunted to sidelines during virus crisis.*** By Jim Bronskill, Canadian Press. March 26, 2020. https://nationalpost.com/pmn/news-pmn/canada-news-pmn/freedom-of-information-requests-shunted-to-sidelines-during-virus-crisis

[7] ***During COVID-19, government transparency takes a beating.*** By Ken Rubin, Ottawa Citizen. April 24, 2020. https://ottawacitizen.com/opinion/rubin-during-covid-19-government-transparency-takes-a-beating/

[8] ***The Lost Year of the FOI.*** By Steph Wechsler, J-Source. April 13, 2020 https://j-source.ca/article/the-lost-year-of-the-foi/ On the impacts of the COVID-19 on Canadian FOI

[9] ***Access-to-information systems across Canada slowed by COVID-19. Some agencies have stopped accepting requests, but advocates say accountability is more important than ever.*** By Karissa Donkin. CBC News. April 3, 2020. https://www.cbc.ca/news/canada/covid-foi-systems-1.5519114

United States

[10] CLD summary - Several resources are tracking the FOIA policies adopted by various federal agencies during the pandemic, including this spreadsheet from the Reporters Committee for Freedom of the Press and this COVID-19 Resource page from the National Freedom of Information Coalition. The Congressional Research Service also produced a report on FOIA processing changes due to COVID-19 on 27 March 2020.

[11] ***Don't let open government become another victim of the COVID-19 pandemic.*** Column by Dean Ridings, CEO at America's Newspapers. April 22, 2020. https://www.victoriaadvocate.com/opinion/guest-column-don-t-let-open-government-become-another-victim-of-the-covid-19-pandemic/article_937b1f3e-83ec-11ea-84ab-1f3fe0b40565.html

[12] ***Public Access to Information Suffers Under Coronavirus.*** By Richard Salame and Nina Zweig. Columbia Journalism Review. March 25, 2020. https://www.cjr.org/analysis/covid-19-pandemic-foia.php

[13] ***Transparency in government is essential during the coronavirus.*** By Justin Silverman, Boston Globe, editorial. March 20, 2020. https://www.bostonglobe.com/2020/03/20/opinion/transparency-government-is-essential-during-coronavirus/ Links to:

Related: Editorial: Celebrating 'Sunshine' in the age of coronavirus

Related: Remote meetings. Shuttered offices. Amid outbreak, some fear government is receding from view

[14] ***Government secrecy is growing during the coronavirus pandemic.*** Column by David Cullier for TheConversation.com. April 3, 2020. https://theconversation.com/government-secrecy-is-growing-during-the-coronavirus-pandemic-135291

[15] ***Casualties of a Pandemic: Truth, Trust and Transparency.*** Journal of Civic Information, April 7, 2020. https://journals.flvc.org/civic

[16] ***Reporters barred. Records delayed. How coronavirus shrouded local government in secrecy.*** By Jessica Priest, USA Today Network. April 8, 2020. https://www.usatoday.com/story/news/investigations/2020/04/08/coronavirus-fears-pit-public-safety-against-government-transparency/2939129001/

[17] ***Open Government in a WFH World.*** By Rachael Jones. The Brechner Center. April 3, 2020. https://medium.com/@UFbrechnercenter/open-government-in-a-wfh-world-how-public-records-and-open-meeting-requirements-are-adapting-to-7d9c566db7ef

[18] ***Government transparency is also falling victim to the coronavirus pandemic.*** By William Bender and Jeremy Roebuck. Philadelphia Inquirer, March 25, 2020. https://www.inquirer.com/health/coronavirus/coronavirus-public-records-foia-transparency-open-government-20200325.html

[19] ***Access to public information restricted as schools move online.*** By Cameron Boatner. Student Press Law Center. March 24, 2010. https://splc.org/2020/03/access-to-public-information-restricted-as-schools-move-online/

The World

[20] ***Right to information: A matter of life and death during the COVID-19 crisis.*** By Adam Foldes, Legal Advisor, Transparency International, Berlin. April 2, 2020. https://voices.transparency.org/right-to-information-a-matter-of-life-and-death-during-the-covid-19-crisis-d98e6422a174

[21] ***Governments Delay Access to Information Due to COVID-19.*** By Toby McIntosh, Investigative Journalism Network. March 31, 2020 (with many good links). Includes information on Australia, Brazil, Canada, El Salvador, India, Italy, Hong Kong, Mexico, New Zealand, Romania, Serbia, the United Kingdom, and the United States. https://gijn.org/2020/03/31/governments-delay-access-to-information-due-to-covid-19/

STATEMENTS

[22] ***Statement by Information Commissioner of Canada.*** April 2, 2020. https://www.oic-ci.gc.ca/en/resources/news-releases/access-information-extraordinary-times

[23] ***Statement by Information Commissioner of the United Kingdom.*** March 2020 https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/

[24] ***U.K. Campaign for Freedom of Information statement.*** April 6, 2020. https://www.cfoi.org.uk/2020/04/foi-and-the-pandemic/

[25] ***144 Organizations Sign Statement on American Government Coronavirus Emergency Transparency.*** **National Freedom of Information Coalition (NFOIC).** April 1, 2020 https://docs.google.com/document/d/1n4QuRJa1iFEQUl3eQSun4REAWdC7VG67nJk9i-ZTe1I/edit

[26] ***Statement by the International Conference of Information Commissioners on the Right to Information.*** April 14, 2020. https://www.informationcommissioners.org/covid-19

[27] ***Statement by the Council of Europe.*** April 7, 2020. https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

Council of Europe Guidelines on RTI in times of crisis. 2007
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680 5ae60e

[28] ***Statement by the civil society members of the Open Government Partnership Steering Committee.*** (From FOIANet) April 27, 2020. https://www.opengovpartnership.org/news/statement-on-threats-to-democracy-and-open-government-due-to-covid-19/

[29] ***IACHR Resolution 1/2020 on the pandemic and human rights in the Americas.*** Inter-American Commission on Human Rights, April 10, 2020. https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf

[30] ***Statement by African Commission on Human and Peoples' Rights.*** March 24, 2020 https://www.achpr.org/pressrelease/detail?id=483

FIPA BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

#103-1093 West Broadway
Vancouver B.C. V6H 1E2

p: 604.739.9788
e: fipa@fipa.bc.ca
w: fipa.bc.ca
tw: @bcfipa

ISBN 978-1-947543-05-8