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## TWO CHALLENGES IN ADMINISTRATION OF THE *ACCESS TO INFORMATION ACT*

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### Author Note

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## 1 Two Challenges: Adversarialism and Scope

Canada's *Access to Information Act* (ATIA) came into effect in 1983.<sup>1</sup> The law recognizes the right of Canadians to obtain information<sup>2</sup> from government institutions. It establishes the procedures that must be followed in processing a request for information, including deadlines for response, and enumerates the conditions under which institutions are justified in withholding information. The law also created a new authority, the Information Commissioner, to investigate complaints about non-compliance with its requirements. If the Commissioner decides that a government institution had improperly denied a request for information but the institution continues to balk at disclosure, a remedy can be pursued in the Federal Court of Canada.

Before adoption, it was anticipated that federal institutions might receive about 100,000 requests for information under the ATIA every year.<sup>3</sup> This was a substantial over-estimate of demand. Although the volume of requests has increased by about seven percent per year, by 2004 the total number received was still only 25,232 (Chart 1). This total comprises several separate "information streams." The largest stream consists of requests from businesses, typically seeking information about inspection, regulation and licensing activities, or about governmental procurement of goods and services (Table 1). The "information stream" generated by media requests is smaller and quite distinct. The plurality of these requests seek information about policy development and research, are more likely to receive broad public attention, and are almost always believed by officials to pose political risks for the Government. A similarly small but sensitive category of requests are those filed by Opposition political parties. The volume is difficult to gauge, because federal institutions do not distinguish such "partisan" requests in public reports (although they do internally). Perhaps five to ten percent of all ATIA requests are partisan, although in some institutions the proportion can be substantially higher (Table 2).

By adopting the ATIA, Canada put itself in the vanguard of an international movement. Before 1982, only five other countries had adopted similar laws; today, the total exceeds 60.<sup>4</sup> In the intervening years, Canada was often looked to as a model of good practice, and with justification. Canada had taken the implementation of the law seriously, while many other countries did not. It created special offices to manage the inflow of requests, staffed these offices with trained professionals, and developed formal procedures to encourage prompt processing of requests. At the same time, the Information Commissioner provided an easily accessible remedy in cases of maladministration. In many respects, Canadian practice is superior to practice under the U.S. *Freedom of Information Act* (FOIA), although the popular conception is often the reverse, and also superior to emerging practice under the more recently drafted UK FOIA.<sup>5</sup>

However, the Canadian law is not without its problems. Indeed, it might be said to be in the vanguard in a second sense—as an illustration of difficulties that beset a mature access regime. Two of these difficulties have been vividly illustrated by the controversy surrounding the Sponsorship Program. One is the problem of adversarialism in the administration of the ATIA. Advocates of disclosure laws have underestimated the extent to which the conflict over government records is often precisely that—a *conflict* precipitated by the clash of sharply opposed interests. Disclosure laws regulate this conflict, and aim to change the terms of engagement in favour of non-governmental actors; but they cannot bring an end to conflict itself. On the contrary, experience suggests that government officials and non-governmental actors become more adept in developing strategies that exploit or blunt the opportunities created by the law. There is no guarantee, of course, that the balance of forces will be preserved over time; one side may prove more skilled at developing new strategies than the other. Evidence suggests that federal institutions have developed techniques for managing politically sensitive requests which now undercut basic principles of the ATIA.

The second difficulty with the ATIA is tangentially related to the first. A longstanding difficulty with the ATIA has been its failure to include many key federal institutions. For many years, the difficulty centred on the exclusion of Crown Corporations; more recently, the problem has extended to include government contractors and a range of quasi-governmental entities that perform critical public functions. These entities have not been created with the intention of evading the ATIA. On the other hand, the failure to include newly-created entities under the law—and the continued resistance to demands for inclusion of Crown Corporations—is in part a technique for resisting the impositions of the ATIA, rationalized internally by the sense of the unfairness of the “rules of engagement” embedded in the law. The emphasis on so-called “alternative modes of service delivery” is unlikely to abate, and the failure to reform the ATIA to account for these new modes would cause the law to have ever-diminishing significance.

## 2 Evidence of Adversarialism

The ATIA was launched with great expectations about its effect on the shape of Canadian governance. “This legislation,” predicted Justice Minister Francis Fox in 1980, “will, over time, become one of the cornerstones of Canadian democracy.” Fox anticipated that the law would “bring about a very major change of thinking within government:”

Simply put, the bill reverses the present situation whereby access to information is a matter of government discretion. Under this legislation, access to information becomes a matter of public right, with the burden of proof on the Government to establish that information need not be released.<sup>6</sup>

The expectation that the ATIA could produce a “major change of thinking” about the release of information might be said to typify the idealists’ view of what can be achieved by a disclosure law. The Commission of Inquiry into the Sponsorship Program and Advertising Activities investigation provides evidence that, almost a quarter century later, this

“major change of thinking” has not occurred. On the contrary, there is evidence that the problems of ATIA administration observed in Public Works and Government Services Canada (PWGSC) are typical of a government-wide pattern of resistance to the requirements of the ATIA.

## 2.1

### Procedures for Sensitive Requests

One mode of resistance has been the development of sophisticated procedures within federal institutions for managing politically sensitive requests for information. These practices have been described by Ontario’s Information Commissioner (who has witnessed the emergence of similar practices within provincial government) as “contentious issues management” procedures.<sup>7</sup> These procedures are not easily observed; indeed, for many years their existence was not widely known outside government. Yet they clearly have a significant effect in defining what the “right to information” means in practice. Elsewhere, I have argued that they constitute part of a “hidden law” on access to information.<sup>8</sup>

Within PWGSC, the practice of isolating sensitive requests was highly routinized, and described in a flow chart for the aid of departmental staff. (The flow chart for the most sensitive requests, presented in evidence to the Commission, is reproduced in Chart 2.) Every week, a list of newly received ATIA requests would be sent to the Minister’s office and the Department’s Communications Branch. In a weekly meeting, ministerial aides and communications staff would meet with ATIA staff to review the list and identify “interesting” requests.<sup>9</sup> An “interesting” request was “one where media attention had been paid to the issue or there is a potential for the Minister to be asked questions before the House [of Commons].”<sup>10</sup> Requests from journalists or Opposition parties were routinely classified as “interesting.”<sup>11</sup> “Interesting” requests were tagged electronically in the tracking system used to manage the workflow of the ATIA office.<sup>12</sup> This made it easier to generate lists of sensitive requests for oversight at a later date.

Especially interesting requests required special handling by communications staff, whose task was to prepare a media strategy to anticipate difficulties following disclosure of information, and also review by ministerial staff before release. “We lost control...of the process once Communications had it in their process,” the Department’s ATIA Coordinator, Anita Lloyd, told the Commission:

[O]nce [the ATIA office] has completed the processing of the file we would send a package to Communications Branch... [T]hen they would circulate it to the [office whose documents had been requested] for media lines, or approval of media lines they had prepared. They would then circulate it to the deputy’s office and the Minister’s Office. When that was done we would get a coversheet back—it was a coversheet for their media lines—and that would be our notification that we could make the release.<sup>13</sup>

This process of review often produced significant delays in responding to requests: “Often we found that it would take about 20 days before we finally got the signoff from the Minister’s Office so that we can make a release.”<sup>14</sup>

These procedures are not unique to PWGSC. Documents released in response to ATIA requests filed with other government departments in 2003 show that several major federal institutions have adopted essentially the same routines. In Citizenship and Immigration Canada (CIC), for example, the ATIA office conducted (at the time the documents were released) a “risk assessment” of incoming requests to identify those that might be used “in a public setting to attack the Minister or the Department.” There was a presumption of sensitivity for requests filed by journalists and representatives of Opposition parties. A weekly inventory of such requests was prepared for review by ministerial and communications staff. Especially problematic requests were “amberlighted,” a designation which triggered the production of a communications strategy and final review by ministerial staff.

Other departments also use the “amberlight” designation. In the Privy Council Office (PCO), for example, these especially difficult cases are known as “red files.” According to the procedures manual for PCO’s ATIA office:

Approximately once a week the [Office of the Prime Minister] is provided with a list of newly received requests. If they wish to see the release package of any requests they notify the [ATIA] Coordinator who passes on the information to the officer handling the request.

A check of PCO’s caseload in October 2003 suggested that about one-third of its caseload had been tagged as “red files;” the majority of these were requests made by journalists or political parties.<sup>15</sup>

These institution-specific routines are complemented by government-wide oversight practices. PWGSC operates, on behalf of the Treasury Board Secretariat (TBS), a government-wide database known as the Coordination of Access to Information Requests System (CAIRS). TBS policy requires that institutions enter information about incoming ATIA requests into CAIRS within one day of receipt. The data on incoming requests that is entered into CAIRS again includes the occupational code—such as “Media” or “Parliament”—of the requester. ATIA offices in all federal institutions are able to search the CAIRS database by several criteria, including occupation of requester.<sup>16</sup> Evidence suggests that the search capacity of the software is used principally by the Treasury Board Secretariat and the Privy Council Office.<sup>17</sup>

CAIRS has been described as a tool to “facilitate the coordination of responding to requests with common themes” by federal institutions. However, reports generated from CAIRS might also be used by communications staff within PCO to guide their own oversight of politically sensitive requests. In 2002, a former director of research for

the Liberal Party caucus complained that the PCO's "Communications Co-ordination Group" (CCG) had become:

[an] egregious example of bureaucratic politicization.... The CCG...is made up of the top Liberal functionaries from ministers' personal staff, along with several of the PMO senior staff, and the top communications bureaucrats from the supposedly non-partisan Privy Council Office.... While the CCG's mandate is supposedly to 'co-ordinate' the Government message, in practice much of the committee's time each week is taken up discussing ways to delay or thwart access-to-information requests.<sup>18</sup>

A senior PCO official conceded in a 2003 *Toronto Star* report that PCO communications staff actively manage the Government's response to sensitive requests received throughout government, to ensure that "the department releasing the information is prepared to essentially handle any fallout."<sup>19</sup> For example, PCO communications staff insisted on reviewing responses to requests relating to the "grants and contributions" scandal of 2000.<sup>20</sup> "When Privy Council Office says they want to see a release package," a communications officer explained in an internal email released by Citizenship and Immigration Canada in 2003, "I am not at liberty to do anything but what they ask." The head of CIC's ATIA office agreed: "A request from PCO Comm is essentially a 'do it' for CIC."<sup>21</sup>

The problem of delay caused by the special procedures for sensitive requests noted in the testimony of Anita Lloyd appears to be commonplace across government. An econometric study of processing time for 2,120 requests completed by Human Resources and Development Canada (HRDC) over three years (1999 to 2001) found that media and partisan requests took an additional three weeks for processing, even after other variables such as the size of the request and type of information requested were taken into account. The probability that processing times would exceed statutory deadlines also increased



for media and party requests.<sup>22</sup> A subsequent and larger study of processing patterns for 25,806 ATIA requests completed by eight federal institutions between 2000 and 2002 found similar delays for media or party requests in six of these institutions. In Citizenship and Immigration Canada, for example, media requests required an additional 48 days of processing time, and party requests an additional 34 days. Again, the processing times for such requests were also more likely to exceed statutory response times.<sup>23</sup>

Such delays suggest that a basic principle of the ATIA is widely and routinely flouted by federal institutions. The ATIA is supposed to respect the rule of equal treatment: a presumption that requests for information will be treated similarly, without regard to the profession of the requester or the purpose for which the information is sought. “The overriding principle,” argue McNairn and Woodbury, is “that the purpose for which information is sought is irrelevant.”<sup>24</sup> The 2002 Report of the ATIA Review Task Force made the same point:

Coordinators, or other officials with delegated authority, are administrative decision-makers when they decide on a right conferred by the Act. . . . [T]heir decision has to be made fairly and without bias. Neither decisions on disclosure nor decisions on the timing of disclosure may be influenced by the identity or profession of the requester, any previous interactions with the requester, or the intended or potential use of the information.<sup>25</sup>

A TBS study completed in 2001 also emphasizes that, “It would be a substantial change in the principles of the Act to make the identity of the requester or the purpose of the request a relevant consideration” in processing requests for information.<sup>26</sup> Yet, as a matter of practice, it is clear that the profession of the requester and the purpose for which information is sought are relevant considerations. There is an operating presumption that media and party requests should be regarded

as sensitive and subjected to distinct procedures that often lead to lengthened processing time and a decreased probability of response within statutory deadlines.

Whether these requests are also prone to less fulsome disclosure decisions is more difficult to determine. There is no neat way of undertaking a statistical analysis of this question. The key issue is not whether a Minister's Office uses the final stage of the process—the review of the proposed disclosure package—as an opportunity to push for more restrictive disclosure decisions. The deeper problem may be that the whole process may be permeated with an awareness that the Minister's Office has a special interest in the file. The office which holds the records—perhaps led by a civil servant four or five levels below the Deputy Minister—is told within days of a request's arrival that it is regarded as sensitive by ministerial staff. Over the next months, frontline officials and the ATIA office may engage repeatedly with communications staff, who may themselves raise questions about the boundaries of disclosure. It would be surprising if ministerial concerns had not been fully anticipated well before the disclosure package went to the Minister's Office for final review.

## 2.2

### Disclosure of Identities

In addition to these “contentious issues management procedures,” there are other ways in which officials attempt to manage the political risks posed by ATIA requests. For example, they may attempt to learn more about the dimensions of the risk by gleaning information about the individual or group that made the request. In testimony before the Commission, Isabelle Roy stated that she had, as a public servant working within PWGSC's Communication Coordination Services Branch, learned the identity of a journalist (Daniel Leblanc, of the *Globe and Mail*) who had filed requests for information regarding the Sponsorship Program.<sup>27</sup>

Such a disclosure is regarded as a violation of the principles of the *Privacy Act*, but it is not unusual for ATIA offices to face pressure to reveal the identity of individuals or groups filing sensitive requests. In May 2000, the Information Commissioner reported that the ATIA office of the Department of National Defence had routinely provided the names of media or party requesters to ministerial staff, in violation of privacy principles. Another of the Commissioner's ongoing investigations in 2000 centred on an allegation that the identity of a requester had been improperly disclosed within the PCO.<sup>28</sup> A year later, senior officials attempted to persuade the *Access to Information Act* Review Task Force that "true transparency" would allow the disclosure of requesters' names within government departments.<sup>29</sup>

In 2001, the Information Commissioner recommended a statutory amendment that would affirm the obligation of ATIA staff to maintain the confidentiality of the names of requesters.<sup>30</sup> However, the question of confidentiality may not hinge on the disclosure of names alone. Even when names are not revealed, it may be possible for identities to be inferred as a result of the practice of distributing the occupation of the requester. The number of journalists who actively use the ATIA is small, and the number who report on specific topics is smaller still. It is probably easy for an experienced communications officer to guess the identity of the journalist who has made a particular request if the occupation of the requester is made clear. The routine dissemination of occupational details across government may therefore result in a constructive violation of privacy. Government officials sometimes invoke this kind of argument to justify the withholding of information under the ATIA on privacy grounds. It is known as the "mosaic effect:" "a term used to describe the situation where seemingly innocuous information is linked with other (publicly available) information to yield information that is not innocuous."<sup>31</sup>

## 2.3

### Pressure on ATIA Officials

Concern about the political damage that may be done by disclosure of official records may also drive officials to put other sorts of pressure on ATIA officials. During the Commission's hearings, evidence was given of the attempt by officials within PWGSC to persuade ATIA staff that Mr. Leblanc's request should be interpreted restrictively or, later, that ATIA staff should attempt to lead Mr. Leblanc into accepting a narrower definition of his ATIA request that would exclude especially sensitive information about the Sponsorship Program. Senior officials were attempting, as Anita Lloyd said, to "manage the issue," but these efforts struck Ms. Lloyd and other ATIA staff as unethical. "There were quite a few meetings on this," said Ms. Lloyd, who consulted a lawyer three times for advice on how to respond to the internal pressures. Ms. Lloyd called the circumstances unprecedented in her years in ATIA administration.<sup>32</sup>

It is difficult for observers outside government to know how intense the pressure on ATIA professionals may become, but there is no doubt that ATIA staff *are* subject to continuing pressure from other officials to adopt restrictive understandings of an institution's obligations under the law. Only a few years after the law's adoption, a TBS survey found that many ATIA coordinators felt significant cross-pressures between their obligations under the law and career considerations within their department.<sup>33</sup> Another study found that coordinators were the "meat in the sandwich" of the ATIA system.<sup>34</sup> More recent studies show that these cross-pressures continue to operate. In 2002, an internal task force appointed to review the ATIA reported that it had a "number of very frank discussions" in which coordinators "talked about the stress involved in dealing with sensitive files and difficult requests."<sup>35</sup> Some coordinators "deplored a perceived lack of accountability for compliance with the Act in some program areas and perceived lack of commitment to the spirit of the Act by some managers at all levels, including senior management."<sup>36</sup>

## 2.4

### Problems in Record-keeping

The political risks posed by ATIA may also be managed by manipulating the stock of government records itself. Evidence presented before the Commission has illustrated two ways in which this might be done. The first is by the decision not to record potentially controversial information at all. “We kept minimum information on the file,” Mr. Charles Guité told the Standing Committee on Public Accounts in April 2004, while testifying on the evolution of the Sponsorship Program, “in case of an access to information request.” The metaphor employed to rationalize this decision was telling:

[T]here was a discussion around the table during the referendum year, 1994-95, when I worked very closely with the FPRO and the Privy Council. . . . We sat around the table as a committee and made the decision that the less we have on file, the better. The reason for that was in case somebody made an access to information request. I think, as I said back in 2002, *a good general doesn't give his plans of attack to the opposition.*<sup>37</sup>

Later, PWGSC officials developed another tactic to deal with ATIA requests regarding the Sponsorship Program. A set of expenditure guidelines were drafted with the expectation that they would be released to requesters and encourage an impression of bureaucratic regularity within the Program. The guidelines did not have operational significance; rather, they had “cosmetic values and purposes.”<sup>38</sup>

Concern that the ATIA has caused deterioration in the quality of record-keeping within federal institutions is not new. Indeed, Canada's Information Commissioner has argued that the “troubling shift . . . to an oral culture” within senior levels of the public service constitutes one of the main challenges to the effectiveness of the ATIA.<sup>39</sup> It should be said, however, that the dimensions and causes of the problem are not

well established. Research on changes in record-keeping since the adoption of the ATIA is not extensive, and the conclusions that are drawn about the effect of disclosure requirements are mixed.<sup>40</sup> Factors other than the ATIA have also played an important role in the decline of record-keeping—such as cutbacks in administrative budgets and the general decline in the formality of decision-making which has been evidenced in some advanced democracies.<sup>41</sup> The effect of new information technologies—such as email and electronic database capabilities—may actually be to substantially broaden the size of the “official record.”<sup>42</sup>

It is also difficult to know what might be done to remedy a decline in proper record-keeping. The Information Commissioner has suggested the need for legislation that would create “a duty to create such records as are necessary to document, adequately and properly, Government’s functions, policies, decisions, procedures, and transactions.”<sup>43</sup> Many jurisdictions already acknowledge narrowly-bounded “duties to document”—for example, by requiring the creation of records that describe a department’s organization, the expenditure of public funds, or reasons for official decisions. As Canadian officials have noted, however, a more general duty encompassing, for example, a duty to describe internal policy deliberations, would be difficult to enforce.<sup>44</sup>

The more serious problem of destruction or manipulation of government records in an effort to subvert disclosure requirements appears to be less common, but not unknown, in Canada. A decade ago, investigations concluded that officials had destroyed tape recordings and transcripts of meetings in which public servants debated how to manage threats to public safety posed by contamination of the blood supply by HIV and Hepatitis C, a few days after receiving an ATIA request for the records.<sup>45</sup> In 1997, the Commission of Inquiry into the Deployment of Canadian Forces to Somalia concluded that National Defence officials

had altered and attempted to destroy documents relating to the misconduct of Canadian Forces in Somalia, documents which had been sought by journalists under the ATIA and by the Inquiry itself.<sup>46</sup> In 1998, Parliament amended the ATIA to make it an offence for officials to destroy, falsify or conceal a record, or “make a false record,” in an effort to deny a right of access under the ATIA.<sup>47</sup>

### 3 Reasons for Adversarialism

The problems in administration of the *Access to Information Act* (ATIA) which have been evidenced during the controversy over the Sponsorship Program are not *sui generis*. Rather, they are particular manifestations of more general problems in ATIA administration. These more general problems have arisen as federal officials have attempted to find ways of minimizing what I have elsewhere called the “disruptive potential” of the ATIA. In deploying these various tactics for dealing with the political risks posed by the ATIA—special procedures, pressure to disclose requesters’ identities, more general pressure on ATIA coordinators, or manipulation of the official record—officials have evinced an adversarial attitude toward the law. They have regarded the law as a threat which must be resisted or managed. In this section, I wish to make the point that this attitude of adversarialism can be, and is, rationalized by federal officials. That is, there are reasons which are evoked to justify this attitude towards the law, some of which have merit, and all of which must be understood if we wish to make the law work effectively in practice.

#### 3.1

##### The Nature of Parliamentary Politics

One obvious defence of adversarialism rests in the nature of parliamentary politics. Partisan requests are often filed with the hope that they may produce information that will compromise the Government’s political position; similarly, stories generated by media inquiries may be used by Opposition parties for the same purpose. Ministers and their staff naturally argue that it is unfair to deny them

the opportunity to anticipate how they may be called to account in Parliament and other fora.

“What we are talking about is power—political power,” said Joe Clark, then leader of the Opposition Conservatives, in 1978.<sup>48</sup> Clark made the observation as part of an argument in favour of broader dissemination of information—and thus of political influence—but the statement nevertheless conveys the hard realities that underlie the day-to-day administration of the ATIA. The same sentiment was conveyed in the 1977 Green Paper on Public Access to Government Documents. Secrecy, the discussion paper said, was partly rooted in the adversarial nature of party politics:

Many of our social institutions proceed on an adversarial basis. Our court system, for example, is based on the belief that justice will be served by the clash of advocates presenting their case as strongly as possible. So, too, our political system is an adversarial process, based on the belief that the public interest will be served by both government and opposition parties presenting their views to public judgment as ably as they can. The effectiveness of this advocacy depends, at least to some extent, on the ability of parties to concert their plans in confidential discussions. *Government and opposition are a little like football teams* who, in the huddle, prepare their action out of earshot.<sup>49</sup>

Whether the metaphor is drawn from sports or (as in the case of Mr. Guité’s testimony before the Public Accounts Committee) the military, the inference is the same: The law is being used by actors whose aims are hostile to the Government, and a strong defence is consequently justified.



## 3.2

### Changes in Use of the Law

A second factor which may aggravate adversarialism is the rise in number and sophistication of sensitive ATIA requests. An ATIA official engaged in the overhaul of CIC's procedures for managing politically sensitive requests observed in an internal email in 2002 that:

[ATIA] requests are more probing than they used to be. There are many more of them and their requests frequently involve far more, and more sensitive, records. The result is that ATI is much more complex than it was 10 years ago—more challenging for us and more threatening for government-side politicians.<sup>50</sup>

From the point of view of Government as a whole, this observation is probably correct. It is difficult to measure the growth of partisan requests because these data are not publicly reported. However, it is undoubtedly true that the number of media requests has grown. In its last five years (FY1989 to FY1993), the Conservative Government received a total of 4,823 requests from journalists; in contrast, the Liberal Government received 12,535 media requests in the five years ending in FY2004.<sup>51</sup> Furthermore, there is anecdotal evidence that journalists (and perhaps other requesters) have developed better understanding of bureaucratic routines and the law, enabling them to make more precise and less easily evaded requests. It may also be the case that partisans and journalists are more likely to “swarm” a department with ATIA requests once the department is affected by controversy, causing a quick surge in politically sensitive requests. For example, Human Resources and Development Canada (HRDC) saw the number of ATIA requests from journalists alone jump from 36 in 1999 to 199 the next year, following the “grants and contributions” controversy.

### 3.3

#### More Complex Governing Environment

Resistance to the requirements of the ATIA is also driven by broader concerns about the erosion of government's ability to govern effectively. This concern about the decline of "governability" is not entirely new or limited to Canadian policymakers.<sup>52</sup> However, there are several reasons why concern for "governability" has increased over the last decade. On one hand, policymakers perceive a decline in authority that is tied to processes of globalization and tighter fiscal constraints. On the other hand, policymakers observe a surrounding environment that seems more complex and turbulent. In most advanced democracies, the number of interest groups has expanded, and so too have the number of external checks (such as auditors, commissioners and ombudsmen) with authority to scrutinize the work of government.

In Canada, Professor Donald Savoie has observed that senior civil servants "have been confronting a work environment analogous to a perfect storm. They might as well be working in a glass house, given access-to-information legislation, several oversight bodies policing their work, and more aggressive media."<sup>53</sup> A similar anxiety was expressed in a 1996 Organization for Economic Co-operation and Development (OECD) report, which observed that governments faced "intense pressure from citizens, transmitted or provoked by the media, and demanding rapid responses." Mechanisms for improving responsiveness—"policies of consultation with the public, freedom of information, and transparency"—could be abused, the OECD report suggested, blocking constructive governmental action. The report concluded that it was important to resist "excessive pressure" from the media and pressure groups: Governments needed "to pursue more active communication policies, to keep control of their agendas and not just react passively to the pressure of events."<sup>54</sup>

For those concerned with the decline of “governability,” the changing role of the media is often a matter of special concern. The structure of the media has clearly changed. Traditional outlets have been undercut by new technologies, so that there are now more potential outlets for news, competing against each other in an accelerated news cycle. We live in the Blackberry age, and this naturally fuels official anxiety about the loss of control over information flows. Added to these structural changes is a perceived decline in the *attitude* of the media towards governmental authority. In this view, as the Archbishop of Canterbury has recently argued, journalists too often begin by assuming that:

[T]he question to ask almost anyone... is the immortal: “Why is this bastard lying to me?”... [T]he effect is to treat every kind of reticence as malign.... Exposing what is for any reason concealed becomes an end in itself, because the underlying reason for all concealment is bound to be corrupt and mystificatory.... [Politics is] reduced to a battleground where information is dragged out of reluctant and secretive powerholders.<sup>55</sup>

In Canada, this general concern about “governability” is heightened by the ongoing concern about constitutional issues. This is evidenced in the Sponsorship Program controversy itself: Mr. Guité recalled that he and other officials had made their decision to avoid record-keeping “during the referendum year, 1994-95,”<sup>56</sup> when the threat to national unity seemed especially sharp. This concern was not new or peculiar to the Liberal Government. Between 1991 and 1993, the Conservative Government attempted to resist the release of public opinion polls on constitutional matters to journalists by arguing that disclosure could undermine “the very existence of the country as we have known it.” The Federal Court of Canada ruled in favour of the journalists.<sup>57</sup>

## 3.4

### Perceptions of Unfairness

A final argument that is invoked to justify official adversarialism is a sense that the law itself is unfair in its design, by failing to block requests which serve no legitimate interest or which draw excessively on public resources. It is indeed the case that disclosure laws, like any other laws, may be abused. In rare cases, officials may be subjected to requests for information whose aim is not to obtain information essential for the pursuit of some important purpose, but rather to harass government workers and obstruct government operations. Such requests are uncommon, a committee of senior officials told the ATIA Review Task Force in 2001, but “give access a bad name.”<sup>58</sup> The ATIA does not give federal institutions explicit authority to disregard such requests, as do some provincial laws. Ontario’s *Freedom of Information and Protection of Privacy Act*, for example, denies the right to information if “the head [of an institution] is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.”<sup>59</sup>

More often, a request may serve a legitimate purpose but nonetheless draw disproportionately on public resources. The cost of processing a single ATIA request is not negligible. In 2000, a Treasury Board Secretariat study concluded that the annual cost of administering the ATIA was \$24.9 million, or about \$1,740 for each information request received that year.<sup>60</sup> An individual may activate a request by paying only five dollars; certain additional fees may eventually be payable, but these will reflect only a fraction of the total cost of processing the request. There is, it must be made clear, a strong case for public subsidization of the ATIA system. However, many officials believe that the subsidy is too lavish, or inappropriately designed, and that requesters are not adequately deterred from making “broad, unfocussed requests and fishing expeditions.”<sup>61</sup> This also undermines respect for the law.

## 4 Responding to Adversarialism

In canvassing these defences of adversarialism, I have not meant to suggest that they are necessarily complete or persuasive. These complaints must be weighed against compelling arguments in favour of transparency, and do not justify *sub rosa* practices which have the effect of undercutting rights granted by the *Access to Information Act* (ATIA) itself. Nevertheless, it is important to recognize that the arguments deployed by officials in defence of current practices are substantial; this implies that the practices themselves are unlikely to be easily changed.

### 4.1

#### A Realist's View of the ATIA

This suggests the need for a more realistic perspective about the role of the law. Disclosure laws like the ATIA have often been promoted by policymakers as tools for overturning the “culture of secrecy” within governments, putting in its place a “culture of openness”—a culture, as Australian High Court Justice Michael Kirby said in 1997, “which asks not why *should* the individual have the information sought, but rather why the individual *should not*.”<sup>62</sup> Earlier, I called this the idealist’s view of disclosure law. It is a widely held view. Shortly after adoption of the Irish *Freedom of Information Act* (FOIA) in 1997, for example, Information Commissioner Kevin Murphy observed:

[The law] has been variously described as heralding “the end of the culture of public service secrecy” and as a “radical departure” into a brave new world of public service openness and transparency. I know that media people... may view such a statement as nothing more than hyperbole; nevertheless, it is a fact that the enactment of the FOIA does mark a radical departure from one style or culture of public service to another.<sup>63</sup>

The British FOIA adopted in 2000 has also been promoted as a tool to break down the “traditional culture of secrecy” and construct “a new culture of openness.”<sup>64</sup>

In practice, however, the “culture of openness” has proved elusive. The 40th anniversary of the American FOIA, in 2006, will not be marked by a celebration of culture change, but by continued controversy over the Bush administration’s efforts to narrow its obligations under the law.<sup>65</sup> Nor is there evidence of profound shifts in bureaucratic culture in Commonwealth jurisdictions that adopted similar laws in the late 1970s and early 1980s. In May 2005, Information Commissioner John Reid marked the completion of his term by lamenting the “stubborn persistence of a culture of secrecy” within the Canadian Government.<sup>66</sup> In 2002, the Government’s own Access to Information Task Force reached a similar conclusion about the durability of old values in federal institutions.<sup>67</sup>

This is not to say that disclosure laws have failed as tools for obtaining information that is held by government institutions. On the contrary, government departments have often been compelled to disclose sensitive information to journalists, Opposition parties or non-governmental organizations which might never have been accessible previously. In many cases, institutions have developed new procedures for routine disclosure of information that is frequently requested under the law. Governments have become more open, but this does not mean that they have acquired a “culture of openness.” It means only that the rules that govern the conflict over information have shifted in favour of openness, and that government officials (as a rule) recognize their ultimate obligation to submit to the rule of law.

If a “culture of secrecy” persists after two decades, what should we do about it? One approach, favoured in the recent report of the ATI Task Force, is a renewed effort to create a “culture of access.”<sup>68</sup> Another and perhaps more realistic view is one that recognizes that the “culture of openness” is probably unattainable. In certain areas, conflict over

information will persist—and may actually intensify, either because of changes in the broader governance context or simply because the protagonists have become more adept in using the law and developing techniques to blunt its impact. The aim of reform in this case is not to change organizational culture, or to deny the reality of conflict, but to construct rules of engagement that are transparent, perceived as fair, and appropriately enforced.

## 4.2

### Transparent Procedures for Sensitive Requests

By these standards, one clear area for reform relates to the special procedures for sensitive requests that have been established by PWGSC and several other departments. Here, a basic principle of transparency is not respected. Institutions rely on rules for handling ATIA requests, rules which clearly affect the substance of an individual's access rights but are generally hidden from public view. It should not require a public inquiry, or an ATIA request, to determine what these rules are. It ought to be standard procedure for each institution to publish its internal procedures for handling requests, including any procedures for special treatment of sensitive requests, on the institution's website. The published procedures should be complete—an institution should not be permitted to rely on additional, non-public processing rules.

There is also a problem of unfairness in the current design of ATIA procedures in major institutions, which routinely segregate partisan and media requests for processing under distinct rules that produce less favourable outcomes to those requesters (at least by the measure of response time, which is often critically important to media and partisan requesters). It may well be the case that institutions are entitled to anticipate the consequences of disclosure, but there is nothing in the law that permits institutions to achieve this goal by undermining the principle of equal treatment.

The challenge lies in deciding how practices should be redesigned to ensure that the principle of equal treatment is respected. It is unreasonable to suggest that institutions should simply forgo anticipating the communications implications of sensitive ATIA requests. The task, therefore, is to find ways of ensuring that this work does not undercut the right to access. One approach is to encourage the Information Commissioner to monitor the handling of sensitive requests as a class, but this is contingent on proper resourcing of the Commissioner's office, as I note below. Another approach would be to make use of special procedures contingent on notice to the requester. This is not an onerous requirement—it could be noted in the request acknowledgment or extension letter, and puts the requester on notice to watch for undue delays that might be attributed to special handling.

### 4.3

#### Protecting Identities

Fairness in the handling of ATIA requests also requires stronger rules to ensure that the privacy rights of individuals requesting information are protected. In practice, it is difficult to detect instances in which privacy rights have been violated. One method of discouraging pressure to disclose identities might be to include a provision in the ATIA stating that such disclosures are generally inappropriate. The Information Commissioner recommended the adoption of such language in 2001.<sup>69</sup>

As I noted earlier, however, the routine of disclosing a requester's occupation (for example, as a media requester) could also lead to a constructive violation of privacy. The practice of classifying requests by source was originally intended to improve public understanding of how the ATIA is used, and there is still a strong argument for requiring ATIA offices to classify requests for this purpose. But any purpose that might be served by circulating this information elsewhere within an institution—or across government generally—may be outweighed by privacy risks.



It must be conceded that a bar on the circulation of occupational information has its own limitations. Suppose, for example, that an ATIA officer conducting a “risk assessment” of an incoming request continued to assume that media and partisan requests were presumptively sensitive. The designation of a request as sensitive would therefore be a flag that an incoming request might come from these sources. However, the risk to privacy is diluted in this case; the class of potential requesters is larger, not only because media and partisan requests are mixed, but also because sensitive requests could come from other sources.

## 4.4

### Autonomy of Coordinators

A major difficulty with ensuring fair enforcement of ATIA requirements is that so much of the process takes place away from public view. Requesters cannot see what is being done within an institution, and the Information Commissioner also lacks the resources to track institutional behaviour closely. In practice, the ATIA coordinator plays a key role in ensuring that the rules of the game are followed.

Two steps can be taken to strengthen the understanding that the ATIA Coordinator acts as a guardian of good process. One step, first recommended by the Commons Standing Committee on Justice in 1987, would be to give the role of ATIA Coordinator explicit recognition in the ATIA itself.<sup>70</sup> This recommendation has been endorsed more recently by the Information Commissioner. The aim of this proposal is not to make the Coordinator an advocate of the requester’s interests; rather, it would be a formal recognition of the Coordinator’s responsibility (in the Commissioner’s proposed language) “to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially.”<sup>71</sup>

Having said this, there is much to be said for a second step: the formal recognition of a duty to assist individuals who seek to exercise their

rights under the ATIA. This is not a radical innovation; a “duty to assist” is included in British Columbia<sup>72</sup> and Alberta<sup>73</sup> law, as well as the new United Kingdom FOIA.<sup>74</sup> British Columbia’s law says that institutions “must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.” Federal ATIA coordinators recognize this principle in practice, but statutory language might help to bolster the position of coordinators in cases where they face inappropriate pressure from other parts of their institution.

## 4.5

### Funding of the Commissioner

Steps should also be taken to modify the method of funding the Information Commissioner’s office. Currently, the budget for the Commissioner’s office is determined by Treasury Board—a Cabinet committee—after representations by the Commissioner’s office. This creates an obvious conflict of interest; a Cabinet that is indifferent to the aims of the ATIA can simultaneously flout the law and undercut the Commissioner’s ability to investigate the complaints that arise from its indifference.

This may not be a hypothetical concern. In the early 1990s, cutbacks to administrative budgets within many federal institutions caused widespread problems of delay in responding to ATIA requests, which generated a dramatic spike in the number of complaints about noncompliance to the Information Commissioner’s office (Chart 3). However the Commissioner’s own budget was essentially frozen for five years; as average caseloads increased, so too did the time required for resolving complaints.<sup>75</sup> The Commissioner’s eventual effort to use his formal investigative powers to prod senior managers into addressing systemic delays led to a serious deterioration in working relationships between his office and the highest levels of the federal bureaucracy.<sup>76</sup>

Although the delay crisis of the 1990s has now receded, the caseload of the Commissioner’s office remains at a historically high level. The

Commissioner recently reported to the House Committee on Access to Information, Privacy and Ethics that his office suffers a “crisis of underfunding:”

The backlog of incomplete investigations is now at a level which would take all my 23 investigators a full year to dispose of. . . . Last year, the average time it took to complete an investigation was some nine months—at least six months longer than is reasonably acceptable. The reason is insufficient resources. Every internal efficiency gain has been exploited. We simply do not have enough investigators to do a labour intensive job. As well, my office has no research, policy, training, public education, or communications staff. These we sacrificed as part of the internal search for resources to put towards investigations.<sup>77</sup>

This shortfall in funding undermines the Commissioner’s ability to monitor the ATIA system as a whole, perhaps by undertaking special government-wide studies of problematic practices. An alternative funding model is already being considered for the office of the Ethics Commissioner. Under this approach, the Ethics Commissioner will propose a budget to the Speaker of the House of Commons; after review, the budget will be forwarded to Treasury Board to be included, without modification, in the Government’s spending proposals.<sup>78</sup> In May 2005, the Committee on Access to Information, Privacy and Ethics endorsed a comparable reform of the funding mechanism for the Information Commissioner and other officers of Parliament.<sup>79</sup>

## 4.6

### Appointment of the Commissioner

Other reforms could also be undertaken as part of an effort to establish an access regime that is generally regarded as fair. One is a reform in the manner by which Information Commissioners are appointed. If the process of requesting information is, in many instances, adversarial, it is important that the Commissioner be universally regarded as a person

who is able to serve as a truly independent arbiter. The current method of appointment—by Order in Council, subject to approval of the appointment by resolution of both Houses of Parliament—does not do this. It gives too much discretion to the Government of the day and tends, as a matter of practice, to undermine popular respect for the law.<sup>80</sup>

This was demonstrated in 1998, when the Government made plans to replace outgoing Commissioner John Grace. Initially it was rumored that the Chrétien Government intended to propose a former Deputy Minister of Justice, an idea which was sharply criticized in the press. Eventually, the Government proposed another former Deputy Minister, Mary Gusella, but Ms. Gusella withdrew her name after protests from former Commissioner Grace,<sup>81</sup> editorialists and Opposition legislators. Government and Opposition leaders eventually agreed on John Reid as an agreeable alternative, but the process by which this agreement was reached lacked transparency and was challenged by non-governmental groups. The lingering effect of the controversy was to undermine the legitimacy of the office itself.

There are better alternatives. One model, used in some jurisdictions for appointment of judges, is to establish an independent committee to consider nominations and propose a short list of acceptable candidates. Such a committee might include cross-party and other non-governmental representatives, and perhaps also some provincial Information Commissioners. The committee might solicit applications or simply provide advice in confidence about proposed candidates. There are many different ways in which such a body might work—all of which would result in decisions that are manifestly fairer than those produced by the status quo.

## 4.7

### Stronger Administrative Controls

A well-functioning law also depends on a perception *within* federal institutions that the rules of the game are fair. Respect for the law—and therefore compliance with its requirements—might also be enhanced by providing protections against clear abuses of the law. A bar on “frivolous and vexatious” requests, comparable to the provision already established in Ontario law, ought to be included in the ATIA as well. A modest increase in the application and other fees—perhaps countering the effect of 20 years’ inflation—might also serve as a reasonable check against otherwise costly ATIA requests. There is also an argument to be made for limits on requests which impose an extraordinary burden on federal institutions.<sup>82</sup>

The controversy surrounding the Sponsorship Program does not directly involve problems of frivolous, vexatious or voluminous requests. However, it may be that the indifference to statutory requirements which is manifested in the controversy is rationalized on the grounds that the law itself does not balance competing considerations properly, and to the extent that reasonable administrative controls help to improve the perceived reasonableness of the statute, they might help to avoid similar problems of official resistance in the future.

## 5 The Scope of the Law

An obvious limitation of any disclosure law is its inability to assure a right to information held by institutions that are not subject to the law. This constraint appeared to operate during the Sponsorship Program controversy, which touched entities—such the Canada Post Corporation, VIA Rail Canada and the Old Port of Montreal—not covered by the *Access to Information Act* (ATIA). In fact, one of the longstanding weaknesses of the ATIA has been its restrictive approach to coverage of institutions in which the federal government has an

interest. This weakness has been aggravated over the past decade as the Government has experimented with several new modes of “alternative service delivery.”

The treatment of Crown Corporations under the ATIA is inconsistent, and longstanding pressures for rationalization of coverage have been resisted by government. Only 28 of 46 Crown Corporations are subject to the law.<sup>83</sup> A 1987 recommendation by the Commons Standing Committee on Justice that the ATIA should cover all Crown Corporations was not accepted by the Government, which promised only to review the matter.<sup>84</sup> In 1996, a committee established to review the activities of Canada Post also recommended that the Corporation’s non-competitive activities should be subject to ATIA.<sup>85</sup> In 2002, the ATIA Review Task Force again recommended the inclusion of more Crown Corporations under the law, although in some instances it suggested that new exemptions might need to be added to protect critical interests.<sup>86</sup>

In February 2005, the Government affirmed its willingness to include (through Order in Council) 10 of the excluded Crown Corporations, including the Old Port of Montreal.<sup>87</sup> At the same time, it indicated that seven other Crown Corporations—including Canada Post and VIA Rail—should not be included until the ATIA had been amended to provide stronger exemptions for certain kinds of information held by those entities.<sup>88</sup> In April 2005, the Minister of Justice indicated that legislative action to amend the ATIA in this way would be deferred until the Standing Committee on Access to Information, Privacy and Ethics had completed its review of the ATIA.<sup>89</sup>

A critical issue during this review will be the breadth of the new exemptions which are thought to be required as a prerequisite for inclusion of Crown Corporations such as Canada Post and VIA Rail. The Government appears to contemplate the addition of new

exemptions that would permit Corporations to withhold confidential business information, or information received in confidence from other parties, without the obligation to demonstrate a risk of harm from disclosure that is contained in current exemptions.<sup>90</sup> Such exemptions would be inconsistent with the basic logic of disclosure laws—that decisions on the withholding of information should require a weighing of benefits and harms—and would substantially qualify the gains realized by including these Corporations under the law.

The impression that may be conveyed by these years of deliberation is that the extension of disclosure requirements to Crown Corporations is a deeply problematic or technically complicated exercise. This is not the case. Many other countries already take a more expansive view. For example, the United States Postal Service, the Royal Mail, Australia Post and New Zealand Post are all subject to disclosure laws like the ATIA, while Canada Post is not. While the Canadian Broadcasting Corporation is not subject to the ATIA, many other similar organizations—the British Broadcasting Corporation, the Australian Broadcasting Corporation, Television New Zealand, and the Irish broadcaster RTÉ—are covered, with exemptions for journalistic or program material. Some organizations with functions analogous to those of VIA Rail—such as the United States' Amtrak—are also required to comply with national disclosure laws; in this sector, comparison is complicated by differences in the structure of national rail systems.

It must also be emphasized that the inclusion of Crown Corporations would constitute only a partial response to the problem of the ATIA's limited scope. A range of other mechanisms that have recently been relied upon for the delivery of public services must also be accounted for. These include:

- contractors who deliver increasingly large components of work once undertaken by federal institutions;

- many of the federal government’s “other corporate interests” (Table 3), such as the air traffic control service, NAV Canada, as well as entities which expend substantial amounts of money provided by the federal government, such as the Canadian Foundation for Innovation; and
- other critical advisory or service delivery bodies created on the initiative of the federal government, but not recognized as federal government corporate interests, such as major airport authorities,<sup>91</sup> the Nuclear Waste Management Organization<sup>92</sup> and Canadian Blood Services.<sup>93</sup>

Also lacking is a clear set of standards for determining when organizations should be included under the ATIA. As the ATIA Task Force observed in 2002:

The government continues to create organizations intended to achieve a public purpose at some distance from government. The Act may or may not apply to such organizations. . . . We could not identify an obvious rationale or any apparent criteria that were used in determining which of these organizations should be subject to the Act. It is our view that the current approach is unsatisfactory. . . . [T]here is a need for a principled approach to coverage under the Act.<sup>94</sup>

Missing as well is some kind of mechanism to ensure that proper consideration is given to the question of whether newly created organizations should be subject to the law. As the Task Force again observed, “there is apparently no formal process within government for ensuring that the Act’s application is considered when new institutions are created.”<sup>95</sup>

Again, reform of the Act to accommodate new modes of service delivery is not a technically challenging task. For example, New Zealand and Irish laws deem contractor records to be held by the contracting agency, and thus subject to the right of access. Several laws also include



formulae which deem a body to be subject to the law if it relies heavily on government financing; is effectively under government control (through board appointments, for example); undertakes a critical public function within the jurisdiction of a government; or holds information the disclosure of which is essential to the protection of a basic citizen interest.<sup>96</sup> Some laws (such as the United Kingdom's *Freedom of Information Act*<sup>97</sup>) articulate criteria but leave it to government discretion to determine whether an entity meeting those criteria should be added to a schedule of institutions covered by the law.

A range of options for dealing with contractors and quasi-governmental entities have now been presented in Canada. The ATIA Review Task Force proposed that the government procurement policy should be amended to ensure a right of access to contractor records, and that the Government should undertake a review of quasi-governmental entities, adding them to the schedule of federal institutions subject to ATIA if:

- Government appoints a majority of board members, provides all of the financing through operations, or owns a controlling interest; or
- the institution performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security; unless
- inclusion would be “incompatible with the organization’s structure or mandate.”<sup>98</sup>

The Information Commissioner, in contrast, has recommended amendment of the ATIA to assure that federal institutions retain control over all records generated pursuant to service contracts. An amended ATIA would also create a *mandatory* obligation for Government to add a new entity to the schedule of covered institutions if it meets any one of six criteria:

- it is funded in whole or in part from parliamentary appropriations or is an administrative component of the institution of Parliament;
- it or its parent is owned (wholly or majority interest) by the Government of Canada;
- it is listed in Schedule I, I.1, II or III of the *Financial Administration Act*;
- it or its parent is directed or managed by one or more persons appointed pursuant to federal statute;
- it performs functions or provides services pursuant to federal statute or regulation; or
- it performs functions or provides services in an area of federal jurisdiction which are essential in the public interest as it relates to health, safety, protection of the environment or economic security.<sup>99</sup>

A key difference between these two approaches is the extent to which the Government is to be trusted to undertake decisions necessary to ensure that the ATIA maintains appropriate coverage. The Task Force is prepared to trust executive discretion, while the Information Commissioner is not. On the other hand, there appears to be broad agreement on the criteria to be used in determining whether entities should be covered, relying on a blend of considerations relating to control, financing, jurisdiction and criticality of function.

In his recent discussion paper, the Justice Minister makes no comment on the treatment of contractor records and expresses no view on the merit of the criteria for including quasi-governmental entities proposed by the Task Force or the Information Commissioner, except to say that any criteria should be related to “stable characteristics of an organization.” The Minister favours an approach under which Government retains discretion over the inclusion of entities, but suggests the Government may be amenable to a requirement that it account annually for its decisions.<sup>100</sup>

The emphasis on new modes of service delivery is unlikely to abate. As a consequence, some better method of accommodating these modes within the transparency regime established by the ATIA is necessary; the alternative is acquiescence in the slow erosion of that regime. An explicit policy on the treatment of contractor records is therefore necessary; so, too, is an explicit policy on the treatment of quasi-governmental entities. Furthermore, a policy that is entrenched within the ATIA is preferable to one that relies principally on the good will of the executive. (The apparent indifference of the executive to the effect of restructuring on the functioning of the ATIA over the past 15 years may be the most compelling evidence on this point.) The reforms proposed by the Information Commissioner are consequently preferable to those of the Task Force, although there may well be room for debate about the precise definition of the criteria that should trigger the mandatory obligation to include new entities in the schedule of institutions covered by the law.

## 6 Conclusion

While the *Access to Information Act* (ATIA) system has its difficulties, and while it may have failed to achieve a “change in culture” within federal institutions, it would be inappropriate to conclude that it is therefore a failed policy. This is far from being the case. Every year, thousands of requests are filed which serve important public purposes: assuring fairness in the treatment of citizens and businesses; promoting better understanding of policy-making within government; and promoting a business environment that is regarded as stable and transparent.

Furthermore, the ATIA provides good value for money, even if particular requests may draw disproportionately on government resources. As I noted earlier, the annual cost of administering the law was about \$25 million in 2000; it will have increased significantly since then, because of heightened demand and input costs. Nevertheless, a sense of proportion is needed. The federal government planned to spend \$393

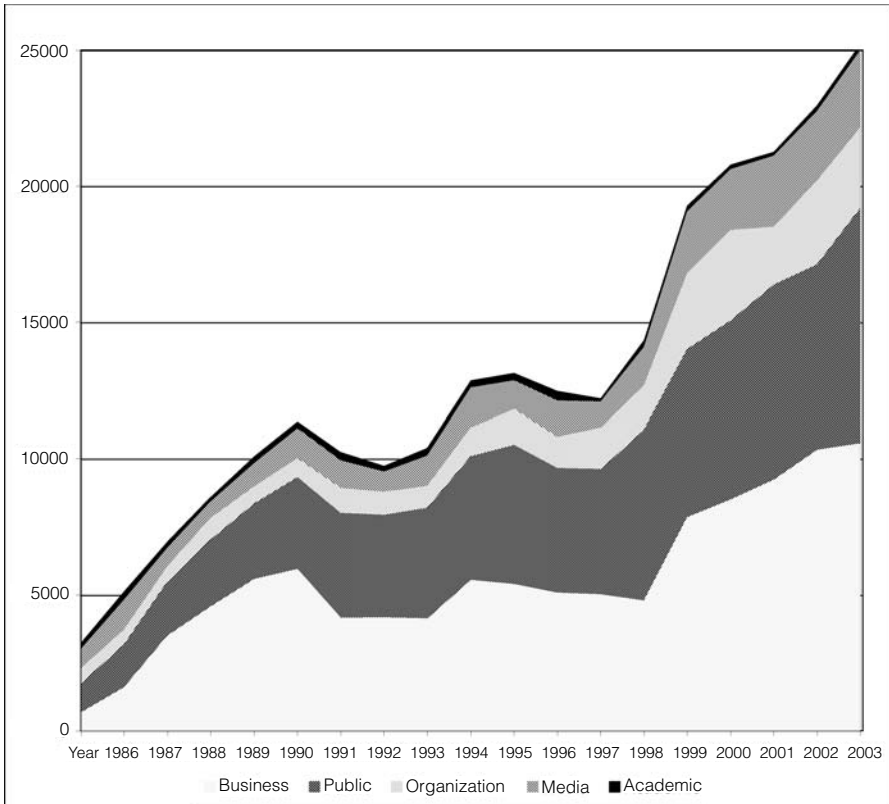
million on information activities—including advertising services; public relations and public affairs services; and publishing, printing and exposition services—in fiscal year 2005.<sup>101</sup> The amount of money that is spent on the ATIA—what might be called “uncontrolled” information dissemination—is only a fraction of the total amount that is spent on “controlled” dissemination.

Nevertheless, the ATIA requires reform. This is not surprising; it is a system that is now over two decades old, governed by a law which has never had a comprehensive overhaul. Any such reform must give full consideration to the two issues canvassed in this paper. Adversarialism is an unavoidable feature in the administration of the ATIA, particularly with regard to the roughly four or five thousand requests received annually which are regarded as posing political sensitivities for the Government of the day.<sup>102</sup> The problem of adversarialism must be addressed directly. As I have noted earlier, several simple reforms can be undertaken to provide requesters and officials with assurance that the “rules of the game” are transparent, fair and properly enforced.

The law must also be amended to accommodate the new realities of governance. It is now a commonplace that our old conception of the public sector—in which the public’s work was done primarily in government departments staffed by public servants—has become obsolete. The “public sector” has become a more variegated composite of governmental, quasi-governmental and “private” actors, and there is good reason to think that this process of fragmentation will continue. A law which does not properly account for this fundamental change in the structure of governmental institutions will have declining relevance as a tool for providing an assurance of transparency in the performance of public work.

Chart 1: Number of Requests Filed by Source, 1986-2004

Based on data contained in annual reports filed by federal institutions under section 72 of the *Access to Information Act*, and tabulated by Treasury Board Secretariat.



**Table 1: Distribution of Requests by Source and Subject-Matter**

Based on an analysis of a sample of 663 ATIA requests drawn randomly from a list of requests received by federal institutions and logged in the Coordination of Access to Information Requests System (CAIRS) in 1999.<sup>103</sup>

*(a) Summing to 100% by source of request (Business Media, Organization, Other)*

	Business	Media	Org.	Other	ALL
Personnel management	1%	3%	4%	11%	5%
Procurement	32%	6%	21%	4%	17%
Budgeting and financial control	7%	12%	15%	12%	11%
Grants and contributions	2%	8%	17%	5%	6%
Inspection, regulation & licensing	37%	13%	6%	14%	21%
Policing, criminal prosecutions & corrections	4%	13%	3%	13%	8%
Research and policy development	5%	24%	21%	8%	11%
Other	12%	21%	14%	32%	20%
ALL	100%	100%	100%	100%	100%

*(b) Summing to 100% by subject-matter of request (N=663)*

	Business	Media	Org.	Other	ALL
Personnel management	6%	9%	12%	73%	100%
Procurement	67%	5%	20%	8%	100%
Budgeting and financial control	23%	18%	23%	37%	100%
Grants and contributions	12%	19%	43%	26%	100%
Inspection, regulation & licensing	64%	10%	5%	21%	100%
Policing, criminal prosecutions & corrections	17%	26%	6%	52%	100%
Research and policy development	14%	33%	30%	22%	100%
Other	22%	16%	11%	51%	100%
TOTAL	36%	16%	16%	32%	100%

**Table 2: Breakdown of Requests by Type in Nine Institutions**

Several departments operate ATIA tracking systems which deploy more detailed categorizations of incoming requests than are used in the publicly available reports on ATIA usage that must be provided under section 72 of the ATIA. The following table is based on data extracted from tracking systems for some major federal institutions. Data for HRDC are based on all requests completed by the institution in 1999-2001. For all other institutions, the table is based on all requests completed in 2000-2002. The “Partisan” category includes requests coded as “Parliament” or “Political Party” by each institution. Six institutions used only the category “Political Party” in this period; one (PCO) used only the category “Parliament;” another one (DND) used both. SGC used neither.

Source	HRDC	CCR	CIC	DND	FAI	JUS	PCO	SGC	TC
Academic		0.1%	0.0%	0.6%	2.3%	1.3%	3.1%	3.8%	0.5%
Business	6.6%	35.0%	12.4%	15.9%	5.0%	14.2%	14.2%	0.0%	21.2%
Lawyer	3.3%		40.2%	1.0%	3.1%	7.8%	1.8%	1.3%	14.0%
Media	11.3%	7.5%	1.1%	33.5%	36.5%	19.8%	32.2%	58.2%	25.6%
Organization	8.2%	14.0%	0.7%	0.7%	4.8%	2.1%	3.9%	18.0%	8.0%
Other	30.1%	40.8%	44.9%	44.5%	35.6%	19.3%	20.7%	18.8%	17.4%
Partisan	40.5%	2.6%	0.7%	3.6%	12.7%	35.5%	24.1%		13.3%

Chart 2: Flow Chart for Sensitive Requests Within PWGSC

Three flow charts describing the handling of ATIA requests within PWGSC were presented in evidence before the Commission of Inquiry into the Sponsorship Program and Advertising Activities. One described the process for routine requests, while a second described the process for requests that were “interesting” but did not require preparation for anticipated media queries. This third chart described procedures for “interesting” requests that would require development of “media lines.”

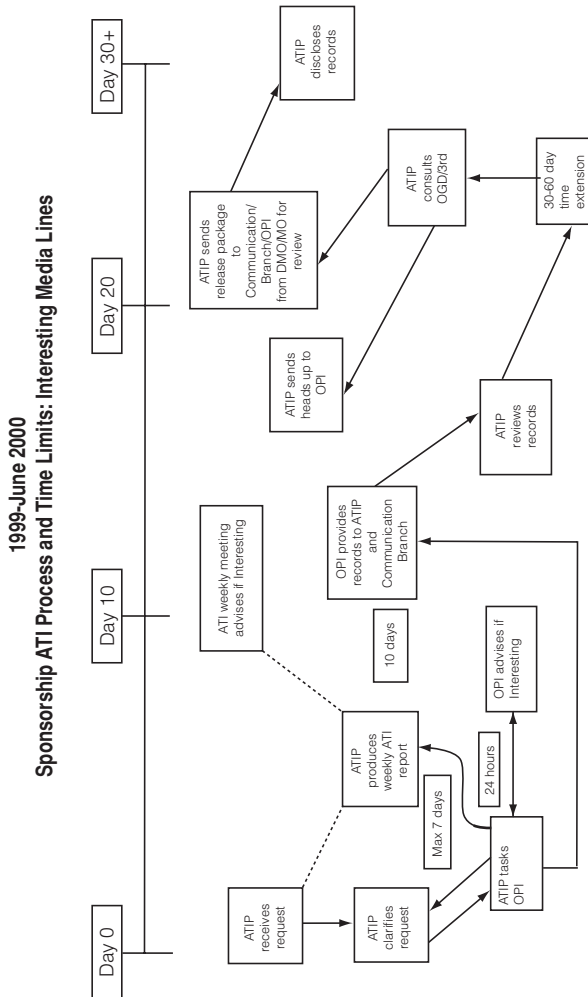
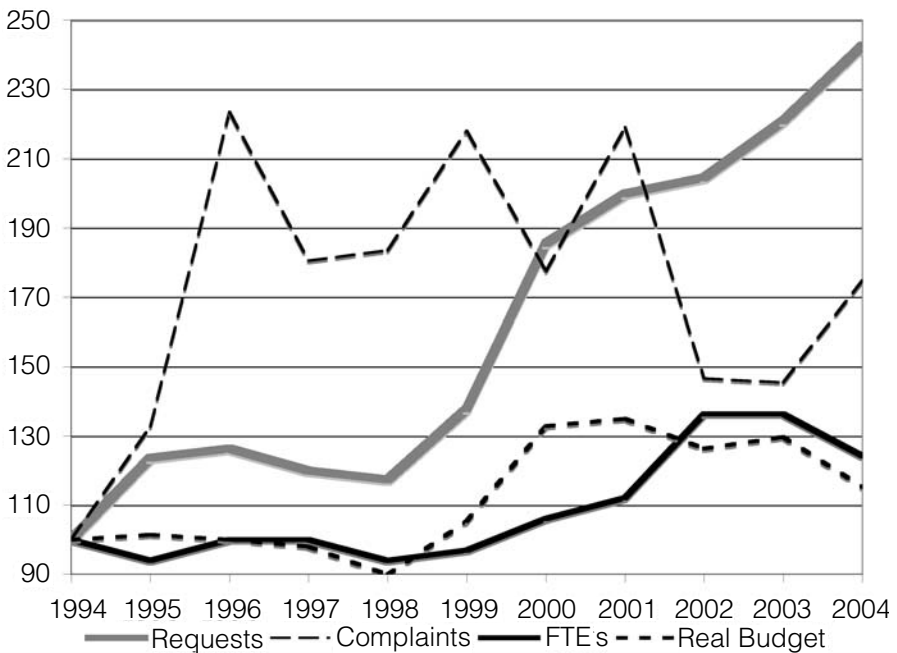




Chart 3: OIC Workload and Budget

The following chart shows the following data, with all series normalized so that figures for FY1994 equal 100: (a) total ATIA requests received by federal institutions; (b) complaints received by the Office of the Information Commissioner; (c) OIC personnel (as FTEs), excluding corporate services personnel; and (d) OIC budget, deflated using the Consumer Price Index, excluding the corporate services budget. Figures are drawn from institutions' annual reports under section 72 of the ATIA and from OIC annual reports. CPI data was obtained from Statistics Canada.



**Table 3: Coverage of Crown Corporations and Other Federal Government Corporate Interests<sup>104</sup>**

COVERED BY ATIA	NOT COVERED BY ATIA
Parent Crown Corporation	
<p>Atlantic Pilotage Authority Bank of Canada Blue Water Bridge Authority Business Development Bank of Canada Canada Council for the Arts Canada Deposit Insurance Corporation Canada Lands Company Limited Canada Mortgage and Housing Corporation Canadian Air Transport Security Authority Canadian Commercial Corporation Canadian Dairy Commission Corporation Canadian Museum of Civilization Canadian Museum of Nature Canadian Tourism Commission Defence Construction (1951) Limited Farm Credit Canada Freshwater Fish Marketing Corporation Great Lakes Pilotage Authority International Development Research Centre Laurentian Pilotage Authority National Capital Commission Corporation National Gallery of Canada National Museum of Science and Technology Pacific Pilotage Authority Royal Canadian Mint Standards Council of Canada Telefilm Canada The Federal Bridge Corporation Limited</p>	<p>Atomic Energy of Canada Limited Canada Development Investment Corporation Canada Pension Plan Investment Board Canada Post Corporation Canadian Broadcasting Corporation Canadian Race Relations Foundation Cape Breton Development Corporation Enterprise Cape Breton Corporation Export Development Canada Marine Atlantic Inc. National Arts Centre Corporation Public Sector Pension Investment Board Queens Quay West Land Corporation Ridley Terminals Inc. VIA Rail Canada Inc.</p>
Joint or mixed enterprises	
	<p>Lower Churchill Development Corporation North Portage Development Corporation and The Forks Renewal Corporation</p>
Other entities	
<p>Belledune Port Authority Fraser River Port Authority Halifax Port Authority Hamilton Port Authority International Centre for Human Rights and Democratic Development Montreal Port Authority Nanaimo Port Authority North Fraser Port Authority Port Alberni Port Authority Prince Rupert Port Authority Quebec Port Authority Saguenay Port Authority Saint John Port Authority Sept-Îles Port Authority St. John's Port Authority The Jacques-Cartier and Champlain Bridges Incorporated Thunder Bay Port Authority Toronto Port Authority Trois Rivières Port Authority Vancouver Port Authority Windsor Port Authority</p>	<p>Asia-Pacific Foundation of Canada Buffalo and Fort Erie Public Bridge Authority Canada Foundation for Innovation Canada Foundation for Sustainable Development Technology Canada Millennium Scholarship Foundation Canadian Centre on Substance Abuse Canadian International Grains Institute Canadian Livestock Records Corporation Canadian Wheat Board Cape Breton Growth Fund Corporation Nav Canada Old Port of Montreal Corporation Inc. Parc Downsview Park Inc. Roosevelt Campobello International Park Commission Saint John Harbour Bridge Authority Seaway International Bridge Corporation Limited Vanier Institute of the Family</p>

## Endnotes

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- <sup>1</sup> R.S.C. 1985, c. A-1.
- <sup>2</sup> Strictly, the law gives a right of access to *records* in either paper or digital form. See sections 3 and 4(3) of the Act.
- <sup>3</sup> John Roberts, "Green Paper on Legislation on Public Access to Government Documents," in *The Complete Annotated Guide to Federal Access to Information*, ed. Michel Drapeau and Marc-Aurèle Racicot (Toronto: Carswell, 2001), 32-33.
- <sup>4</sup> David Banisar, *Freedom of Information and Access to Government Records around the World* (Washington, DC: freedominfo.org, May 2004 [Accessed May 31, 2004]), available from <http://www.freedominfo.org/survey.htm>.
- <sup>5</sup> These observations are based on experience in making requests under all three laws.
- <sup>6</sup> Quoted in *The Complete Annotated Guide to Federal Access to Information*, 161-162 and 179.
- <sup>7</sup> Information and Privacy Commissioner/Ontario, *Annual Report 2004* (Toronto: Office of the Information and Privacy Commissioner of Ontario, 2005), 5.
- <sup>8</sup> Alasdair Roberts, "Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government?" *Canadian Public Administration* 45, no. 2 (2002): 175-194.
- <sup>9</sup> Testimony of Isabelle Roy: Gomery Commission, *Transcript of Public Hearing, October 14, 2004* (Ottawa: Commission of Inquiry to the Sponsorship Program and Advertising Activities, 2004), 3672; Testimony of Anita Lloyd: Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6547.
- <sup>10</sup> Testimony of Anita Lloyd: Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6544.
- <sup>11</sup> *Ibid.*
- <sup>12</sup> *Ibid.*, 6559.
- <sup>13</sup> *Ibid.*, 6549-6551.
- <sup>14</sup> *Ibid.*, 6550.
- <sup>15</sup> Alasdair Roberts, "Spin Control and Freedom of Information," *Public Administration* 83, no. 1 (2005): 1-23; Ann Rees, "Red File Alert: Public Access at Risk," *Toronto Star*, November 1, 2003, A32.
- <sup>16</sup> Roberts, "Spin Control and Freedom of Information," 10.
- <sup>17</sup> An analysis of data on use of the search features of CAIRS extracted from its access log is provided in *ibid.*, Table 1. In February 2004, Treasury Board Secretariat undertook its own survey of departments to ask about their use of CAIRS; survey responses released by TBS also suggested that few institutions were active users of the search features of the database. PCO did not respond to the survey: Alasdair Roberts, *Research Note: Results of TBS Survey on CAIRS* (Syracuse, NY: The Maxwell School of Syracuse University, 2004).
- <sup>18</sup> Jonathan Murphy, "Your Candle's Flickering, Jean," *Globe and Mail*, May 17, 2002, A15.
- <sup>19</sup> Rees, "Red File Alert: Public Access at Risk."
- <sup>20</sup> Information Commissioner of Canada, *Annual Report 1999-2000* (Ottawa: Office of the Information Commissioner, 2000), 15-18.
- <sup>21</sup> Roberts, "Spin Control and Freedom of Information," 8-9.

- <sup>22</sup> Roberts, “Administrative Discretion and the Access to Information Act: An ‘Internal Law’ on Open Government?” The Information Commissioner suggested in 2000 that one cause of such delays was the Government’s impulse during the “grants and contributions scandal” to “let its reflexive need to ‘control’ the story take precedence over the legal rights of access requesters to obtain timely responses. Ministers wanted to be out front of any access request—making a clean breast of any bad news before it hit the street and, when it did, being armed with an action plan.” Information Commissioner of Canada, *Annual Report 1999-2000*, 15-18.
- <sup>23</sup> Roberts, “Spin Control and Freedom of Information,” Tables 3 and 4.
- <sup>24</sup> Colin McNairn and C.D. Woodbury, *Government Information: Access and Privacy*, Release 1, 2000 ed. (Toronto: Carswell, 2004), section 2(1)(a).
- <sup>25</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Treasury Board Secretariat, 2002), 124.
- <sup>26</sup> Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation* (Ottawa: Treasury Board Secretariat, 2000).
- <sup>27</sup> Testimony of Isabelle Roy: Gomery Commission, *Transcript of Public Hearing, October 14, 2004*, 3660-3661.
- <sup>28</sup> Information Commissioner of Canada, *Annual Report 1999-2000*, 49, 68.
- <sup>29</sup> Access to Information Review Task Force, *Highlights of Meeting of Assistant Deputy Ministers Advisory Committee* (Ottawa: Treasury Board Secretariat, 2001).
- <sup>30</sup> Information Commissioner of Canada, *Annual Report 2000-2001* (Ottawa: Office of the Information Commissioner, 2001), 64.
- <sup>31</sup> Deborah Lovett, *Inquiries before the Information and Privacy Commissioner: Evidentiary Considerations* (Vancouver: Continuing Legal Education Society of British Columbia, March 19, 2001 [Accessed June 28, 2005]), available from <http://www.cle.bc.ca/CLE/Analysis/Collection/01-5127701-free-dominfo?practiceAreaMessage=true&practiceArea=Administrative%20Law>.
- <sup>32</sup> Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6576-6598.
- <sup>33</sup> Treasury Board Secretariat, *Review of Access to Information and Privacy Coordination in Government Institutions* (Ottawa: Treasury Board Secretariat, 1986).
- <sup>34</sup> Bruce Mann, “The Federal Information Coordinator as Meat in the Sandwich,” *Canadian Public Administration* 29, no. 4 (1986): 579-582.
- <sup>35</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 126.
- <sup>36</sup> Access to Information Act Review Task Force, *Consultation: Access to Information Coordinators* (Ottawa: Access to Information Act Review Task Force, 2000).
- <sup>37</sup> Standing Committee on Public Accounts, *Evidence* (Ottawa: House of Commons, 2004). Emphasis added.
- <sup>38</sup> Gomery Commission, *Transcript of Public Hearing, October 14, 2004*, 3667.
- <sup>39</sup> Hon. John Reid, *Remarks to the House Committee on Access to Information, Privacy and Ethics* (Ottawa: Office of the Information Commissioner, 2005).
- <sup>40</sup> Anecdotal evidence strongly supports the view that the ATIA has discouraged proper record-keeping. On the other hand, an early study of the impact of the Australian FOIA, based on interviews with government officials, reported that there had been no significant impact on the frankness of official advice: Robert Hazell, “Freedom of Information in Australia, Canada and New Zealand,” *Public Administration* 67, no. 2 (1989): 189, 204. A 2001 study by Canada’s National Archives reached a similar conclusion. The archivists’ expectation was that the ATIA would be found to have had “a significant and negative influence on record-keeping” within the federal bureaucracy. However, the researchers were surprised to conclude from their research that there was “no evidence . . . that the Access to Information Act has altered approaches to record-keeping in the Government of Canada.”

National Archives of Canada, *The Access to Information Act and Record-Keeping in the Federal Government* (Ottawa: National Archives of Canada, 2001).

- <sup>41</sup> The Canadian Information Commissioner's complaint about an "oral culture" has been mirrored by concerns about the emergence of a "sofa culture" within the Blair Government, documented by the Butler Review of Intelligence on Weapons of Mass Destruction in 2004—a culture in which "formal procedures such as meetings were abandoned [and] minutes of key decisions were never taken." This "sofa culture" had apparently taken root well before the implementation of the United Kingdom's FOIA. See Peter Osborne, "The Sofa Revolution," *The Tablet*, July 17, 2004, [http://www.thetablet.co.uk/cgi-bin/book\\_review.cgi/past-00192](http://www.thetablet.co.uk/cgi-bin/book_review.cgi/past-00192).
- <sup>42</sup> For example, technologies such as email capture interactions which had never been recoverable previously. Conversations which once might have been undertaken in person or by telephone are now "a matter of record." On the other hand, journalists have complained that officials now routinely "RAD"—that is, "read and delete"—potentially sensitive emails: Judith Lavoie, "Civil Servants Fearful of FOI Don't Keep Written Record," *Vancouver Sun*, September 26, 2003, B3; Greg Weston, "Read and Delete: Read It and Weep," *Toronto Sun*, June 8, 2003, C4.
- <sup>43</sup> Information Commissioner of Canada, *Annual Report 2000-2001*, 66.
- <sup>44</sup> As an internal TBS assessment of the Commissioner's proposal has recently observed: "[I]t is quite straightforward to require in policy that government contracts for goods and services be documented. It is more problematic to prescribe in policy what should be documented as a result of a more casual discussion amongst officials such as a commitment to contact a specialist for advice as part of an issues management responsibility." Treasury Board Secretariat, *The Duty to Document: Assessment of Information Commissioner's Proposal*, released under ATIA A-2004-00137/tr (Ottawa: Treasury Board Secretariat, 2004).
- <sup>45</sup> Information Commissioner of Canada, *Annual Report 1996-1997* (Ottawa: Office of the Information Commissioner, 1997).
- <sup>46</sup> Somalia Commission of Inquiry, *Report* (Ottawa: Public Works and Government Services Canada, 1997).
- <sup>47</sup> Section 67.1.
- <sup>48</sup> Andrew Osler, "Journalism and the FOI Laws: A Faded Promise," *Government Information in Canada* 17 (1999), <http://www.usask.ca/library/gic/17/osler.html>.
- <sup>49</sup> Roberts, "Green Paper on Legislation on Public Access to Government Documents," 7. Emphasis added.
- <sup>50</sup> The comment is made in an email released in response to CIC ATIA request 2002-05225, page 539.
- <sup>51</sup> Statistics provided by institutions in reports required by section 72 of the ATIA, and consolidated by Treasury Board Secretariat. The number of media requests rose between those two periods at a greater rate than did queries from other types of requesters.
- <sup>52</sup> I develop this argument in more detail in Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2005), chapters 3 and 4.
- <sup>53</sup> Donald Savoie, *Breaking the Bargain* (Toronto: University of Toronto Press, 2003), 164.
- <sup>54</sup> OECD, *Ministerial Symposium on the Future of Public Services* (Paris: OECD, 1996), Session 2.
- <sup>55</sup> Rowan Williams, *The Media: Public Interest and Common Good* (London: Lambeth Palace, June 15, 2005 [Accessed June 17, 2005]), available from [http://www.archbishopofcanterbury.org/sermons\\_speeches/050615.htm](http://www.archbishopofcanterbury.org/sermons_speeches/050615.htm).
- <sup>56</sup> Standing Committee on Public Accounts, *Evidence*.
- <sup>57</sup> *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427.
- <sup>58</sup> Access to Information Review Task Force, *Highlights of Meeting of Assistant Deputy Ministers Advisory Committee*.

- <sup>59</sup> Ontario *Freedom of Information and Protection of Privacy Act*, section 10(1)(b). The institution must provide reasons for disregarding a request on these grounds (section 27.1(1)). Criteria for determining whether a request is “frivolous or vexatious” are elaborated in R.R.O. 1990, Regulation 460, section 5.1. Such a request must be part of a “pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution,” or be “made in bad faith or for a purpose other than to obtain access.” The decision to refuse a request may be appealed to the Information Commissioner.
- <sup>60</sup> Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation*.
- <sup>61</sup> Access to Information Act Review Task Force, *Highlights of Assistant Deputy Ministers Advisory Committee Meeting*. See also the argument for fee reform in the TBS cost study: Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation*.
- <sup>62</sup> Hon. Michael Kirby, *Lecture to the British Section of the International Commission of Jurists: Freedom of Information, the Seven Deadly Sins* (Canberra: High Court of Australia, 1997). Emphasis in original.
- <sup>63</sup> Kevin Murphy, *Address on the Launch of the Freedom of Information Act, 1997* (Dublin: Office of the Ombudsman, 1998).
- <sup>64</sup> United Kingdom, *Your Right to Know: The Government’s Proposals for a Freedom of Information Act*, Cm 3818 (London: Stationery Office, 1997), Preface; Lord Falconer, *Address to the Society of Editors’ Annual Conference* (London: Department of Constitutional Affairs, 2004).
- <sup>65</sup> John Podesta, “Need to Know: Governing in Secret,” in *The War on Our Freedoms*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: Public Affairs, 2003).
- <sup>66</sup> Information Commissioner of Canada, *Annual Report 2004-2005* (Ottawa: Office of the Information Commissioner, 2005), 4.
- <sup>67</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 157-158.
- <sup>68</sup> *Ibid.*, 157-165.
- <sup>69</sup> Information Commissioner of Canada, *Annual Report 2000-2001*, 64.
- <sup>70</sup> Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen’s Printer, 1987).
- <sup>71</sup> Information Commissioner of Canada, *Annual Report 2000-2001*, 64.
- <sup>72</sup> *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, section 6(1).
- <sup>73</sup> *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, section 9(1).
- <sup>74</sup> *Freedom of Information Act*, 2000, section 16(1).
- <sup>75</sup> See also Alasdair Roberts, “New Strategies for Enforcement of the Access to Information Act,” *Queen’s Law Journal* 27 (2002), 647-683, Table 4.
- <sup>76</sup> For evidence of the fallout from this effort, see Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 104-110.
- <sup>77</sup> Reid, *Remarks to the House Committee on Access to Information, Privacy and Ethics*.
- <sup>78</sup> See the *Parliament of Canada Act*, section 72.04.
- <sup>79</sup> Standing Committee on Access to Information, *A New Process for Funding Officers of Parliament* (Ottawa: House of Commons, 2005).
- <sup>80</sup> *Access to Information Act*, section 54(1).
- <sup>81</sup> David Pugliese, “Grace Opens Fire: Departing Information Czar Says Government’s Choice for Replacement Shows ‘Contempt for the Public,’” *Ottawa Citizen*, May 7, 1998, A1.

- <sup>82</sup> In a recent discussion paper, the Department of Justice suggests that institutions be permitted to recover the full cost of processing requests after the cost exceeds \$10,000: Justice Canada, *A Comprehensive Framework for Access to Information Reform* (Ottawa: Justice Canada, 2005), 26. A modification of this proposal might require the requester to make a case for the importance of a request when costs exceed a certain amount. South African law, for example, qualifies the right to information in certain circumstances by stating that the right exists if information “is required for the exercise or protection of any rights.” *Promotion of Access to Information Act, 2000*, section 9(a)(ii).
- <sup>83</sup> Treasury Board Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada’s Crown Corporations* (Ottawa: Treasury Board Secretariat, 2005).
- <sup>84</sup> Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2.6.
- <sup>85</sup> Canada Post Mandate Review, *The Future of Canada Post Corporation* (Ottawa: Canada Post Mandate Review, 1996), section 7.18.
- <sup>86</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 24-25.
- <sup>87</sup> These are Canada Development Investment Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Cape Breton Growth Fund Corporation, Enterprise Cape Breton Corporation, Marine Atlantic Inc., Old Port of Montreal Corporation Inc., Parc Downsview Park Inc., Queens Quay West Land Corporation and Ridley Terminal Inc.: Treasury Board Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada’s Crown Corporations*, 37.
- <sup>88</sup> These are VIA Rail Canada Inc., National Arts Centre Corporation, Canadian Broadcasting Corporation, Export Development Canada, Canada Post Corporation, Atomic Energy of Canada Limited and the Public Sector Pension Investment Board: *Ibid.*
- <sup>89</sup> Justice Canada, *A Comprehensive Framework for Access to Information Reform*, 7.
- <sup>90</sup> *Ibid.*, 6.
- <sup>91</sup> Authorized by the *Airport Transfer (Miscellaneous Matters) Act, 1992*.
- <sup>92</sup> Established by the *Nuclear Fuel Waste Act, 2002*.
- <sup>93</sup> Canadian Blood Services was created with agreement of federal and provincial governments in 1998 as the successor to the Canadian Red Cross Blood Program and the Canadian Blood Agency, the former funding and policy arm of Canada’s blood supply system. The Canadian Blood Agency was a federal not-for-profit corporation established in 1991 to assume the functions of the Canadian Blood Committee: Krever Commission, *Final Report* (Ottawa: Commission of Inquiry on the Blood System in Canada, 1997), 1004. The federal government initially intended to adopt a *Canadian Blood Services Act* that would “enshrine the mandate and governance structure of the new national blood authority, the Canadian Blood Services.” Health Canada, *1998-1999 Estimates* (Ottawa: Health Canada, 1998), 11. The Canadian Blood Committee had been at the centre of a controversy over the destruction of documents sought under the ATIA: Information Commissioner of Canada, *Annual Report 1996-1997*, 66.
- <sup>94</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 22-23.
- <sup>95</sup> *Ibid.*, 22.
- <sup>96</sup> Alasdair Roberts, “Structural Pluralism and the Right to Information,” *University of Toronto Law Journal* 51, no. 3 (2001): 243-271; Jerry Bartram, *The Scope of the Access to Information Act: Developing Consistent Criteria for Decisions Respecting Institutions* (Ottawa: Access to Information Review Task Force, 2001).
- <sup>97</sup> *Freedom of Information Act, 2000*, section 5.
- <sup>98</sup> Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 24.
- <sup>99</sup> Information Commissioner of Canada, *Annual Report 2000-2001*, 57.

<sup>100</sup> Justice Canada, *A Comprehensive Framework for Access to Information Reform*, 8.

<sup>101</sup> See Part II of the Main Estimates 2004-2005, p. 1-28.

<sup>102</sup> In fiscal year 2004 the federal government received 2,835 requests from the media. I assume, based on the statistics I noted earlier, that the federal government receives between 1,000 and 2,000 “partisan” requests a year.

<sup>103</sup> The analysis is compromised by problems of underreporting within CAIRS. For the full analysis, see Alasdair Roberts, Jonathan DeWolfe and Christopher Stack, *An Evidence-Based Approach to Access Reform*, Policy Studies Working Paper 22 (Kingston: School of Policy Studies, 2001).

<sup>104</sup> Data taken from Table 5 of the Government’s Population Affiliation Report: [http://www.hrma-agrh.gc.ca/hr-rh/hrtr-or/hr\\_tools/Intro\\_e.asp](http://www.hrma-agrh.gc.ca/hr-rh/hrtr-or/hr_tools/Intro_e.asp).