CENTRE FOR FREE EXPRESSION

Occasional Paper Series

It's Time for Change!
206 Recommendations for Reforms to Canada's *Access to Information Act*

Stanley L. Tromp

August 3, 2021

Ryerson University
Centre for Free Expression
Faculty of Communication & Design

About the Centre for Free Expression

The Centre for Free Expression at Ryerson University focuses on issues related to freedom of expression and the public's right to know. This includes campus free expression, academic freedom, hate speech, censorship, disinformation, access-to-information, whistleblower protection, anti-SLAPP legislation, corporate and government surveillance, and freedom of the press. The Centre sponsors public educational events, does research, provides advice, and engages in advocacy on these issues. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

About the Author

Stanley L. Tromp is a Vancouver-based Canadian journalist whose work has appeared in the *Globe and Mail, Vancouver Sun, The Province, Georgia Straight, National Post, Vancouver Courier,* and *Courthouse News,* among other publications. He has been nominated for the Webster Award, the Canadian Association of Journalists award, the B. C. Newspaper Foundation award, and won a Canadian Community Newspaper Association Award.

He is author of *Fallen Behind: Canada's Access to Information Act in the World Context*, 2nd ed. (Victoria: BC FIPA, 2020). His FOI website is at http://www.canadafoi.ca Email: stanleytromp@gmail.com

Centre for Free Expression

Rogers Communications Centre
Faculty of Communication & Design
Ryerson University
80 Gould Street
Toronto, Ontario

E: cfe@ryerson.ca
W: www.cfe.ryerson.ca

Table of Contents

Author's Note

My purpose is to provide government transparency advocates with a resource base of recommended reforms to Canada's *Access to Information Act* (1982). They can select from, modify, or add to these 206 items as they choose, to create their own lists of preferred amendments. Many of these proposals can also be adapted for provincial or other national FOI laws.

I have tried to be as comprehensive as possible, to detail every needed amendment to the *ATIA* that I could conceive of, and have considered the widest range of sources, which I have collected over three decades. There are several explanatory notes, to explain and bolster the recommendations; and I have especially noted whenever some of the principles have been endorsed by government - mainly in Justice Department and Treasury Board reports - a fact that weighs even more obviously for their prompt implementation. There are even a few examples of officials' broken law reform pledges, beyond the more familiar ones made by politicians. Overall, I hope to have found some sort of balance here between (1) the ideal, and (2) the politically achievable.

The Canadian sources are noted at the end. The reader may also find it helpful to have open on a screen the most recent version of the *ATIA* text (available at https://laws-lois.justice.gc.ca/eng/acts/a-1/) as a reference.

INTRODUCTION

Canada's *Access to Information Act* was adopted more than 35 years ago and has aged badly. Despite numerous calls for substantial reforms to the legislation, many formal reviews and consultations, and various amendments to the *Act*, changes have been little more than cosmetic. As a result, Canadians have been denied the access to information so important for a healthy democracy. The following is a comprehensive compilation of recommendations based on best practices elsewhere, advice of Canadian information commissioners, and access policy experts and frequent users, and suggestions for reform by civil society groups.

RECOMMENDATIONS

A. FUNDAMENTALS

Recommendation #1

That Canada's *Access to Information Act* be renamed *The Right to Information Act.*

(Explanatory note: The purpose is to assert a stronger sense of a "right," as with the title of India's law, and also indicate Canada's break away from its ossified *ATI Act* of the past 38 years – now ranked #52 among 128 nations' FOI laws in the CLD-AIE ratings.[1])

Recommendation #2

That the Prime Minister and premiers begin discussions on amending Canada's Constitution to fully ensure the public's right to obtain government information. This right should be subject to restrictions only in accordance with the test for restrictions which applies to all rights.

(This is a provision that 76 other nations have in their Constitutions or Bill of Rights, and it has been endorsed by the United Nations. Several Canadian court rulings have described the right as "quasi-Constitutional," and the Supreme Court of Canada ruled unanimously in a 2010 case that the right to access government records is protected by the *Charter of Rights*.[2] If placed in our Constitution, the access right would not be absolute, but subject to the Charter's limitations clause. When the principle has been mainly accepted by our highest court, it should be placed in law.)

Recommendation #3

[1] Access !NFO and Centre for Law & Democracy, The RTI Rating Map: analyses the quality of the world's access to information laws. https://www.rti-rating.org/

[2] *Ontario (Public Safety and Security) v. Criminal Lawyer's Association,* [2010] S.C.J. No. 23, SCC https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7864/index.do

Add a clause to the *ATIA* to state that access to government information is to be regarded in Canada as "a human right."

(There is a growing body of authoritative statements by international human rights bodies and courts to the effect that access to information is a fundamental human right. Such right of access 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*, to which Canada is a party.)

Recommendation #4

Broaden the purpose clause for the *ATIA*.

(The stated principles in the purpose clause is extremely important, for these can provide guidance to commissioners or judges in writing their rulings. Other factors could be added to the *ATIA*'s existing Sec. 2; in other nations, these include: accessing information necessary to investigate crimes against humanity, human rights violations, crimes of economic damage to the state, environmental harms, and reducing corruption and inefficiency. The purpose clauses in the FOI laws of Alberta and Nova Scotia have good features.)

B. EXEMPTIONS, HARMS TESTS, TIME LIMITS – GENERAL REFORMS

[**Preface**. Several *ATIA* exemptions lack explicitly-stated harms tests and so are known as "class exemptions," a situation that falls seriously short of world FOI standards. 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. As the human rights organization Article 19 has noted, FOI statutory exemptions should be narrowly drawn, based on the content rather than the type or name of the record, and time-limited.

Some nations set just one time limit, and one mandatory or discretionary setting, across all exemptions. This is an error, being far too imprecise. After a general prefatory statement on the harms principle, each Canadian *ATIA* exemption should be detailed individually. In most cases, each document and the context of its release is unique and should be judged on its merits.

Time limits should be reserved only for the protection of public interests, but not applied for a very few private 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.

The *ATIA*'s Sections 13, 16(1), 16(3), 16.1, 16.2, 16.3, 16.31, 16.4, 16.5, 18.1(1), 20, 20.1, 20.2, 20.4, 21, 22.1, 23, 24, 68 and 69 are missing harms tests. Because I have not the space here to discuss them all, I will focus mainly instead on what I consider the five most egregious cases – Sections 13, 21, 23, 24 and 69. These sit unchanged since 1982, as we enter the third decade of the 21st century.

As one *ATIA* guidebook by two lawyers[3] notes of Sec. 13: "This first exemption sets the tone for all the rest. Its meaning is unclear, and the power it gives can be abused." Notes on other exemptions below are less detailed, although many of their flaws may be mitigated by the general recommendations below that apply to all exemptions.]

Recommendation #5

Amend the *ATIA* to state: "The right to refuse information only lasts for the period in which the risk of harm from disclosure remains live, or for the number of years set for each exemption, whichever occurs first."

(This may be ideal phrasing for FOI exemptions, as it ensures the best of both worlds. With the first option, the topic sensitivity might expire long before a set time limit and so the records should be opened. Yet even if they should, if a recalcitrant agency denies this and stubbornly resists in court for years, then the second option of the fixed time limit would remain,as it does now, as a default catch-all net. Also consider the terms of the Czech FOI 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 a reason for refusal still lasts.")

Recommendation #6

The *ATIA* should be amended to prescribe that exemptions cannot be generally applied to withhold information that has already been published - subject to a very few special harms exceptions.

(This is advised because there are examples of agencies invoking discretionary *ATIA* exemptions to withhold information published in old newspaper clippings, and data already posted on a company's website. Yet common sense indicates that if harms could have resulted from such information release, these damages most likely would have occurred during its first, "informal" publication; if they did not, then fears of such harms resulting from a second, formal release via *ATIA* are almost certainly groundless.)

Recommendation #7

Place in the *ATIA* these terms from Article 19's *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations[4]:

> Principle 4. Exceptions should be clearly and narrowly drawn and subject to strict "harm"and "public interest" tests. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.
>
> (1) the information must relate to a legitimate aim listed in the law;

[3] Heather Mitchell andMurray Rankin, *Using the Access to Information Act*. Vancouver: International Self-Counsel Press, Ltd., 1984.

[4] Article 19, *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations - https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf

(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 theinformation

Recommendation #8

Add to above terms this clause from Mexico's FOI law, Article 104, III: "The limitation is consistent with the principle of proportionality and is the least restrictive means available to avoid harm."

Recommendation #9

Add a general provision at the beginning of the exemptions part of the *ATIA* oblige heads of institutions to use their discretion in favour of access and openness as opposed to refusal.

Recommendation #10

Amend the *Act* to adapt the stronger default right to records present 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."

Recommendation #11

Implement this worthy proposal from the Treasury Board Secretariat's *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 ofinformation; weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and thefact that information generally becomes less sensitive over time; and having good, cogent reasons for withholding information when claiming a discretionary exemption.

Recommendation #12

In 2006 the government amended the *ATIA* to enable it to withhold draft internal audits, in Sec. 22.1(1). Delete this subsection, because such harms are already prevented by other *ATIA* exemptions; or retain it only if a good harms test is added.

(The 2002 Treasury Board Task Force 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 candor of individuals in their dealings with auditors. Even if that was the case, a harms test on such points should still have been explicitly written into this *ATIA* subsection, instead of passing it as a class exemption.)

Recommendation #13

The *ATIA* should make clear that officials may not mingle exempt and non-exempt records together, then claim an exemption for them all (for example, wrongly placing records into files of cabinet or international relations documents)

Recommendation #14

Establish an expert independent panel of academics, historians, journalists, librarians, and representatives of the LAC and OIC, to advise and report upon [1] the de-classification of historical records, and [2] the ideal time limits for each *ATIA* exemption. These could be two separate panels.

(Several nations' FOI laws simply allow for all material prior to a certain historical point to be released, and this could be considered for the *ATIA*. Some nations also 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.)

Recommendation #15

Implement the proposal in *A Call for Openness*, the report of the MPs' Committee on Access to Information, 2001: **"**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 30 years after their creation. This provision would override all exemptions from release contained in the *Act*."

(NDP MP Pat Martin advised the same 30-year rule in his *Bill C-201* of 2004, but added: "except where specifically exempted for reasons of national security, public safety or international obligations."

Meanwhile, 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. There, individuals can make requests for mandatory declassification instead of using the U.S. *FOIA*, and this may be advisable for Canada. See *A Declassification strategy for national security and intelligence records*, a 2020 report by Prof. Wesley Wark for the Information Commissioner of Canada.)

Recommendation #16

Add these terms to the *ATIA*, from Justice Gomery's report *Restoring Accountability*, 2006:

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'"

Recommendation #17

The current Sec. 17 of the *ATIA* creates a discretionary exemption dealing with safety-related concerns. Commissioner John Reid advised in his 2005 draft *Act* that this should be expanded to cover information that could threaten "the mental or physical health" of individuals. (This factor appears in several provinces' FOI laws, and might be considered for the *ATIA*.)

Recommendation #18

Implement these recommendations (from *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, Carolyn Maynard, 2021):

> **4 -** The *Act* should allow heads of government institutions to provide access to personalinformation where disclosure does not constitute an unwarranted invasion of privacy.
>
> **5 -** The *Act* should allow heads of government institutions to provide a deceased person'sspouse or close relatives access to their personal information on compassionate grounds.
>
> **6 -** The *Act* should permit the disclosure of a person's business or professional contactinformation.

(Moreover, Ontario's *FOIPP Act* lists a series of non-exhaustive circumstances to be considered by the head of an institution in determining whether disclosure of personal information as a result of an access request constitutes an unjustified invasion of personal privacy. The same should be contained in the *ATIA*, whose Sec. 19 is the most widely used exemption in the Act, invoked in 42% of access requests in 2018-2019.)

C. SECTIONS 13 AND 14

Section 13 regards "information obtained in confidence" [from other governments]; it is mandatory, with no time limit.

Recommendation #19

Mitchell and Rankin note that "institutions" are not defined in sec. 13 - "Does it include Crown corporations? Water boards? Tribunals?" The term should be defined in the *ATIA.*

Recommendation #20

Sec. 13 needs a harms test whereby the head of a government institution may refuse to discloserecords containing information supplied in confidence from another government only "if disclosure could cause serious harm to relations with the government, institution or organization."

(It is spurious to assume that every single item "obtained in confidence" would *de facto* harm intergovernmental relations if revealed. Some foreign state might even welcome publicity on a particular supplied record. In his 2002 report, John Reid advised that Sec. 13 should be a discretionary and injury-based exemption, subject to a public interest override, and with a 15 year time limit - unless the information relates to law enforcement or security and intelligence matters, or is subject to extensive and active international agreements and arrangements.)

Recommendation #21

Amend Sec. 13 to state that information may be withheld "where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy."

Recommendation #22

Amend Sec. 13 to state that, if the Canadian public body wishes to apply this exemption, it must first consult with the other government to ask if it would object to disclosure of the records, as likely to cause "serious harm based on reasonable expectations of secrecy," not just unilaterally claim that it would do so without inquiring.

Recommendation #23

Although the exemption for "information obtained in confidence" is discretionary in the FOI laws of seven provinces, it can remain mandatory in the federal *ATIA*, but only if a strong harms test (such as the one above) is added.

Recommendation #24

Amend the *ATIA* to read: "13. (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." It currently reads "may."

Recommendation #25

Regarding time limits, the Sec. 13 exemption for information obtained in confidence cannot be applied after 15 years in seven provinces and territories, and this is advisable for the *ATIA* as well. (Yet consider the qualifier in the Newfoundland and British Columbian FOI laws to this time limit: "unless the information is law enforcement information.")

Recommendation #26

Combine *ATIA* Sections 13 and 14 into one section.

(*ATIA* Sec. 14, for "federal-provincial affairs" is a discretionary exemption, with a harms test, but no time limit. It should be deleted, if it is not heavily revised. Firstly, 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 of 1981.

Secondly, say Mitchell and Rankin, "Section 14 seems hardly necessary. Other exemptions cover all the concerns," and they cite Section 13 and 21. Indeed, some believe that the topics of Sections 13 and 14 so heavily overlap that they should be combined into one exemption, as do some countries and Canadian provinces.)

Recommendation #27

For Sec. 14, replace the term "affairs" with the narrower term "negotiations."

(The John Bryden MPs' committee of 2001 advised that Sec. 14 be narrowed so that it was available only in relation to federal-provincial consultations and deliberations; many others have advised that it be revised to "negotiations.")

D. SECTION 21 – POLICY ADVICE

Recommendation #28

Amend Sec. 21 with the wording of Article 19's *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.

At a bare minimum, implement the harms test for policy advice records in Sec. 36 of the FOI law of the UK, Canada's parliamentary model, whereby information is exempt if its release would be likely to "inhibit the free and frank provision of advice."

(In an important case[5] 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. This principle should be explicitly set in a reformed *ATIA.*

Moreover, in the early 1980s, Canadian Treasury Board *ATIA* guidelines *did* in fact suggest a harms test for Sec. 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 Ottawa has accepted this principle in its *ATIA* interpretive guidelines, is it not then only sensible to enshrine it in the law?)

Recommendation #29

That Sec. 21 be amended to add a definition of "advice." It should also 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. As well, clarify that "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process, not sweeping separate concepts.

Recommendation #30

That Sec. 21 be amended to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers – that is, only information which recommends an actual decision or course of action by a public body, minister or government.

The *Open and Shut* report of 1987 well advised that Sec. 21 "only apply to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process."

[5] *Canada (Office of the InformationCommissioner) v. Canada (Prime Minister), 2017 FC 827* https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/234925/index.do

Recommendation #31

In Sec. 21 (1)(c) after "positions or plans developed for the purpose of negotiations carried on or on behalf of the Government of Canada and considerations relating thereto," add the phrase – "and disclosure of the record could reasonably be expected to be injurious to the conduct of the negotiations."

Recommendation #32

Clearly mandate the principle of severability to all policy advice records. (This should be stated at the start of the exemptions portion of the *Act*, for all exemptions, but might need to be reiterated here.) A prescribed format should be developed for Sec. 21 documents that would allow for easy severance of exempt from releasable non-exempt material.

Recommendation #33

Have the policy advice exemption covered by a mandatory public interest override (while ideally there would be a general override for all exemptions in the *ATIA* as most provinces do in their FOI laws).

Recommendation #34

In 2015, the Information Commissioner advised "reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comesfirst," and this is a good option.

(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* - such as 5 years for Nova Scotia, and 10 years for Quebec and British Columbia. Even the Treasury Board's *Access to Information Review Task Force* report of 2002 states: "In our view, reducing the protective period from 20 to 10 years is unlikely to compromise the frankness or candour of advice being provided to the government, the convention of ministerial responsibility,or the authority of Ministers.")

Recommendation #35

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.

Amend the *ATIA* to clarify the exemption would only apply to ongoing discussions, and not to the policy's successful outcome. Follow the example of Kenya's law, Sec. 6(1), where 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."

Peru's FOI law, Article 15B commendably adds a further deciding element for policy openness - publicity: "Once that decision is made this [policy advice] exemption is terminated if the

public entity chooses to make reference to the advice, recommendations and opinions." (The Government of Canada has accepted some of these principles, as noted in its discussion paper *Strengthening the Access to Information Act*, 2006: "The proposal to narrow thescope 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," and "information which relates to a particular decision should normally be disclosed once the decision has been taken."

Moreover, the Justice Department of Canada, in *A Comprehensive Framework for Accessto Information Reform: A Discussion Paper*, 2005, stated on Sec. 21(1)(d): "According to theTask 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 Sec. 21 to implement this recommendation." Yet it was never implemented.)

Recommendation #36

Amend Sec. 21 to include a clause on the model of Quebec's FOI law Sec. 38, whereby the 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.

Moreover, this should be added: If the record concerns a policy advice matter that has been completed but not made public, the 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, thegovernment may only withhold the record for five years (on the model of Nova Scotia's FOI law, Sec. 14).

Recommendation #37

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. Yet, as the British Columbia FOI law allows, rejected plans should be as open to public scrutiny as plans which are brought into effect.

Recommendation #38

In respect to what factual records may be released notwithstanding the policy advice exemption,the *ATIA* inadequately contains just one 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 employeeof 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, 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. *Appendix 1* below lists 14 examples of such non-exempt papers, from Section 13(2) of the B.C. law, and these should all be prescribed for the *ATIA*. These items should be proactively published, or at least routinely released upon request, i.e., with no *ATIA* request needed. Moreover, in 21(2)(b) after "report" prepared, add – "or advice."

(The Justice Department of Canada has accepted some of these principles, as noted in its *Comprehensive Framework for Access to Information Reform*, 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.")

Recommendation #39

A fine report by the Quebec Information Commission[6] 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 shouldbe disclosed and the Québec Commission recommended that to assist public bodies in doing the job, there be "decision help tools" developed by the Quebec counterpart of the federal Chief Information Officer Branch. This approach is advisable for the *ATIA* as well.

Summary Comment on Section 21

"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, 1988. The Section 21 exemption "has the greatest potential for routine misuse" - *Open and Shut* report, 1987. "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. This problem urgently needs rectifying.

Also see Appendix 2, below, regarding the Dutch FOI protection for policy analysts.

E. SECTION 23 – LEGAL AFFAIRS

Recommendation #40

Solicitor-client privilege, in terms of advice given to public bodies by officials who just also happen to be lawyers in their policymaking and statute-designing roles, was not intended to be protected as is solicitor-client privilege in litigation or law enforcement matters. This must be

[6] Québec Commission d'Accès à l'Information, *Reforming Access to Information: Choosing Transparency,* 2002

made clear in an amended *ATIA*, that the former matters are not "legal advice," and should instead be dealt with instead in Sec. 21, the policy advice exemption.

The specificity in Quebec's FOI 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." This is valid only if this opinion does not constitute policy advice, as per Sec. 21.

(Overall, for the *ATIA* legal affairs exemption, the main issue is the wide 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 also important. This exemption should be mainly restricted to legal or administrative proceedings and designed to ensure a fair trial.)

Recommendation #41

Amend Sec. 23 to state that the exemption cannot be applied to records 30 years after they were created, per the model of the UK FOI law's Sec. 43. Better yet, the American *FOIA* sets a 25-year limit for such records.

(On time limits, Information Commissioner John Reid well noted in 2005: "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, generalor 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." P.S. All this seems just one more reason to remove the *ATIA* from the Justice Dept.'s partial overview and place it solely under the Treasury Board.)

Recommendation #42

Add a harms test to Sec. 23, to state the exemption can only be applied to withhold records prepared or obtained by the agency's legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his/her client. Sec. 23 should be limited to a litigation privilege or matters which would be privileged from production in legal proceedings.

(Politicians sometimes summon a lawyer to merely sit in on a closed door meeting to listen, and then term his or her presence "legal advice." Some lawyers also fight to keep secret their taxpayer-funded legal billing figures - claiming solicitor-client privilege on this point - even after all appeals are finished, and the *ATIA* should prohibit this.)

Recommendation #43

In its brief to the Senate on *Bill C-58*, the Quebec journalists' federation noted a special problem, which should be thwarted in a reformed *ATIA*:

"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."

Recommendation #44

ATIA Sec. 23 should be amended to spell out that the application of severance to a record under the authority of Sec. 25 does not result in loss of privilege on other portions of the record.

(This was well advised by John Reid in his 2002 report[7]; he explained that the *ATIA* is unequivocal that Sec. 23 is subject to the Sec. 25 severance mandate, so any information in a record which does not qualify for solicitor-client privilege must be released. The courts have also decided that Sec. 23 is subject to the severance requirement.

"Nevertheless," he added, "the Justice Department continues to advise institutions not to apply severance to a record containing solicitor-client material. Justice clings to the view that, if any portion of a record is disclosed from a record containing privileged material, the privileged portions may somehow be stripped of their privilege." In 2005, the Justice Dept. paper recognized a need for clarification of Sec. 23 and 25 of the *Act*, the combined effect of which is to protect such information but to require the release of those parts of records that can be severedfrom the privileged parts.)

Recommendation #45

Add a clause to the *ATIA* Sec. 23 that information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

Recommendation #46

In the *ATIA*, it is important 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.

(For instance, the legal affairs exemption is well split in the revised version of New Brunswick's FOI statute, which states: "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 law's discretionary Sec. 27 on solicitor-client privilege within government.)

[7] *Response to the Report of the Access to Information Review Task Force*, by John Reid, Information Commissioner, 2002.

Recommendation #47

If an amended *ATIA* is ever to newly protect legal advice for "contemplated" proceedings – as per Ontario's FOI statute, Sec.19(b) – then this caveat would need to be added: this protection may not be applied for more than two years since no action was taken on the contemplated case, e.g., filing a statement of claim.

(Otherwise, the term could be misused as an escape hatch, to deny disclosure for the indefinite future without real cause. American courts have confined the privilege to documents prepared in anticipation of particular litigation. The U.S. Department of Justice's *FOIA* guidebook of 2004[8] states: "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.'")

Recommendation #48

The legal advice exemption in most provincial laws can be overridden by the public interest override, and this is also advisable for the *ATIA*.

Summary Comment on harms tests

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. 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."[9]

The problem has been officially conceded. The Conservative Party of Canada's (broken) election promise of 2006 reads: "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."

F. SECTION 24 – THE *ATIA* AND OTHER STATUTES

[Preface. "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," was an unkept pledge from *Stand*

[8] U.S. Department of Justice, *FOIA* guidebook, 2004. https://www.justice.gov/oip/foia-guide-2004-edition-basic-foia-references

[9] *Draft on Ugandan Access to Information Bill*. London: Article 19, 2004. https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/uganda_foi_04.pdf

Upfor Canada, the Conservative Party election platform of 2006. To this end, the deletion of Sec. 24 was advised by Justice John Gomery, several Information Commissioners, and many other experts. As Commissioner John Grace well wrote in 1994: "This provision is the nasty little secret of our access legislation and it has no place at all in the law."]

Recommendation #49

Whereas the *ATIA*'s existing exemptions afford adequate protection for all legitimate secrets, delete *ATIA* Sec. 24 and its related Schedule 2. This currently allows more than 60 secrecy provisions in other statutes to absolutely override the *ATIA*, some forever. This recommendation would render the*ATIA* supreme on disclosure questions.

Recommendation #50

If the previous recommendation on Sec. 24 above is not accepted, then at the very least mandate that an all-party committee study the necessity of each paramountcy clause in other Acts that overrides the *ATIA,*with a view to repealing or amending those clauses. Consider advice from the same review process on this topic that occurred in the United Kingdom.

(The repealed *ATIA* Sec. 24(2) required that each statute contained in Schedule 2 be reviewed by Parliament at the same time as the general review prescribed by subsection 75(2). The Canadian parliamentary committee that reported in *Open and Shut* in 1987 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 occurred. The United Kingdom also allows several other statutes' provisions to override its FOI law; yet the UK's Department of Constitutional Affairs identified 381 other 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.

In 2005, the Justice Dept. recommended that, while keeping Sec. 24, the number of provisions in Schedule 2 be reduced and that criteria be established to determine the provisionsthat should be listed in future. Positively, its paper suggested that a high standard for inclusion should be set, with specific criteria and the requirement that the government institution seeking to add a provision justify why the information cannot be adequately protected by the exemptions already in place in the *Act.*)

Recommendation #51

If Sec. 24 and Schedule 2 are retained, prescribe in the law, at a minimum, that the Information Commissioner must be consulted when new overrides are to be added, to note where the information would not be protected by a general exemption that already exists in the *ATIA*. Strongly consider granting the Commissioner the power to veto such an addition.

(As noted by the Commonwealth Parliamentary Association, which includes Canadian MPs, in 2004: "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.")

Recommendation #52

Even if Ottawa does not wish to delete *ATIA* Sec. 24, it may be a hopeful sign that it recognizes its problematic nature, in the Justice Department of Canada's *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005. At the barest minimum, this advice therein should be implemented:

"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. 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.*"

Recommendation #53

Consider the advisability of Antigua and Barbuda's FOI law, Sec. 6(3): "Nothing in this *Act* limits or otherwise restricts the disclosure of information pursuant to any other law, policy or practice."

Recommendation #54

In 2001, *Bill C-36* amended the *Official Secrets Act* of 1981, which was replaced by and renamedas the *Security of Information Act*. This amended Sec. 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 *ATIA*, by issuing a certificate. 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.

This amendment should be repealed. Possible harms to such interests from disclosure are already prevented by the existing *ATIA* Sec. 15 (which concerns "subversive or hostile activities"), and other *ATIA* exemptions.

G. SECTION 69 – CABINET RECORDS

[Preface: A rarity in the FOI world, Sec. 69 is an exclusion and not an exemption from the *ATIA.* John Reid wrote in his 2002 report, "There is no description of the essential interest which the exclusion is intended to serve and, hence, the exclusion is open-ended," adding that in nearly all other jurisdictions, the preferred approach is to focus more clearly on the purpose

of the exemption, the protection of the substance of deliberations of Cabinet, as the basis of the test. As Justice Minister John Crosbie told the *Open and Shut* review in 1987: “A lot of the information previously classified as a Cabinet confidence can and should be made available."]

Recommendation #55

That Sec. 69, on cabinet records, be converted from an exclusion to a mandatory exemption.

(This was advised in the *ATIA Review Task Force* report of the Treasury Board Secretariat in 2002, and by many others. Ottawa’s original *Freedom of Information Act, Bill C-15*, drafted during the Conservative government of Joe Clark in 1979, had a mandatory exemption for cabinet confidences, but his government fell before it could be passed. Note that a mandatory exemption has a far greater chance of political acceptance than the discretionary one that some urge; and the former course is set in every province’s FOI law except Nova Scotia’s.)

Recommendation #56

That a definition of “Cabinet confidence” be added to the *Act*, which would focus on information that reveals the substance of Cabinet’s deliberations, decisions, and submissions, and deliberations between or among Ministers. In addition, the definition should give full effect to the decision of the Federal Court of Appeal in the *Ethyl*[10] ruling.

(This was advised by the 2002 Treasury Board report, and by the Justice Department of Canada in a discussion paper of 2005, which refers to the *Ethyl* case. There, the Supreme Court of Canada decided that, under Sec. 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.”

John Reid in his 2002 report noted that the phrase "would reveal the substance of deliberations of the Cabinet" is sometimes accompanied by a non-inclusive list of generic types of information which would qualify for the exemption, and he details three merits to this approach. “The list, of course, should not be exhaustive so that the provision will be flexible in the face of future changes in the Cabinet papers system,” he added, and supplied a list of examples.)

Recommendation #57

Sec. 69 should be amended to clarify that “deliberations” only applies to the actual deliberations of Cabinet, not any other material. Sec. 69 should also establish that documents may only be withheld if they were actually discussed by cabinet, not if they were only prepared for that purpose but never were discussed. No record can be said to reveal “deliberations” if it was never actually deliberated upon.

(Such a new clause is regrettably necessary to stop a deleterious practice often observed in cabinet rooms in Commonwealth nations, whereby Cabinet members simply take documents

[10] *Minister of Environment vs. the Information Commissioner*, [2003] F.C.A. 68

into Cabinet and then out again and claim an exemption or exclusion - behavior which is now a perfectly legalway to circumvent disclosure obligations in most Canadian jurisdictions. In Australia, applicants have had FOI requests refused because documents were "prepared for submission to Cabinet (whether or not it has been so submitted).")

Recommendation #58

Add a harms test to Sec. 69, replicating the terms found in Scotland's FOI law, Sec. 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 [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.

Two terms could be added from the FOI statute of Ghana, which prescribes in Sec. 6.(1)(c) that cabinet records are exempt that:

> [i] prejudice the effective formulation or development of government policy;
>
> [ii] frustrate the success of a policy by the premature disclosure of that policy;

At the bare minimum, the *ATIA* could reflect the terms used in the FOI statute of the United Kingdom, on policy advice and cabinet confidences, Sections 35 and 36.

Recommendation #59

Sec. 69 should 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 of Cabinet.

(In the Newfoundland FOI law, 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." In the FOI statute of the United Kingdom, in Sec. 35, once a cabinet decision has been made, "any statistical information used to provide an informed background to the taking of the decision" is not exempt.

"This exception for background explanations, analysis of problems, and policy options is crucial in opening up the information which forms the general basis on which Cabinet acted, without exposing its deliberations," noted John Reid in his 2002 report. "Given the history of resistance by governments to disclosing such information, the *Act* should be amended to make it crystal clear that background explanations, analysis of problems, and policy options are subject to the right of access.")

Recommendation #60

Clearly mandate the principle of severability to cabinet records. Implement recommendation #4-5 of the *ATIA Review Task Force* report of the Treasury Board Secretariat, 2002: "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."

Recommendation #61

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 better yet to 10 years, as in Nova Scotia. (The Treasury Board's *Access to Information Review Task Force* report of 2002 advised a 15 year limit.)

Recommendation #62

Proactively publish cabinet minutes 15 years after their creation, instead of the current 30 years, and on the government internet.

Recommendation #63

Sec. 69 (3)(b) states that discussion papers are not exempt if "(i) if the decisions to which the discussion papers relate have been made public, (ii) where the decisions have not been made public, if four years have passed since the decisions were made." Amend the *ATIA* to add that the subsection does not apply – "(iii) where a decision has not been made on a topic that was discussed in cabinet, nor the topic publicly disclosed, if ten years have passed."

Recommendation #64

A provision should be added to Sec. 69 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. Ideally this would be released proactively, not requiring *ATIA* requests.

Section 8(1)(i) of India's *Right to Information Act 2005* provides a good example of such a clause, wherein there is no obligation to give citizens "(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."

Recommendation #65

Implement the advice of John Reid in his 2002 report, to amend the *ATIA* to clearly state that summaries of decisions are not considered Cabinet confidences once they are severed from other information which may reveal the substances of deliberations of Cabinet or one of its committees.

(He noted: "Such summaries - e.g., Treasury Board circulars implementing decisions relating a new policy or budget reduction - should be routinely available to the public. All governments summarize Cabinet decisions in order to communicate these to the public or allow government institutions to implement the directions of Cabinet. Not all such summaries are made available to the public in press releases or other similar public documents.")

Recommendation #66

Grant the Information Commissioner and the courts the right to access and review all cabinet, ministerial and Prime Ministerial records, in regard to Sec. 69 claims and other *ATIA*-related issues.

(Note the unkept pledge from *Stand Up for Canada*, the Conservative Party election platform of 2006: "4. Subject the exclusion of Cabinet confidences to review by the Information Commissioner.")

Recommendation #67

That Cabinet may choose to publish or grant access to information that is otherwise excluded under Sec. 69.

Recommendation #68

Subject Sec. 69 to a mandatory public interest override, or at very least a discretionary one.

(Seven Canadian provinces and territories – and many nations - do have general public interest overrides, which cover cabinet records, in their FOI laws. In Newfoundland's *Act*, although cabinet records are not fully included within the law's general public interest override, there is a kind of override within the cabinet records section: "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." This is advisable for the *ATIA*, at a bare minimum. The best model is that of India's law, in Sec. 8[1], wherein cabinet records may be released "if public interest in disclosure outweighs the harm to the protected interests.")

Recommendation #69

- Regarding the accurate labelling of documents: many documents labeled "discussion paper" are not cabinet discussion papers, hence the Information Commissioner and the courts should have right to review if all records have been properly identified.
- The Act should remove all potential uncertainties in the wording around cabinet documents, making it clear that they are defined solely by their substance, not by their titles.

(This need arises because, as two legal 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.'" – Murray Rankin and Heather Mitchell, *Using the Access to Information Act*, 1984. It is also notable here that many provincial FOI laws do not specify document types but focus on information that would reveal the "substance of deliberations" of Cabinet.)

Recommendation #70

As noted by John Reid in his 2002 report, "from time to time, Cabinet or a Cabinet committee (e.g., Treasury Board) may serve as an appeal body, under a specific act. It can be argued that, in such instances, the record of the decision, but not the advice and recommendations supporting it, should be publicly available. Often such decisions are communicated to the public."

Hence amend the *ATIA* to clearly state that such appeal decisions are not to be treated as Cabinet confidences - per the standard in the B.C. and Alberta FOI legislation. (Ideally, these decisions would be routinely published.)

Recommendation #71

Implement this proposal: "That the *Access to Information Act* and the *Privacy Act* be amended to contain a specific framework for the review of Cabinet records." (From *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, 1987)

Recommendation #72

Implement this proposal: "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." (From *A Call for Openness*, report by MPs' Committee on Access to Information, 2001) These would include allowing the appellate bodies full access to all records.

Recommendation #73

Implement the worthy advice of Information Commissioner Suzanne Legault, in *Recommendations to Modernize the Access to Information Act*, 2015. In #4.27, the Commissioner proposes that the exclusion 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.

Summary Comment on Section 69

On cabinet records, the two best Commonwealth FOI laws for the *ATIA* to follow are those of India and New Zealand. Positively, the Justice Department of Canada - in *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005 – has accepted some of these principles: "The Government is considering the following changes to theCabinet 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."

H. SEVERAL OTHER EXEMPTIONS

Recommendation #74

Section 15 of the *ATIA*, for international affairs and national defence, should be amended to clarify that the classes of information listed are merely illustrations of possible injuries. The overriding issue should remain whether there is a reasonable expectation of injury to an identified interest of the state.

(So advised in the 1987 *Open and Shut* report and John Reid's 2002 report. The MPs' Committee worried that, as currently interpreted, Sec. 15 did not adequately link injury to the nine classes or illustrations enumerated.)

Recommendation #75

Amend the *ATIA* so that an injury test be included in all elements of Sec. 16 (law enforcement). In effect, this would mean a repeal of paragraphs 16 (1)(a) and (b), since all such information would be covered by 16 (1)(c) if an injury test was to be introduced.

(So advised in the 1987 *Open and Shut* report and John Reid's 2002 report. The latter noted: "A decade of experience with the law has shown no compelling reason why such interests should get a 20-year grace period during which secrecy may be maintained without any need to demonstrate an injury from disclosure. Though professional nervousness may be understandable, the fears are as groundless now as they were then." The changes would bring the *ATIA* into line with the FOI laws of Ontario, B.C. and Alberta.)

Recommendation #76

Sec. 18 (economic interests of Canada) should be amended in parallel with Sec. 20 (confidential business information) information regarding the release of the results of product and environmental testing.

(So advised in the 1987 *Open and Shut* report and John Reid's 2002 report; the latter added that: "The term 'substantial value' in paragraph 18(a), relating to trade secrets and financial,

commercial, scientific and technical information should be modified and narrowed by the term "monetary.")

Recommendation #77

Regarding Sec. 20 (confidential business information), paragraph 20(1)(b), should be abolished. Paragraph 20(1)(c), as it now stands, is fully adequate to ensure that any legitimate business need for secrecy is served, and should be renumbered as 20(1)(b).

Recommendation #78

Consider whether paragraph 20(1)(a) (regarding trade secrets) is needed in the light of paragraph 20(1)(c) – and possibly delete the former clause. Any information which would qualify for secrecy as a trade secret would certainly qualify for secrecy under 20(1)(c).

Recommendation #79

Amend the *ATIA* to allow other forms of Sec. 20 notice – e.g., public notice or advertisement - whenever such substituted notice is likely to be more effective, practical and less costly than direct notice.

(So advised the 1987 *Open and Shut* report and John Reid's 2002 report. The latter explained that under Sec. 20, institutions must give direct notice to and consult with third partiesbefore records may be released. This adds very long delays; and often there are so many of these third parties - in one case *126,000* of them – that direct notice is simply impractical, and so departments take the path of least resistance and simply refuse to disclose the records.)

Recommendation #80

As John Reid well advised in 2002: "The law should tell firms choosing to bid for government contracts that the bid details, and details of the final contract, are public for the asking. There is partial disclosure of winning bids, none at all of losing bids. Contract prices are released withoutdetails. That is not good enough."

On this issue, I earlier advised the proactive publication of both winning and losing contract bids, so the public can consider for itself the value of the award decisions

[In sum, as John Reid wrote in 2002: "Section 20 is one of the most used, abused and litigated exemptions under the *Access to Information Act*. Many of the *Act*'s delay problems concern requests for business information. This Commissioner has seen thousands of government-held records relating to private businesses. Real secrets are rare. Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking. Concern for the public interest in the transparency of government's dealings with private businesses has been almost abandoned by government officials. New rules of the road are needed to govern the right to know more about government dealings with the private sector."]

I. SCOPE OF COVERAGE

Recommendation #81

Amend the *ATIA* so that the Prime Minister's office and ministers' office are fully covered by the*Act* (which was pledged by the current Prime Minister in the 2015 election campaign but not done) and that the Information Commissioner has the right to inspect all their records in regards to *ATIA* disclosure. Follow the proposal of the Information Commissioner who in 2015 also recommended extending coverage of the *Act* to ministers of State, and parliamentary secretaries.

Recommendation #82

As the Information Commissioners advised in 2009 and 2015, extend the *ATIA*'s coverage 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. Yet the *Act* should also 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.

(Some form of this right was also advised in the 1987 *Open and Shut* MPs' report and the 2002 Treasury Board report. Court records, with exceptions, are covered by the B.C. and Alberta FOI laws. Alberta, Newfoundland, the United Kingdom, Australia and Ireland include Parliament in the coverage of their legislation – with exceptions for privacy and parliamentary privileges.)

Recommendation #83

The Information Commissioner well advised extending coverage of the *ATIA* to the administrative records of 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 #84

The *ATIA* should be amended to add the terms used in Article 19's *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 Governmentor 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 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.

Recommendation #85

Several other entities also need to be added to the *ATIA*'s coverage in addition, and there are more details below to flesh out the criteria above:

- institutions having the power to establish regulations or standards in an area of federal jurisdiction

- institutions responsible for carrying out a public policy on behalf of the federal government; or it performs functions or provides services pursuant to federal statute or regulation

- statutory boards, tribunals, agencies and commissions

- nationalized industries

- non-departmental bodies or quangos (quasi non-governmental organizations)

- consulting firms, research institutes and universities under contract with government (e.g., the Public Policy Forum, whenever contracted by Ottawa to aid in policy development), but only to the extent of their public duties; or the *ATIA* should deem that all contracts entered into by scheduled institutions contain a clause retaining control overall records generated pursuant to service contracts.

- federal government institutions, including Special Operating Agencies
- any entity that provides under contract with a public authority any service whose provision is a function of that authority

- agencies whose capital stock forms part of the domain of the State

- all present and future federal foundations

- if public institutions are exclusively financed out of the Consolidated Revenue Fund, they should be covered; agencies that are not financed exclusively in this way, but can raise funds through public borrowing should be included, with the major determinant being their degree of government control

- all institutions listed in Schedule I, I.1, II or III of the *Financial Administration Act*

- an entity should be covered if owned totally or partially, or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing

- an entity should be covered if it carries out a statutory or important public function or a statutory or public service, but only to the extent of that statutory or public function or public service

(The FOI law of India – ranked #7 in the world by the CLD-AIE - is often held up as a model for Canada, and with good reason. It 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.

Yet the Justice Initiative also 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 *Right to Information 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." These terms would need to be clarified in an amended Canadian *ATIA*.)

Recommendation #86

The *ATIA* should be amended to cover any entity in which a majority of its governing board members are appointed by government or a minister - or if not so appointed, in the discharge of their duties they are public officers or servants of the Crown; or if its parent is directed or managed by one or more persons appointed pursuant to federal statute.

(A report of 2007 commissioned by the Treasury Board and prepared by the Jerry Bartram management consulting firm advised 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.

The Treasury Board's *Task Force* report of 2002 advised that private firms performing public functions and new mechanisms for delivering federal services be added to the *ATIA*'s coverage if: 1. The government appoints a majority of the members of the organization's governing body; 2. The government provides all the organization's financing through appropriations; 3. The government owns a controlling interest in the organization; or 4. The organization performs functions in an area of federal jurisdiction with respect to health and safety, the environment or economic security.)

Recommendation #87

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.

Recommendation #88

Adopt the proposal of Article 19, that 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 organizations should also be subject to FOI regimes based on the principles enunciated above.

Recommendation #89

The purpose clause of Canada's *ATIA* 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 […]" Add to this the wording of British Columbia's FOI law: "This *Act* applies to all records in the custody or under the control of a public body." Clearly and explicitly define these legal terms in the statute, i.e., what exactly is record "custody" and "control."

Recommendation #90

Amend the *Act* to make clear that where the records are stored will not have a bearing on whether or not they are deemed to be in the "custody" or "control" of body covered by this *Act*. Perhaps follow Quebec's FOI law 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."

Recommendation #91

The *ATIA* should require that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts. Implement this proposal from the Treasury Board Secretariat, in *Access to Information: Making it Work for Canadians*, the *ATIA Review Task Force* report, 2002:

> 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.

Recommendation #92

Add to the *ATIA* the wording of the FOI law of the United Kingdom, Sec. 3(2), on the right to access records that are held elsewhere: "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 it is held by another person on behalf of the authority."

Recommendation #93

The question arises as to who should have the authority to determine what entities must be covered according to the criteria, and how. The Information Commissioner should have this authority; and if Schedule 1 is retained, amendments to the *ATIA* should include the right for any person to make a complaint to the Information Commissioner if the Government fails to add any particular government institution or institutions to the list, according to the proposal in the Commissioner's *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.

Recommendation #94

For FOI purposes, the definition of 'public body' should focus on the criteria of the type of service provided rather than on formal designations. Hence repeal Schedule I to the *ATIA*.

(This was advised in *Open and Shut*, a report by the MPs' Justice committee, 1987. The statutory solution in many nations is not for the FOI statute to list named entities in schedules to the law, 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.)

Recommendation #95

Enact this proposal from the United Kingdom Justice Committee's *Post-legislative scrutiny of the UK Freedom of Information Act:*

> 37. We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under [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.

Recommendation #96

Any such partnership or service contract with government is a public record and should be posted online - except for small portions where genuine commercial confidentiality or other

legitimate interests may be protected, only per *ATIA* exemptions. At the very least, they should be released routinely upon request, without an *ATIA* application required.

Recommendation #97

Enact South Africa's FOI legal provision (which is also set 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.

Recommendation #98

The *ATIA* should be amended to provide that an agency, board or commission may not be removed from compliance with the *Act* by virtue of changing its name but continuing to perform the same functions.

Recommendation #99

Amend the *ATIA* so that the national government may not enter into a "shared jurisdiction" arrangement or contract, or create a new institution with provincial, municipal or other governmental co-partners, unless the records of that arrangement, etc., are available under an FOI law of at least one of the partners.

(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 of such *ATIA*-exempt entities are the Canadian Centre on Substance Abuse, the Canadian Energy Research Institute, and the First Nations Health Authority.)

Recommendation #100

Create a special schedule of which named entities qualify as an "aboriginal government" (while criteria for this can be added also).

Summary Comment on FOI Coverage

Some positive movement occurred with the *Accountability Act* of 2006, which extended *ATIA* coverage to all Crown corporations and their subsidiaries. Yet Canada's overall failing here is perhaps the one topic in which Canada stands in the starkest contrast to restof the FOI world community. As the Centre for Law and Democracy in Halifax noted in 2012, in the global context, "Canadian jurisdictions performed abysmally, with every law excluding major public authorities."

Recall the unkept pledge from *Stand Up for Canada,* the Conservative Party election platform of 2006: "Expand the coverage of the *Act* to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions." These must include the *ATIA*-exempt Waste Management Organization, which handles Canada's nuclear waste; Canadian Blood Services, which manages Canada's blood supply; and NAV Canada, the civil air navigation service provider, and airport authorities. Their

current exclusion may impair public health and safety.

As John Reid noted in his 2002 report: "In future years, there may be changes in the way governments manage corrections, drug approvals, grants and contributions, policing, emergency response measures - the list goes on. Accountability through transparency should not be lost merely because the modality of service provision has changed. The proposed criteria for inclusion are intended to be objective, yet flexible enough to be useful guides for the future."

Fear of the burdens of coverage are generally illusory. Treasury Board president Reg Alcock said, when adding ten companies to the *ATIA* coverage in 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." Scope of coverage is indeed a rather more complex FOI topic than some, but this claim must not be utilized as an excuse for eternal inaction.

J. THE PUBLIC INTEREST OVERRIDE

[**Preface:** As Article 19 noted in 2004: "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."

Of the world's 128 FOI laws, there are 92 with broad public interest overrides, and about 75 percent of these are mandatory. In seven provinces the override covers all exemptions and is mandatory, and 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.

Yet there are only two public interest override features in the Canadian *Access to Information Act*, both discretionary. The first is within the mandatory Sec. 20, on third party information; the second is found within the *ATIA*'s Sec. 19, on personal information. The override should apply to all *ATIA* exemptions and be mandatory, as per the global FOI standard. Recall the unkept pledge from *Stand Up for Canada*, the Conservative Party's election platform of 2006: "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."]

Recommendation #101

Place in the *ATIA* these principles articulated by Article 19 in its *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.

Article 19 also 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."

Alternatively, have the *ATIA* adapt the wording of the strong override in British Columbia's FOI law:

> 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*.

Recommendation #102

Other features in several national FOI laws could be considered for an *ATIA* public interest override (while emphasizing such a list is not exhaustive):

- a contravention of, or a failure to comply with a law or regulation
- an imminent and serious threat to public safety, public health, the prevention of disorder or crime or the protection of the rights or freedoms of others
- (a) a miscarriage of justice; or (b) significant abuse of authority or neglect in the performance of official duty; 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
- ignoring regulations, unauthorized use of public resources, misuse of power, and other related maladministration issues.
- consumer protection (and this factor should at a bare minimum be added to the *ATIA*'s override in Sec. 20(6) on third party business secrets)
- (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 nation

Recommendation #103

There are "hard" overrides, which apply absolutely, for example for information about human rights, corruption, or crimes against humanity. These should be enacted in the *ATIA*

(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. The Mexican law states "14. Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.")

Recommendation #104

In the *ATIA*, the burden of proof shall lie with the public authority to establish that the information requested is subject to one of the exemptions. In particular, the public authority must establish that the likelihood and gravity of that harm outweighs the public interest in disclosure of the information.

Recommendation #105

Establish in the *ATIA* that there shall be no consideration of temporal urgency in applying a public interest override.

(The B.C. Information and Privacy Commissioner considered this question in a report of 2015. After the environmental disaster at the Mount Polley mine, she received complaints that the provincial government had failed to proactively release data on the risks before the event, per *FOIPP Act* Sec. 25, public interest override. She advised "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.")

Recommendation #106

In 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. This could be considered for the *ATIA*.

(*Open and Shut*, the 1987 report by the MPs' Standing Justice committee, advised: "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.")

Recommendation #107

In Slovenia's FOI law, Article 6.2, the override applies to all exemptions except those containing classified information of another country. Similarly, this one exception to the override could be considered for *ATIA* Sec. 13 (information obtained in confidence), but only if Sec. 13 has first been amended to add a strong harms test. (See Recommendation #29)

Recommendation #108

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 below are necessary to assert, this may stem from political realism and experience. These might be considered for the *ATIA:*

> 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.

K. DUTY TO DOCUMENT AND RECORD RETENTION

[**Preface:** 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 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 Government of Canada's discussion paper, *Strengthening the Access to Information Act*, 2006, provides some room for hope: "Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound." 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.

The *Library and Archives of Canada Act,* 2004, states: "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." Yet penalties are lacking, and one can legitimately ask how closely that LAC *Act* is followed in practice.

The Chief Information Office told the Senate in 2019 that the Treasury Board's Policy on Information Management already establishes an obligation to document decisions. 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." It is very doubtful if this policy is rigorously enforced, however; and these terms, at a minimum, should be placed into the text of the *ATIA* or another law.

The Commissioner wrote in 2021 that, in spite of these policies and directives, "the OIC's investigations show that actions are not always properly documented"; a joint resolution for this

end was published by Canada's Information and Privacy Commissioners in 2016. Recall too the Conservative Party of Canada's broken election pledge of 2006: "A Conservative government will: Oblige public officials to create the records necessary to document their actionsand decisions." We also need to emphasize that effective systems of record management are key not only to the effective functioning of an FOI regime but also to good governance and our historical record.]

Recommendation #109

The Government should adopt legislation requiring public servants to fully and properly document governmental functions, policies, procedures, decisions, recommendations, essential transactions, advice, and deliberations. Make it an offence to fail to do so or to destroy documentation recording decisions, or the advice and deliberations leading up to decisions. It includes records of any matter that is contracted out by a public office to an independent contractor. This requirement would ideally be placed in a new comprehensive *Information Management Act* rather than in the *ATIA*.

Details would be worked out in policy at a ministerial, 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. There should be a (non-exhaustive) list of examples of records to be generated.

(Although not yet quite a global standard, mandated record creation may hopefully in time become one. New Zealand's *Public Records Act* of 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." In 1950 the United States enacted the *Federal Records Act*, which 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." The Danish FOI law and some Australian states also mandate record creation.)

Recommendation #110

The body responsible for archives should develop, in coordination with the Information Commission, a records management system which will be binding on all public authorities. Such codes should be developed in consultation with public bodies and then laid before Parliament.

Recommendation #111

Implement this proposal from Article 19's *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.

Recommendation #112

Implement this proposal from the Information Commissioner, in *Striking the Right Balance for Transparency*, 2015: "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."

Recommendation #113

In Canada and most nations, records are primarily catalogued for the government's convenience, not for the public's scrutiny. The only provincial FOI law that prescribes record management to assist applicants is that of Quebec, in Sec. 16, and this should be added to a reformed *ATIA*:

> 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.

(This factor is present in the FOI laws of many nations also, such as with India's law: "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." The African Union's *Model Access Law* of 2013 prescribes that officials must "arrange all information in its possession systematically and in a manner that facilitates prompt and easy identification" and "keep all information in its possession in good condition and in a manner that preserves the safety and integrity of its contents.")

Recommendation #114

- Include a provision in the *ATIA* 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 the access law.

- Ban public officials using private email accounts, personal cell phones and tablets for carrying out government business. The *ATIA* should be amended to include electronically stored information (e.g. voice-mail, E-mail, computer conferencing) 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.

- The *ATIA* should be amended to require access officials to keep up-to-date on the latest information and communication technologies, so as to watch for and thwart any back-channel evasions of FOI obligations.

(The Information Commissioner 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. Yet in this digital age, FOI law and policy always struggle to keep up with lightning-paced technological changes.)

Recommendation #115

A common tool of FOI avoidance is for Canadian officials and politicians to use post-it sticky notes to avoid a paper trail - an intolerable breach of the public interest.

Amend the *ATIA* to add this wording of British Columbia's FOI regulations, which state that any marginal note made upon a document transforms that record into "a new record," and a separate copy 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."

Recommendation #116

The *Access to Information Act*, the *Privacy Act*, and the *Library and Archives of Canada Act* provide a legislative framework for Information Management Services, while the *Policy on Information Management*, the *Directive on Information Management Roles and Responsibilities,* and *Directive on Recordkeeping* provide a policy framework. Their relationship should be considered, and they be harmonized if advisable.

Recommendation #117

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. For instance, in Washington state's FOI law, "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." This measure is advisable for the *ATIA*.

Recommendation #118

The FOI statute of Ecuador commendably raises it one step better, wherein "information cannot be classified following a request." This measure is advisable for the *ATIA*.

Recommendation #119

Beyond core government, the *ATIA* should require every entity covered by the *Act* to create detailed records for all decisions and actions, and factual and policy research, and to assign responsibility to individuals for the creation and maintenance of each record, and to maintain each record so that it remains easily accessible.

Recommendation #120

Implement this advice from the Treasury Board Secretariat's *ATIA Review Task Force* report, 2002:

> 9-1. The Task Force recommends that: a coordinated 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 thenecessary audit and evaluation tools, be established and implemented within governmentinstitutions…
>
> 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…

Recommendation #121

Information commissioner John Grace issued a sharp rebuke to the oral government concept, noting its origins: "The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions."

This last point is crucial, and the solution to such ignorance is to begin an education program forall federal officials and public servants about how the *ATIA* exemptions work, exactly what information can be legally withheld, and why the *ATIA* need not be so feared.

L. THE INFORMATION COMMISSIONER'S POWERS

[**Preface** – The Liberal party kept its 2015 electoral 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 the new power in the *Bill* is not "a true order- making model" due to five serious failings with it, failings which are mostly absent in the rest of the FOI world. As well, some systems with order-making power also provide for mediation processes at the front end, and only if this process fails will the Commissioner move to an adjudication process – an option needed in Canada. The *ATIA* still needs amendment to allow the Commissioner to review the decision to invoke the Cabinet confidences exclusion to a review - as most nations permit - amongst many other issues.

The Canadian Bar Association well stated*: "*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."]

Recommendation #122

Implement these recommendations from the Information Commissioner's report, *Failing to Strike the Right Balance for Transparency*, 2017:

> 18 - Remove Section 44.1, *de novo* review.
>
> 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.
>
> 20 - Amend Section 36.1 so that any order of the Information Commissioner can be certified as an order of the Federal Court.
>
> 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.
>
> 22 - Include a formal mediation function in the course of investigations.

Recommendation #123

If the *de novo* review standard is not repealed, then, at a bare minimum, to remove its worst aspect, "a modified *de novo* review standard could be employed, which precludes public authorities from making new claims about exceptions following the appeal before the Information Commissioner." (Advised by the Centre for Law and Democracy, Halifax)

Recommendation #124

The *Act* should maintain the Commissioner's existing power to initiate investigations related to information rights.

Recommendation #125

The *Act* should include a time limit of 120 days for the Information 's office to complete an investigation under the *ATIA*.

(Applicants sometimes wait years for a resolution; some time limit is surely required foran *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. 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 Newfoundland the Commissioner is given 90 days to complete the review.)

Recommendation #126

Add this feature to the *ATIA*: "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." (Per *Bill C-556,* introduced by Bloc Quebecois MP Carole Lavallée, 2008)

Recommendation #127

The *ATIA* should provide for the Commissioner's power to audit institutions' compliance with the *Act*.

Recommendation #128

Under *ATIA* Sec. 31, applicants have within 60 days of receiving an unsatisfactory response from the public body, to appeal to the Commissioner about 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 between the two, and this limit should be set in the *ATIA*.

Recommendation #129

Amend the *ATIA* to add: "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." (Per *Bill C-556,* introduced by Bloc Quebecois MP Carole Lavallée, 2008)

Recommendation #130

Amend the *ATIA* so that upon the conclusion of an investigation, the Commissioner's office will have the power to recommend to the Attorney General's office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. These amounts will be determined in further amendments or regulations.

Recommendation #131

The government should grant applicants the right to appeal an *ATIA* request refusal directly to court, bypassing the Information Commissioner, if they prefer.

(Today applicants must first wait for the Commissioner's resolution to their cases, which can stretch out to years, before going to court. With this new right, 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 partly created 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 should indeed always remain intact. But this rationale should not prohibit better-resourced or FOI expert applicants from proceeding straight to trial, with self-representation if they choose.

This new right was also advised by the MPs committee chaired by P. Szabo, and by Commissioner Robert Marleau in 2009, who added: "An alternative approach would be to allow a complainant to bring a judicial review application directly to the Federal Court where the complaint concerns an access refusal and the complainant has not received the Information Commissioner's report of finding within a specified time.")

Recommendation #132

The *ATIA* should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in Parliament, so that the Commissioner may comment on its implications for access to information. The Commissioner may publicize his or her comments, subject only to the exemptions for harms contained in the *ATIA.* Also amend the *ATIA* so that public bodies must incorporate consultation with the Information Commissioner in their policy development processes.

(Such a right is contained in the B.C. and Alberta FOI laws, and was advised in the 2002 Treasury Board report: "The Commissioner's advisory role, with respect to the implications for the right of access of proposed government initiatives, and with respect to "best practices" across government, be recognized in the *Act*."

The view was also endorsed by Justice La Forest in his report entitled, *The Offices of the Information Commissioner and Privacy Commissioners: The Merger and Related Issues*: "The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction. Ideally, there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage.")

Recommendation #133

Amend the *ATIA* to grant the Information Commissioner the power to require public bodies to submit statistical and other information related to their processing of *ATIA* requests, in a form and manner that the Commissioner considers appropriate.

(The Commissioner well noted in 2021: "In Scotland, statistics are gathered every three months through a computer system rather than compiled once a year in an annual report; this allows them to promptly assess trends and institutions' performance. This method of data collection also makes it possible to take action quickly and as needed, something that is not possible in our current access regime." This is advisable for Canada too. The 2002 Treasury Board Task Force report proposed: "The Commissioner's role in conducting issue-based, system-wide investigations (reviews or audits) be recognized in the *Act.*")

Recommendation #134

Amend the *ATIA* to include this proposal from the Commissioner in 2021: "The Information Commissioner's authority to publish should be extended to cover decisions rendered with respect to applications to decline an access request set out in Section 6.1 of the *Act*." (That section allows an agency to refuse "vexatious" or "bad faith" access requests, upon the Commissioner's approval.)

Recommendation #135

Amend the *ATIA* to enact this proposal from the Commissioner in 2021: "The time line for publication set out at subsection 37(3.2) of the *Act* should be repealed."

Recommendation #136

Amend the *ATIA* to enact this proposal from the Commissioner in 2021: "The notice to third parties set out in section 36.3 of the *Act* should be repealed."

Recommendation #137

The Information Commissioner should be given powers in the *ATIA* to require systemic changes in government departments to improve compliance (as in the United Kingdom).

Recommendation #138

Amend the *ATIA* to implement this advice (from *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to InformationRegime*, Carolyn Maynard, 2021):

That Subsection 63(2) of the *Act* should be amended to enable the Information Commissioner to disclose information relating to the commission of an offence against a law of Canada or a province by any person; and disclose such information to the appropriate authority.

(She noted therein a special problem: "The fact that I am not authorized to disclose information except where it involves a director, an officer or an employee of a government institution shelters certain individuals from the disclosure of information, which relates to the commission of an offence. This is the case for, among others, political staff, as well as individuals with whom institutions have entered into a contract, such as consultants and advisorswho are not directors, officers, employees.")

Recommendation #139

Implement this advice: "Since the Commissioner is a key government watchdog, it is important that the law ensure that holders of this post are competent and independent from the political process. Being too restrictive in this regard could unduly narrow the range of talented candidates but the law should at least set out some minimum standards for this position and rule out individuals with direct connections to political parties from being appointed." (From the Centre

for Law and Democracy, Halifax)

M. RESPONSE TIMES

[**Preface**: *ATIA* response delays have truly reached a crisis level. The most common initial FOI response time set 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 three to 21 days. For the extension limit, 58 nations set from three to 21 days, whereas 29 countries set 30 days – all while officials under the Canadian *ATIA* can extend a reply for an unspecified "reasonable period of time." This privilege sometimes delays replies for years - a widely-abused free rein that the public of most nations would never accept. Some FOI laws also have penalties for delays, which the *ATIA* needs.]

Recommendation #140

The *ATIA* should be amended to prescribe 30 days for an initial reply, with 30 days more allowed for an extension only with the permission of the Information Commissioner.

(These 30/30 limits are set in the FOI laws of five Canadian provinces, and advised by a majority of FOI experts. It is still more generous that Quebec's *Act*, with its 20 day initial reply limit and 10 day extension. In 2019 the Senate sensibly proposed this *ATIA* amendment to *Bill C58*: "Limit time extensions taken under Sec. 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 unwisely rejected this proposal.)

Recommendation #141

The *ATIA* should be amended to prohibit the use of any of the discretionary exemptions if the department is in a deemed refusal situation due to delays. In this situation, it would be required to gain the approval of the Commission before withholding information under mandatory exemptions.

(At a minimum, John Reid's 2002 report well advised that the *Act* be amended to preclude reliance upon Sec. 21, internal advice, and Sec. 23, legal privilege, in late responses. "It would have every bit as much force, without risking highly damaging disclosure, if it were restricted to loss of the ability to invoke [these two] sections in late responses. These two sections are discretionary and protect the internal, advice-giving process. A sanction so limited would pinch where the pinch is needed.")

Recommendation #142

Amend the *ATIA* to state that when response time limits are breached, it requires the personal sign-off of the Minister to apply exceptions. (Advised by the Centre for Law and Democracy, Halifax)

Recommendation #143

Under no circumstances may a third party notification excuse the public authority from complying with the time periods established in the *ATIA*.

Recommendation #144

Implement this recommendation (from *Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, by Carolyn Maynard, 2021): "The *Act* should provide a clearer process for institutions that decide to have a consultation and set out a maximum length of time for consultations required in order to respond to access requests."

(This is necessary because, as the Commissioner noted, as long as a consultation is under way, institutions generally will not respond to an access request, even though there is nothing to stop them from doing so under the *Act*. The OIC's investigations show that institutions rarely decide to disclose information without having a consultation when the information concerns other institutions. As a result, requesters are frequently denied timely access to requested records, in whole or in part.)

Recommendation #145

That the *ATIA* specify time frames for the Commissioner's office to complete administrative investigations. (Advised by two Commissioners and an MPs' committee; Commissioner Reid suggested a 120-day timeframe)

Recommendation #146

Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, or for public health emergencies, a response must be provided within 48 hours.

(This term appears in many nations' FOI laws, while in Afghanistan and Nepal such information must be provided within 24 hours.)

Recommendation #147

Whereas the worst delay bottleneck is often at the "sign off authority" levels and processes, these must be streamlined and simplified. Hence, amend Sec. 9 of the *ATIA* (on the extension of time limits) to restrict the delegation of granting time extensions to a senior official, perhaps at Assistant Deputy Minister level, with the hopes of increasing the accountability for institutions' FOI performance.

Recommendation #148

Amend the *ATIA* to state that information releases may never be delayed due to public relations concerns or consultations, such as pre-release "issues management" or "spin control" plans.

(Public relations staff need not be prohibited from being informed about *ATIA* requests - in

reality this could likely not be stopped anyway - 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 news media *ATIA* request documents labelled as "sensitive" were subject to unwarranted delays by government agencies.)

Recommendation #149

Records should be granted to *ATIA* applicants in staged releases if they request so. That is, if any portion of the information requested can be considered by the information officer within the time period specified, it must be reviewed and a response provided to the requester.

(The Treasury Board Secretariat in its *ATIA Review Task Force* report, 2002, advised 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." This right should be set in law, beyond encouragement.)

Recommendation #150

ATIA Sec. 26 allows the head of a government institution to refuse to disclose records to a requestor if the head believes the material will be published by government within 60 days after the request is made. In 2015 the Information Commissioner advised Sec. 26 be repealed, and this is indeed most advisable.

(Sec. 26 has been misused as a game to buy extra time. An institution may receive a request for a record, deny the request on the basis of Sec. 26 and, when that period expires, simply change its mind about publication and newly apply exemptions to the record.)

Recommendation #151

Yet if the government does not wish to repeal Sec. 26, there is a secondary option: Amend it to change the period from 90 days to 30 days after the request is received, and stipulate that if the record is not published within those 30 days, it must be released forthwith in its entirely with no portions being exempted. (John Reid in his 2002 report agreed with this measure, but advised reducing the 90 day limit to 60 days.)

Recommendation #152

Implement these measures advised by Information Commissioner Suzanne Legault (in *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015):

> 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.
>
> 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.

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.

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*.

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.

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.

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 notrespond to the request by the date of the expiry of the extension.

Recommendation #153

Alternatively, for the *ATIA* consider the limits set in Newfoundland's revised FOI law: "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." The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to here.

("That is a reasonable compromise between the need for some flexibility and the problemof abuse of extensions by public bodies," said Toby Mendel on Newfoundland's law, "although Iprefer the absolute limits found in many laws, i.e., 30 days plus another 30 and that's it.")

Recommendation #154

This time limit may be extended for two reasons. First, government may transfer the request

toanother 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. Amend the *ATIA* to change 15 days to 5 days (as per the revised Newfoundland FOI law).

Recommendation #155

Amend the *ATIA* to allow for rolling or continuing requests.

(Two provinces admit "rolling requests." In Alberta's law: "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).)

Recommendation #156

In 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.

Recommendation #157

It is recommended that *ATIA* Sec. 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.

Recommendation #158

Persistent and excessive failures to respond to *ATIA* requests within the time limits would be reflected in the reduced remuneration and bonuses of the head of the public body responsible for *ATIA* compliance (such as deputy ministers).

Summary Comment on FOI Delays

What Information Commissioner John Grace wrote in 1997 about the "silent, festering scandal" of delays is even more valid today: "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." For instance, consider Afghanistan, whose FOI law - ranked #1 in the world in the CLD-AIE ratings – sets a 10 day response time and three day extension limit.

N. PROACTIVE PUBLICATION AND ROUTINE RELEASE

[**Preface**: The centrepiece of the Liberals' 2015 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* of 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 actually amount to "regressions."]

Recommendation #159

Fulfill the recommendations in the Information Commissioner's report, *Failing to Strike the Right Balance for Transparency. Recommendations to improve Bill C-58,* 2017:

> 7 - Impose a timeline to proactively disclose mandate letters and revisions to mandate letters, consistent with the timelines currently under the Act.
>
> 8 - Remove Section 91 in order for the Information Commissioner to have jurisdiction over proactively disclosed materials.
>
> 10 - Allow requesters to request under the *Access to Information Act* information that has been proactively disclosed by ministers' offices.
>
> 11 - Subject ministers' offices proactive disclosure obligations to oversight from the Information Commissioner.
>
> 12 - Subject all "government institutions", using the definition that is currently found in the *Act,* to consistent disclosure obligations.
>
> 13 - Maintain requesters' right to request under the *Access to Information Act* information that has been proactively disclosed by government institutions.
>
> 14 - Subject government institutions' proactive disclosure obligations to oversight from the Information Commissioner.

Recommendation #160

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, and this rule should be established in Canada as well.

Recommendation #161

Implement these goals, as articulated in the Treasury Board Secretariat's *ATIA Review Task Force* report of 2002: "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."

Recommendation #162

Sec. 68 - "This *Act* does not apply to (a) published material or material available for purchase by the public" - should be amended to read "(a) published material or material available for purchase by the public if such material is available at a reasonable price and in a format that is reasonably accessible, as deemed by the Information Commissioner upon a complaint."

Recommendation #163

Proactive disclosure in the *ATIA* or another law should mandate the publication of:

- public sector remuneration - salaries, expenses, bonuses, etc. - above a certain level (and with exceptions for the identifying of certain security-intelligence officials and others in very sensitive positions)
- both winning and losing contract bids, so the public can consider for itself the value of the award decisions
- all contracts, licences, permits, authorizations and public-private partnerships granted by the public body or relevant private body

Recommendation #164

The government should include 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 #165

There are 14 examples of records that cannot be withheld via the policy advice exemption in Sec.13(2) of the B.C. FOI law, and these should all be prescribed for the *ATIA.* If not proactively published, these records should at least routinely released upon request, i.e., with no *ATIA* request required. (See *Appendix 1* of this report for the list)

Recommendation #166

In its report on *Bill C-58*, the Senate recommended an amendment to Sec. 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, but it should have passed.

Recommendation #167

Apply this enlightened clause in Ontario's FOI law to 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."

Recommendation #168

The proactive publication of public opinion polls and research is set in the *Government Policy on Information Collection and Public Opinion Research,* and these polls are regularly posted on departmental websites. Yet the proactive publication of all such research should be further

mandated in the *ATIA* or another statute to give it the force of law.

The *Act* should also be amended to state that that no *ATIA* exemptions will be applied to results of public opinion research, and that complete listings of polls, and public opinion results, must be provided upon informal request by the public.

Recommendation #169

Implement the principle set in the FOI *Code* of Wales (subject to the United Kingdom's FOI law), which 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*."

(This positive spirit may be contrasted to that of Canada, where some officials file lawsuits to block FOI requests that could reveal facts and analyses related to policy advice.)

Recommendation #170

The *ATIA* should include a proactive disclosure requirement for environmental enforcement information, and risks to endangered species.

Recommendation #171

Clarify that government statistics and datasets – if all personal identifiers have been removed - cannot be withheld under any *ATIA* exemption.

Recommendation #172

Implement the terms of Article 19's *Model Freedom of Information Law*, 2001:

> 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 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.

See *Appendix 3*, below, for some samples of records requiring proactive publication in the FOI laws of other nations.

Summary Comment on Proactive Publication and Routine Release

Longtime CBC journalist Dean Beeby said that in practice so far, "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." In Ottawa's 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.

That being said, some useful and interesting information can still be released proactively in law. The Commonwealth Human Rights Initiative noted that proactive publication "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 FOI laws."

In the 2016 mandate letter from the Prime Minister to the Treasury Board President, the government framed these relatively narrow changes to "modernize" the *ATIA* as a first step in a longer process to implement more major reforms. We shall see.

O. WHISTLEBLOWER PROTECTION

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

In 2005, Parliament passed *Bill C-11*, the *Public Servants Disclosure Protection Act*, which came into effect for allfederal public service staff in 2007, including those working in *ATIA* processing. It was studied in depth by a House of Commons committee in 2017, and its report gave many recommendations to protect federal staff – none of which were 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.[11]

[11] Report of the Standing Committee on Government Operations and Estimates, *Strengthening the Protection of the*

Canada's integrity commissioner has said he suspected "thousands" of wrongdoings are going unreported among the 375,000 federal workers covered by this *Act* - and presumably, this may include *ATIA* wrongdoing. A recent report by the International Bar Association and the US-based Government Accountability Protect rated Canada's whistleblower protection legislation the weakest among the 37 countries studied in the report.[12]

It took years of struggle to pass even that inadequate 2005 whistleblower *Act*, and the government is mainly content with it. *ATIA* staffers cannot wait longer for that *Act* to be improved, if ever, and so it follows that others need to lead the way to provide them with the protections that *Bill C-11* should have done but never did, i.e., to do so now within a reformed *ATIA* itself, if nowhere else.]

Recommendation #173

Whistleblower protection for FOI staff already exists within the new *Public Servants Disclosure Protection Act.* But for the present, its general protections for federal staff could be reiterated in the *ATIA* text anyways as a reminder and reference.

Add this statement within the *ATIA*: "Protection from civil and criminal liability: As per the terms of the *Public Servants Disclosure Protection Act (2005)*, any person who grants or discloses information in good-faith reliance on provisions of the *ATIA* 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.*" (Consider expanding the protection to "anything done in good faith in the performance of the *ATIA*.")

Recommendation #174

Improve whistleblower protection for those involved in the FOI process by at least introducing within an amended *ATIA* all the recommendations appropriate to the *ATIA* that were made by the House of Commons committee in 2017 upon the *Public Servants Disclosure Protection Act.*

Recommendation #175

For ATIP coordinators, implement the advice of the 1987 MPs' Justice Committee *Open and Shut* report - which stated that the time was long past due to professionalize their role - to [1] classify them as part of departmental senior management group, [2] make them a part of departmental executive committees, [3] give them direct reporting relationships with deputy heads of departments, [4] develop a uniform set of job descriptions and set of expectations for them, [5] ensure that they have completed standard, formal training in their discipline, and [6] surround them with a leadership culture which does not penalize them for making the access law effective within their institutions.

Public Interest Within the Public Servants Disclosure Protection Act. 2017. https://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/

[12] International Bar Association and Government Accountability Project, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation*. 2021. https://www.ibanet.org/article/EE76121D-1282-4A2E-946C-E2E059DD63DA

P. PENALTIES

[**Preface**: In the *ATIA*, there are 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 access statutes of 57 nations, and prison terms for this offense in 31 nations. There are penalties for delaying replies to FOI requests in 26 nations – an advisable feature for the *ATIA.* See *Appendix 4* below on the wide scope of penalties in Mexico's FOI law.]

Recommendation #176

The Centre for Law and Democracy notes: "Every jurisdiction in Canada contains some sanctions for violating provisions of their access law, but few define the offence sufficiently broadly." Amongst provinces, Quebec's FOI statute Sec. 158-163 has the widest definition of wrongdoing, followed by a generous escape clause for "good faith." These Quebec features could be considered for the *ATIA* (albeit with much higher fines):

> 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*.

Recommendation #177

Alternatively, amend the *ATIA* to render it an offense to willfully (a) obstruct access to any record contrary to the *Act*; (b) obstruct the performance by a public body of a duty under the *Act*; or (c) destroy records without lawful authority.

Anyone who commits such an offence 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. (In the most egregious willful violations, penalties might include loss of any severance payment, and partial clawback of any pension payments.)

Recommendation #178

Draft milder penalties for not creating records, and for not maintaining records properly

Recommendation #179

Consider 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, and parts of it may be advisable for the *ATIA*:

> **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.

Recommendation #180

India's FOI law penalizes those have knowingly given out incorrect, out-of-date, incomplete or misleading information, and this is advisable for the *ATIA*

Recommendation #181

For an amended *ATIA*, we should consider the India's law, whereby 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 fine for each day until the information is furnished, up to a maximum amount. (Many other nations' FOI laws have this same feature.)

Recommendation #182

This principle should be adapted in the *ATIA*: "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."

Recommendation #183

Implement this principle of Transparency International, in *Tips for the Design of Access to Information Laws*, 2006:

> 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.

Recommendation #184

The *ATIA*'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, and this amount should also be set for the former offense.

Recommendation #185

There is an exemplary feature in New Brunswick, whereby penalties for FOI non-compliance also apply to employees of a non-public body who are working in an agreement with government, and this is advisable for the *ATIA*.

(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." Kenya's FOI statute adds: "Private bodies in serious breach of the law will barred from any future contracts with government under procurement laws.")

Recommendation #186

In Mexico's fine FOI law, officials can be penalized for "fraudulently classifying information that does not fulfill the characteristics indicated by this Law." The FOI law of Ukraine also imposes penalties for "ungrounded categorization of information as restricted access [classified] data."

Such a principle would be welcome in Canada's *ATIA*, e.g., for officials who deliberately misclassify cabinet records to exclude them from the *Act*'s scope.

Recommendation #187

The *ATIA* should make it clear that "creative avoidance" practices such as these and others are prohibited, and set penalties for doing so:

- Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

- Changing the title of a record sought by an FOI applicant, sometimes after a request for itis received, then wrongly telling the applicant "We have no records responsive to your request." (This has occurred in Canada.) The law should make it make it clear it is only the record's subject matter that counts, not the record's title per se.

- Interpreting the wording of an applicant's request too narrowly, or even altering it and then replying to the agency's re-worded version

Recommendation #188

Kenya's FOI statute prescribes penalties for access officials who refuse to assist a requester who is unable to write to reduce the oral request to writing in the prescribed form; or who 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 a disability. This could be considered for the *ATIA.*

Recommendation #189

In its report on *Bill C-58,* the Senate recommended an amendment to Sec. 67.1(1)(b.1) to defeat an 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, but it should have passed.

Recommendation #190

Establish an independent special panel of experts to study and report to Parliament upon the advisable penalties for *ATIA* violations.

Summary Comment on Penalties

Penalties raise complex, difficult questions. For instance, such a panel would consider which offenses would be civil or criminal. Moreover, who should pay the fines is a matter of debate; 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. Conversely, the group Article 19 believes 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. (We might also consider publicizing *ATIA* offenses.)

The Government of Canada's discussion paper, *Strengthening the Access to Information Act*, 2006, well notes: "Obviously, there must be a distinction between poor record keeping and intentional, bad (or even criminal) behaviour. Whatever sanction is applied, it must be commensurate to the misbehavior …. good information management practices must be learned, including rules or standards about when records should be created."

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)."

Q. OTHER TOPICS

Recommendation #191

Implement the advice of John Reid's 2002 report, "that there be a single minister, preferably the President of the Treasury Board, to be responsible for the *Access to Information Act* - all of its administration and policy."

(He added that to make the bureaucracy reflect the new leadership, it would make sense to sever the Information Law section of the Department of Justice from its present department - and from its inherent conflict-of-interest - and absorb it into the Treasury Board Secretariat. This expanded unit would provide a locus of real leadership on information policy to officials and practical advice to access coordinators. "Most important, this unit would be a much-needed counterweight to the powerful, yet heavily legalistic, influence which Justice, in its legal advisory role, exerts over all departments.")

Recommendation #192

The *ATIA* should be amended to disallow the government to charge any fees for an *ATIA* application - currently $5 - or for the processing of records.

(There are currently no fees beyond the application fee because of a May 6, 2016, directive from the President of the Treasury Board; this is not a legislated waiver of fees, but rather is just a policy of the current government. Moreover, the Federal Court stated that government can no longer charge fees for the search and processing of electronic government documents covered under the *ATIA*, per the March 2015 ruling of Justice Sean Harrington.[13] These statements should be set in law in the *ATIA.)*

Recommendation #193

Amend the *ATIA* to permit "anyone" to file requests.

(The right of all people regardless of citizenship to file access requests is the global standard, included in the FOI laws of 94 of 128 nations, including 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 profoundly impact the people of other nations.)

Recommendation #194

Parliament needs to find a balance between the *ATIA* and international agreements signed by Canada, and other such foreign obligations – to determine which law should assume supremacy, and who decides this, when and how.

Recommendation #195

Amend the *Act* to establish that an applicant who makes a formal access request has the right to

[13] Ruling of Justice Harrington, *2015 FC 405*, March 31, 2015

anonymity throughout the entire process, as in Newfoundland's FOI law. Add a privacy protection clause in the *ATIA* to state that an applicant's identity must not be revealed within government without a strict need to know (for example, to locate the records the applicant seeks that include his or her name, or with consent).

Recommendation #196

Implement the advice of John Reid's 2002 report, that the *ATIA* should be amended to give a requester the right to request information in a particular format. Departments should be allowed to deny the request on reasonable grounds, but any refusal should be subject to review by the Information Commissioner. On this issue, the right of access to records set out in Sec. 4 of the *Act* should be amended to offer a right of access to "recorded information."

Recommendation #197

Commissioner John Reid's 2002 proposal to create *ATIA* regulations on these matters should be placed in the *ATIA*:

> The *Act* and regulations do not, however, mention the conversion of data from one format into another. If requesters are asked to pay for these conversions (which can often be done simply and automatically), will subsequent requesters have to pay again? Or will a department, having accomplished the conversion once, be required to maintain the data in the converted format for future requests? Would documents printed on demand from an electronic record be held in anticipation of a future request? No regulations are in place to govern on-line or remote access to electronic information.

Recommendation #198

Amend the *ATIA* to permit a government institution, for the purposes of paragraph 9(1)(a) of the *Act*, to group all requests received from a requester (within 30 days of receipt of the initial request) on the same subject matter. When grouping has been employed for the purposes of paragraph 9(1)(a), it is appropriate that the requester be so informed in the extension notice.

Recommendation #199

Add a clause to the *Act* to state that government and agencies may never assert "crown copyright" regarding records released in response to *ATIA* requests. Follow the lead of the American *Copyright Act* that states no government records can be copyrighted.

Recommendation #200

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 – via the *ATIA* and/or legislated proactive publications - and a pledge to maintain these standards.

Recommendation #201

Consider a policy directive for the department that administers the *ATIA* system to educate and promote the access process to the general public. Alternatively, the Commissioner could be granted a mandate for this task. If so, government must provide adequate funds for this work, and it would be a dedicated, stand-alone part of the Commissioner's budget.

(Canadians lack an awareness of this essential right. In 1987, in *Access and Privacy: The Steps Ahead*, the government stated: "An essential part of making the *Access to Information Act* more effective is to ensure that it is better known and understood by the public. . . The government will also amend the *Act* to provide a public education mandate for the office of the Information Commissioner." Yet this pledge was broken. The 2002 Treasury Board *Task Force* report also advised that "the Commissioner's public education role be recognized in the *Act*."

The B.C. information commissioner explicitly has this right in law. In 128 national FOI laws, 51 have some legislated mandate to promote the law or educate the public, most strongly in India. Via Ecuador's law, public bodies are required to adopt programs to improve awareness of the law and citizen participation, and educational bodies are required to include information on FOI rights in their education programs. In Mexico high school students are taught how to file FOI requests.)

Recommendation #202

The legal system in *ATIA* cases needs to be rendered fairer and more equitable for all. Except for genuinely frivolous or vexatious requests, 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.

(Generally, we should seek wider grounds to bar court costs in *ATIA* cases from being levied against a citizen applicant or lay litigant, considering the large imbalance of power and resources. If such costs are assessed against an applicant, he or she could be financially ruined, which is why some applicants dare not engage in FOI litigation. It is especially deleterious if important legal or Constitutional FOI issues are in dispute.)

Recommendation #203

The law should state that the usage of in-camera affidavits in *ATIA* court cases should be curtailed to the bare minimum necessary and justifiable.

(Inequity arises when FOI applicants, who are sometimes lay litigants, voice all their arguments in the open, where these can be parsed and shredded by expert Crown lawyers at unlimited public expense; by contrast, the agency too frequently presents its arguments and much evidence via in-camera affidavits, which the applicant cannot view or challenge, and hence must prepare reply submissions to these in the dark.)

Recommendation #204

One feature of American FOI litigation worth contemplating for our *ATIA* is the "Vaughn Index." This is a document prepared by agencies that are opposing disclosure under the U.S.

FOIA. It 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," said one U.S. court.

Recommendation #205

Create a national Canadian "Freedom of Information Process Forum." This would candidly and respectfully discuss systemic FOI practices and problems, and pragmatically attempt to resolve these. It would be a council of *ATIA* applicants (such as journalists, lawyers, FOI advocates, academics) and senior government officials (such as access coordinators, deputy ministers, chief information officers, and members of the Information Commissioner's office), who would meet twice a year to begin and then perhaps more often, by teleconferencing if need be.

This Forum has a separate kind of function and value from a politicized Parliamentary law reform review each five years. It could be organized by a university department (e.g., sociology, political science), law school, 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 - https://www.archives.gov/ogis/foia-advisory-committee

Recommendation #206

Immediately work in full partnership with First Nations and their representative organizations to develop and enact mutually agreed-upon changes to policy and legislation regarding access to information, in full compliance with Article 19 of the UN Declaration of the Rights of Indigenous Peoples.

(Complete and timely access to federally controlled information is essential to First Nations' pursuit and resolution of their historical grievances against the Crown, including historical breaches of the Crown's legal obligations under statutes or treaties. Full access to information is also necessary for Indigenous peoples to protect and advance their Title, Rights, and Treaty Rights, and in matters related to governance and cultural interests.)

APPENDICES

Appendix 1

Records that cannot be withheld under the B.C. *FOIPP* law's policy advice exemption

There are 14 examples of non-exempt records, from Section 13(2) of the B.C. law, and these should all be prescribed for the *ATIA*'s Sec. 21. These should also by law be proactively published; or if not, at least routinely released upon request (i.e., with no *ATIA* request required).

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.

Appendix 2

The Dutch FOI protection for policy analysts

For the *ATIA* Sec. 21, consider the Dutch legal protection for policy analysts. In the Canadian public service, civil servants "who even cast the slightest doubt on the wisdom of the government's policy are severely reprimanded," wrote one author. 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 maybe 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 intentionto 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 effect on their careers.

Appendix 3

Several proactive publication rules of 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. Below are just a few.

• 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 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 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)

• 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, Art. 8 requires 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 they use.

Appendix 4

FOI Penalties: the wide scope of Mexico's law

[The freedom of information law of Mexico - RTI-ranked #2 in the world by the CLD-AIE - 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 there to no longerexist 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.

CANADIAN SOURCES

• *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 InformationAct* and the *Privacy Act*. Ottawa, 1987.

• *The Access to Information Act: A Critical Review. Ottawa*. A report prepared for the Information Commissioner of Canada by the consultants Sysnovators Ltd. of Ottawa, 1994. https://www.humanrightsinitiative.org/programs/ai/rti/implementation/monitor/critical_review_1994_canadian_info_comm.pdf

• *Toward a Better Law: Ten Years and Counting*. By John Grace, Information Commissioner. Recommendations for *ATIA* reform, in Commissioner's 1993-94 Annual Report

• *Blueprint for Reform*. By John Reid, Information Commissioner. Recommendations for *ATIA* reform, Commissioner's 2000-01 Annual Report. Ottawa, 2001. https://publications.gc.ca/collections/Collection/IP20-1-2001E.pdf

• *A Call for Openness*. Report of MPs' Committee on Access to Information, chaired by Liberal MP John Bryden. Ottawa, 2001

• *Access to Information: Making it Work for Canadians.* Report of the Access to Information Review Task Force. Ottawa, 2002. Appended with 29 research reports. https://publications.gc.ca/collections/Collection/BT22-83-2002E.pdf

• *Response to the Report of the Access to Information Review Task Force*, by John Reid, Information Commissioner, 2002. (This is by far the most detailed and comprehensive pro-transparency list of *ATIA* reforms, hence indispensable reading - especially on Sec. 69, cabinet records.) https://www.oic-ci.gc.ca/en/resources/reports-publications/response-report-access-information-review-task-force-special-report

• *Bill C-201 An Act to amend the Access to Information Act and to make amendments to otherActs*. Introduced by NDP MP Pat Martin, 2004

• *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*. Justice Department of Canada, Ottawa, 2005. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/ati-aai/ati-aai.pdf

• *Access to Information Act - Proposed Changes and Notes*. Draft bill by John Reid, Information Commissioner, Ottawa, 2005

• *Stand Up for Canada*. Federal election platform statement of the Conservative Party of Canada, 2006

• *Restoring Accountability*. From the Final Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, by Justice John H. Gomery. Ottawa, 2006. https://publications.gc.ca/site/eng/287381/publication.html?wbdisable=true

• *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. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/atia-lai.pdf

• *Bill C-556, Act to amend the Access to Information Act*. Introduced by Bloc Quebecois MP Carole Lavallée, 2008

• *Strengthening the Access to Information Act to Meet Today's Imperatives.* By Robert Marleau, Information Commissioner, 2009. https://www.oic-ci.gc.ca/en/resources/reports-publications/strengthening-access-information-act-meet-todays-imperatives

• *The Access to Information Act: First Steps Toward Renewal.* Report of the Standing Committee on Access to Information, Ethics and Privacy. Chaired by Liberal MP Paul Szabo, 2009 https://www.ourcommons.ca/DocumentViewer/en/40-2/ETHI/report-11

• *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*. The Centre for Law and Democracy (Halifax), 2012. https://sitka.bibliocommons.com/v2/record/S49C126602784

• *The Access to Information Act and Proposals for Reform.* A summary for the Library of Parliament by Kristen Douglas, 2005, rev. 2012. https://publications.gc.ca/site/fra/426825/publication.html

• *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*. By Suzanne Legault, Information Commissioner, 2015. https://www.oic-ci.gc.ca/sites/default/files/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf

• *Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58*. By Suzanne Legault, Information Commissioner, 2017. https://www.oic-ci.gc.ca/en/resources/reports-publications/failing-strike-right-balance-transparency

• Senate of Canada, *Observations to the thirtieth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-58*), 2019. https://sencanada.ca/en/committees/report/69354/42-1

• *Fallen Behind: Canada's Access to Information Act in the World Context,* by Stanley Tromp. 2nd revised edition. BC Freedom of Information and Privacy Association (FIPA), Victoria, 2020. https://fipa.bc.ca/wp-content/uploads/2020/05/2020_FallenBehind.pdf

• *A Declassification strategy for national security and intelligence records.* A report for the Information Commissioner by Wesley Wark, 2020. https://www.oic-ci.gc.ca/en/resources/reports-publications/declassification-strategy-national-security-and-intelligence-records

• *Information Commissioner on the Government of Canada's Review of the Access to Information Regime*, by Carolyn Maynard, Information Commissioner, 2021. https://www.oic-ci.gc.ca/en/resources/reports-publications/observations-and-recommendations-information-commissioner-review