

**THE *ACCESS TO INFORMATION ACT* 25 YEARS LATER:
TOWARD A NEW GENERATION OF ACCESS RIGHTS
IN CANADA**

BY
MURRAY RANKIN QC
(WITH RESEARCH ASSISTANCE OF CHANTELE SUTTON)

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INTRODUCTION

The *Access to Information Act* (“ATIA”) is over a generation old. The purpose of this discussion paper is to identify selected issues that warrant changes to this increasingly outdated law. One thing is abundantly clear: the ATIA is now in desperate need of reform. Even if there had not been serious teething problems resulting from the grafting of a statutory right to records onto a previously secretive parliamentary system of government, the breathtaking strides in information technology since 1982 have caused fundamental and ongoing changes in government’s record management practices. Significant and thoughtful proposals for reform have been made almost continuously over the last two decades, but very few have attracted parliamentary attention. For legislation like the ATIA, which the courts have affirmed is quasi-constitutional in nature¹, its continuing vitality now hinges upon meaningful reform efforts.

This paper reviews recent reform initiatives and examines several key issues that have arisen from changes in technology, out of changes in government programs or from various reform proposals. Rather than simply rehearsing proposals for amendments to particular aspects of the ATIA, the paper begins by situating the ATIA in the context of other legislative access to information initiatives. Annex A summarizes several key reform initiatives, particularly the more recent ones, which may provide useful background before considering the selected issues that are addressed below.

¹ See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, para. 25, Gonthier, J.); *Conseil de la Magistrature du Québec v. Commission d'accès à l'information*, [2000] R.J.Q. 638 (Que. C.A.), para. 47, cited with approval by Bastarache and LeBel JJ. (dissenting but not on this point) in *Macdonell v. Quebec (Commission d'accès à l'information)* 2002 SCC 71, at para. 72.

SELECTED CRITICAL ISSUES

1. *COMMITMENT AND CULTURE*

When the ATIA was adopted in 1982, Prime Minister Pierre Trudeau promised that the law would promote “effective participation of citizens and organizations in the taking of public decisions”. It was the Progressive Conservative Party, however, that in 1984 bore the brunt of the new law. It was later revealed that senior officials quickly took steps to hide background papers prepared for Cabinet that drafters of the ATIA had intended should be subject to the law. Likewise, the officials responsible for oversight of the national blood system secretly shredded records that showed how they had responded to contamination of blood supplies by the AIDS virus in the 1980’s. Similarly, Cabinet officials resisted requests for the results of its public opinion polls on constitutional reform, arguing that disclosure of pooling data would undermine “the very existence of the country”. John Crosbie, the first Justice Minister to be responsible for the Act, dismissed it as a tool for “mischief-makers” whose objective “in the vast majority of instances” was to “embarrass political leaders and titillate the public”.

The Liberal government that succeeded his government attempted to resolve the dilemma by pursuing a policy that honoured the disclosure law in principle while limiting its disruptive potential in practice. Several tactics were deployed to that end. One was resort to litigation, in which a more expansive interpretation of key sections of the law was sought. A second tactic was to spin off many tasks to new quasi-governmental organizations that were then not covered by the ATIA.

Finally, and perhaps of equal importance, were the significant cuts to budgets, particularly in the field of records management, mandated by then Finance Minister Paul Martin. Changes in administrative policy also weakened the disclosure law. There were serious cuts in the resources required for processing information requests, leading to

widespread problems of delay and numerous complaints to and from the former Information Commissioner. Professor Alastair Roberts reported that the federal government quickly installed computer tracking systems geared to filter out and delay politically sensitive FOI requests, mainly from the media and opposition parties (so-called “amber lighting”).

As Professor Roberts has likewise noted,² the events of September 11, 2001 have also led to additional secrecy at the federal level. Additional exemptions were added to the ATIA through the amendments ushered in by the *Anti-terrorism Act* later that year. The new policies reflected a fundamental shift in perceptions about the character of the security threat confronting Canada and the United States. Entirely legitimate concerns for national security have exacerbated an underlying issue that cannot be ignored: namely, the issue of commitment. The federal government’s actual commitment to “freedom of information” has been the subject of considerable debate. Neither politicians nor public servants can honestly be said to enjoy the scrutiny that a well-placed access request can generate.

It is now time to squarely face the perennial issue of commitment: is there a political will and a bureaucratic willingness to live up to the quasi-constitutional rights now enshrined in the ATIA? Is there a similar will to amend the law now, as is urgently required, to make it responsive to some of the serious and pressing issues canvassed below?

2. MANDATORY ROUTINE DISCLOSURE

Five years ago, the Québec Commission d’Accès à l’Information released an excellent report entitled “Choosing Transparency”³. Some new ideas were provided as to how a “culture of

² See, e.g., A. Roberts, *Blacked Out: Government Secrecy in the Information Age* (Cambridge University Press, 2006).

³ Report on the implementation of the Access Act and the Private Sector Act – Summary, “*Reforming Access to Information: Choosing Transparency*” (2002)

secrecy” could give way to a culture of transparency. It noted that the right to information is now being regarded as the prerequisite for the exercise of other rights to democracy. After 9/11, we are constantly reminded of the tragic truth that public security is probably the first requirement of the state. Yet if democracy is to flourish in the future, the right to know what our governments are doing is also essential.

The Québec Commission considered that information should be automatically available to the public, without information requests having to be made. They recommended that this be done to breathe new vitality into the Act. An entirely new approach was recommended:

Instead of waiting for a request for access to a document, the public body should ensure automatic publication of the information when it is created. In fact, the general principle should be the automatic publication of information with the request for access the exception.⁴

It proposed that public bodies be obliged to adopt a policy on automatic publication of information: "The equation is obvious: the less procedures there are to obtain a document, the better the right to information will be."

The Québec Commission also recommended that a general index of documents be drawn up by each public body that would be put online. Once scanning and digitization of documents become the norm, this general index could establish an electronic link to accessible documents. A document could later be revised if appeals to the Commission led to changes in the scope of the disclosure, which could also be updated in the online version of the document. Such a plan and index would be a better information management tool, so that both public servants and citizens have better knowledge of the documents held. There is a crisis in records management in Ottawa; in the real world, this is much more a problem than any conspiracy theory centering on allegations of deliberate neglect.⁵ Therefore, renewed investment in records management is strongly recommended.

⁴ Ibid, at page 7.

⁵ See, for example, Ian Wilson, Librarian and Archivist of Canada, has been outspoken in this regard: "If information is not managed and protected well enough it can lead to administrative inefficiency; reduced accountability; legal, financial and political liability; and the erosion of public confidence in government. "

The Québec Commission also recommended that each agency head have the duty, before refusing to disclose an opinion or recommendation, to inquire into the prejudice, the real harm that could result from such disclosure. If there is no such harm, it should be disclosed and the Québec Commission recommended that to assist public bodies in doing the job, there be "decision help tools" developed by the counterpart of the federal Chief Information Officer Branch.

The role of directors or managers of freedom of information within government was also emphasized in the Québec report. These officials should be "access to information ambassadors" in their public body. They should have much greater independence in performing their duties. Continuing education resources should be created, especially relating to technological change issues. Internal audits, performance standards and a system of report cards should be implemented. The person in charge of access should actually sign reports annually, taking personal responsibility for the scope of disclosure in their department or public body, in an effort to enhance accountability. It is recommended that these additional roles likewise should be made the responsibility of the Chief Information Officer Branch, with external oversight by the Office of the Information Commissioner.

Mandatory disclosure would contribute greatly to a more transparent culture at the federal level. One of the most noteworthy aspects of the United Kingdom's *Freedom of Information Act* is the duty it imposes on every "public authority" to adopt and maintain a "publication scheme", which must be kept current and approved by the Information Commissioner.⁶ There is no reason why similar requirements could not be imposed by an amended ATIA.

from *Technology and the Citizen: The Role of Archives*, cited in *Access to Information: Making it Work for Canadians*, chapter 9.

⁶ Section 19 of the UK *Freedom of Information Act*, 2000, c. 36 provides as follows:

(1) It shall be the duty of every public authority—

(a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme"),

3. *OUTSOURCING/ ALTERNATIVE SERVICE DELIVERY (ASD)*

The ATIA, quasi-constitutional in nature, gives the public a right of access to government records. Canadians and permanent residents have a right of access “to any record under the control of a government institution”. When government functions are outsourced to private sector organizations (“alternative service delivery”), what is the impact on the public’s right of access?

In 2004, a Special Committee was established by the British Columbia Legislative Assembly to review the B.C. *Freedom of Information and Protection of Privacy Act* (“B.C. FIPPA”). The B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that “outsourcing” initiatives by the B.C. government were eroding the B.C. FIPPA. During that period, the provincial government had been steadily transferring to the private sector responsibility for services and functions that previously had been performed within the provincial government agencies. The Commissioner’s concern was that the public’s right of access -- and the accountability that it fosters -- would be diminished were records placed beyond the “custody or control of a public body”, even where the public body did not intend its records to leave its control. There was confusion, both on the part of public servants and contractors alike, as to which party had control of records that contractors created in the course of carrying out their

(b) to publish information in accordance with its publication scheme, and

(c) from time to time to review its publication scheme.

(2) A publication scheme must—

(a) specify classes of information which the public authority publishes or intends to publish,

(b) specify the manner in which information of each class is, or is intended to be, published, and

(c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.

contractual duties. If nothing else, this confusion created needless expense as efforts were made to resolve the issue.

Commissioner Loukidelis recommended that the alternative service delivery model ought not to be allowed to erode the public's access rights. He recommended that the B.C. FIPPA be amended to clarify that records, including personal information, created by or in the custody of any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The Special Committee unanimously agreed, recommending that the BC FIPPA be amended "to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body, are under the control of the public body for which the contractor is providing services".⁷

Contracts between B.C. public bodies and their contractors now routinely confirm that the records are to remain subject to the B.C. Act. These contracts provide that the government remains in 'control' of the documents and the records must be physically delivered to the public body when they are requested. Another option is one found in certain American states – namely, to define by statute what are "public services" and 'public records', thus confirming that a record compiled or generated by a government service provider remains a public record.⁸

An ancillary issue is the extent to which the duty to "create a record" (which is confirmed in certain circumstances in section 4(3) of the ATIA) extends to records that were generated by contractors. While there is a general duty to assist applicants, s. 4(3) provides that subject to limitations provided by regulation,

⁷ See Recommendation 4 of the *Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act* (May 2004).

⁸ See, for example, the *Florida Public Records Act*, Title X, c. 119, which defines "public record" as follows: "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. (emphasis added) "Agency" is likewise defined to include "any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency".

any record requested under this Act that does not exist but can (...) be produced from a machine readable record under the control of a government using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

An outstanding issue is the extent to which this duty continues to exist where the technological capacity rests not within government but with outside contractors. This issue becomes increasingly significant in an era when great strides continue to be made in the field of information technology.

4. INFORMATION TECHNOLOGY CHALLENGES

(a) Introduction

When the ATIA was first enacted over two decades ago, the government's use of computers was not nearly as extensive as today. Websites did not exist. It is difficult to imagine what information management in government will be like in another two decades. A central question, therefore, is whether the public's "right to know" by means of the ATIA will keep pace. Is government transmitting information to requesters by e-mail? Such a practice appears to be infrequent. Are government institutions putting information routinely online for the public to view on departmental web sites? What about electronic reading rooms for public documents, as is mandated in the US federal government under the 1996 e-FOI amendments passed by Congress?⁹ As noted above, the B.C. Special Committee's 2004 Report recommended amendments to require proactive, routine disclosure of records, as is currently required in the United Kingdom.

⁹ *Electronic Freedom of Information Act* (EFOIA), being amendments to the US FOIA effected by Public Law No. 104-231, 110 Stat. 3048(available at http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm). See also Martin E. Halstuk and Bill F. Chamberlin, "The Freedom of Information Act 1966 – 2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To" (2006) 11 COMM. L & POL'Y 511

The ATIA is hopelessly out of date in this regard. The Treasury Board Secretariat should be mandated to place on the websites of various government institutions what requests have been received and to provide links to those documents. If a record is requested more than once, there should be an automatic posting of the document to the website. In this way, the government will avoid having to expend the time and resources to deal with repeat requests. One caution, however, must be noted: a reformed Act would still need to preserve the right of requesters to appeal redactions.

(b) Information Management

Many commentators have noted that contemporary governments are in danger of losing their corporate memory. The former Information Commissioner recommended that a duty to create records be added to the ATIA. Archivists have been vocal in expressing their concerns that in an electronic era, information can readily disappear.

Over the past two decades since ATIA was enacted, the format of records has changed dramatically. Electronic records are often preferred to paper and because revising records is cheaper now, the number of records has exploded. Professor Roberts notes the ongoing disputes over ‘structured’ data (information held in massive governmental databases) versus ‘unstructured’ data (the miscellany of documents within bureaucracies: e-mails, letters, memoranda, reports, spreadsheets, presentation files and the like). Obtaining and analysing data can be lengthy, complex and costly.

One recent Canadian government study that examined documents produced before and after the *Access to Information Act* was passed found no evidence that the law had any influence on record keeping by government officials.¹⁰

¹⁰ A. Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006), at page 214.

(c) The Issue of E-mails

The main problem with e-mails is volume. One study found that in 2002 Canada's 150,000 federal public servants exchanged about 6 million e-mails every working day. Many public organizations have begun to implement Electronic Document and Records Management Systems (EDRM) to give structure to unstructured data. It houses any unstructured data that is important to an agency. The Canadian government has developed EDRM systems in over thirty departments and agencies. The federal government has opined that EDRM systems will help it to enhance transparency by providing better tools for locating documents citizens are entitled to receive under the ATIA.

Yet new electronic tools pose new access challenges. In British Columbia, the former Information and Privacy Commissioner determined in 1999¹¹ that deleted e-mail messages stored in backup records should not be treated under the same rules that apply to other records under the Act. Former Commissioner Flaherty decided that there is no obligation on the part of a public body to recover from a backup system a specific item that may be stored in that system. He concluded that a requirement to search backup tapes, under normal circumstances, goes "far beyond" the "reasonable effort" mandated by the Act. In some government institutions, retrieving a backup copy might be quite simple; in others, it might be expensive, time-consuming or impossible, depending upon the specific technology in use.

The former Information Commissioner of Canada reached a similar conclusion, commenting on a case concerning retrieving archived e-mail.¹² In that case a requester asked the Business Development Bank of Canada (BDC) for copies of all e-mails generated by the Vice-President of Public Affairs during a one-year period. BDC determined that eight months of e-mails had been electronically archived onto back-up

¹¹ See B.C. Order 301-1999 (Commissioner Flaherty).

¹² Annual Report (2006-2007), at Chapter IV case 2.

tapes. When addressing the issue of whether a government institution was required to retrieve electronically archived e-mails in response to an access request, he likewise concluded that it depended upon whether or not retrieving the e-mails would unreasonably interfere with the operations of the institution. The Commissioner's expert determined that BDC already possessed all the necessary hardware and software resources to retrieve the e-mails and that the retrieval of the e-mails could be accomplished in less time than estimated by BDC. Consequently, the Commissioner would not accept the BDC's assertion that that retrieval of the e-mails would unreasonably interfere with BDC's operations.

In summary the Commissioner stated:

Access requests requiring institutions to recover archived e-mail pose significant challenges. As a matter of law, it will be very difficult for an institution to simply refuse to retrieve the e-mails, because so doing would unreasonably interfere with the institution's operation.

Rather, the prudent course is to properly assess fees - yet another challenge. The Regulations do not specifically authorize fees for recovering archived e-mail, and the jurisprudence supports the approach of charging such fees pursuant to subsection 7(2) of the Regulations (which refers to non-computerized records) rather than pursuant to subsection 7(3) (which refers to machine readable records).

(d) Transitory Records

Another issue relating to electronic records involves so-called "transitory" records such as certain e-mails. Although e-mails undeniably constitute "records" for purposes of the ATIA, in some jurisdictions Commissioners' orders (and the requirements of document disposal legislation and policies) have created a category of "transitory records": for example, the simple e-mail exchanges between public servants, perhaps relating to lunch plans, have been held at least in British Columbia not to be subject to the Act.¹³ This issue deserves careful attention in any future reform efforts. It may be considered

¹³ See, for example, Order No. 73-1995 (Commissioner Flaherty).

preferable to consider all records to be subject to the ATIA and not to accept any category of “transitory records”, given the likelihood that it will be increasingly difficult in the future to draw lines between “transitory” electronic communication and other communications. We agree with the recommendation made by the former Information Commissioner that the definition of “record” be expanded to include voicemail, e-mail, computer conferencing and other electronically stored communications.¹⁴ Similarly, the former Commissioner’s proposal that there be a duty to create records deserves urgent consideration. Finally, the term “transitory records” ought to be defined and related record types be reviewed in the context of the requirements of the ATIA, the *National Archives Act* and the Management of Government Information Holdings Policy and the government institutions that create them, in order to ensure that the definition can be used consistently from one policy context to another.¹⁵

(e) “Access Impact Assessments”

While on their face these conclusions seem entirely reasonable, the increasing use of information technology requires Information Commissioners to pay particular attention to these issues. One tool that may be employed is to adapt “privacy impact assessments” for use in assessing the implications for access to information resulting from new government programs or technologies. The privacy impact assessment is a process which enables an organization that is designing, developing and implementing a project or system to (i) determine whether the personal information flows involved with such project or system will comply with applicable statutory and other similar requirements, and (ii) inform management of the organization and relevant stakeholders about the personal information flows involved in the project or system, the privacy issues and business and legal risks associated with such data flows, and the administrative, technical and other measures that have been, or will be, taken to avoid or mitigate such risks. The process consists of the compilation and assessment of information about an

¹⁴ See *Response to the Report of the Access to Information Review Task Force* (2002) at page 61.

¹⁵ See Christine M. Arden, *Transitory Records: A Review* (2001), Report #14, Access to Information Review Task Force, Recommendation #1.

organization's personal information practices, and the preparation of a report — commonly referred to as a PIA report — which sets out the results of the privacy impact assessment.

While the scope of a privacy impact assessment process will vary depending on the nature of the project or system, the completion of any privacy impact assessment will involve a review and analysis of a relatively standard catalogue of information about an organization's personal information practices. Typically, privacy impact assessments have been implemented through internal directives and guidelines and not through a statutory requirement. Treasury Board Guidelines already require the completion of a PIA for new programs or services involving personal information or for changes to existing programs or services involving PIAs. They also require that they be provided to the Office of the Privacy Commissioner for review. Summaries are currently made public.

It is suggested that “Access Impact Assessments” may also be a proactive way to assess if new systems are created in such a way to promote or thwart access requests. This tool could prove particularly useful when dealing with new ASD proposals. Consider, for example the B.C. Ministry of Forests, which spent \$7 million on a new electronic compliance tracking system that was not designed in such a way for information to be readily extracted from public access.¹⁶ Commissioner Loukidelis summarized the situation as follows:

It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are

¹⁶ See Order 03-16 (Commissioner Loukidelis) In Ontario, see Order MO-2288-F (April 2, 2008).

actively and effectively striving to meet this objective. The advantage of the internal non-statutory approach is that a policy is easier to change with evolving circumstances than is a statutory provision.¹⁷

Had there been a statutory requirement to prepare an Access Impact Assessment before in the electronic system was implemented, perhaps these deficiencies could have been rectified.

5. HORIZONTALITY OF POLICY DEVELOPMENT

As Canada explores new governance approaches, some have expressed a fear concerning the implications of expanded federal – provincial – territorial (FPT) collaboration. Indeed, there are now websites in which key policies are elaborated in an iterative process by officials or contractors working at these three levels of government. Many FPT working groups currently exist. Consider the following example (with its description derived from a government website):

The Inter-jurisdictional (or Pan-Canadian) Identity Management and Authentication Task Force was established by a council of Deputy Ministers across provincial, territorial and federal governments with responsibility for service delivery and supported throughout its six month term by the Public Sector CIO Council and the Public Sector Service Delivery Council. The Task Force was established to develop a pan-Canadian strategy for identity management and authentication (IdM&A) that would facilitate seamless, cross jurisdictional, citizen-centric, multi-channel service delivery.¹⁸

A requester may not be able to readily determine precisely which government has “control” of a given record in these circumstances. Making a request to each level of government seems inefficient and inconsistent with the transparency that all FPT governments espouse. There is a legitimate fear that their work product may be beyond the reach of either the ATIA or a provincial or territorial freedom of information regime. To avoid this result, it is recommended that the ATIA be amended to ensure that any

¹⁷ Ibid, at para. 64.

¹⁸ <http://www.cio.gov.bc.ca/idm/idmatf/default.asp>.

records resulting from the participation by the Government of Canada in such horizontal policy development be deemed to be subject to the ATIA and that such a commitment be made a condition of federal participation in such initiatives. An alternative is to task the Treasury Board with developing a policy governing the access to information implications of such participation by the Government of Canada in such initiatives.

6. ACCESS FOR EVERYONE

It is now trite to observe that Canadians live in an increasingly inter-dependent world. The ATIA provides a right of access only to Canadian citizens and residents, including Canadian corporations. The previous Information Commissioner has recommended that any person, regardless of citizenship or place of residence, be extended that same right.

The government's 2006 Discussion Paper examined this proposal, noting that such an amendment would bring the Canadian legislation into line with other jurisdictions, such as Australia, Ireland, New Zealand, the United Kingdom and the United States. It also conceded the following:

[In] today's global and electronic environment, it is becoming increasingly difficult to identify the place of origin of requests. The current methods of using return mail addresses and postmarks to identify whether a requester is "present in Canada" are ineffective in dealing with electronic requests.¹⁹

Although the financial consequences of such a reform, noted in the government's discussion paper, must be acknowledged, it is recommended that universal access now be provided. None of the provincial open government statutes are limited by residence or nationality. It may be that a differential fee structure should be implemented with a full cost recovery scheme for foreign requesters: however, it is suggested that if such an initiative is contemplated, it be addressed by means of regulation, and only after some experience with the reform proposal is available.

¹⁹ "Strengthening the Access to Information Act: a Discussion of Ideas intrinsic to the Reform of the Access to Information Act (April 11 2006), at page 27.

7. SOME IMPLICATIONS OF THE FEDERAL ACCOUNTABILITY ACT

The extension of the scope of application of the ATIA to new institutions, including the Office of the Information Commissioner and new Crown corporations, have several implications, including how to address complaints against the Office of the Information Commissioner and how to deal with new federal institutions undertaking commercial activities that are now subject to access to requests by their competitors. These issues will be addressed in turn.

(a) Who should investigate the investigator?

Now that the Office of the Information Commissioner has been made subject to the ATIA as a consequence of the *Federal Accountability Act*, an inevitable question arises: who should deal with complaints about how this Office is complying with ATIA? The government's Action Plan of 2006 adverted to this issue. At present, the Information Commissioner has asked former Justice Cory to deal with complaints against the Office.

A more lasting solution seems rather straightforward. It is recommended that the ATIA be amended along the lines of the B.C. or Alberta *Freedom Information and Protection of Privacy Act* to create the position of "Adjudicator". In the B.C. Act, for example, the Cabinet is empowered to designate a Supreme Court judge as "adjudicator".²⁰ He or she may "investigate complaints made against the Commissioner as head of a public body with respect to stipulated matters, determine whether the Commissioner as head of a public body is authorized to disregard a request and review, if requested, and address any decision, act or failure to act of the Commissioner in his or her role as head of a public body.

In practical terms, these provisions have worked very well. Statutory reform at the federal level to this effect should not be difficult. For example, we note that the Court Martial Appeal Court is composed solely of superior court judges designated by the

²⁰ Section 60 of the B.C. FIPPA. A similar power is found in s. 75(1) of the Alberta FIPPA.

Governor in Council. Adjudicators could be designated under the ATIA in a similar fashion.

(b) The Commercial Interests of Crown Corporations now Subject to the Act

It must be acknowledged that there is considerable uncertainty among some of the commercially-active Crown corporations as to whether they may be undermined by their private sector competitors who might now use the ATIA essentially for purposes of corporate espionage. Moreover, compliance with the Act may impose a financial and administrative burden upon these Crown corporations that their private sector competitors would not have to bear.

Despite these concerns, however, research conducted for the Access to Information Review Task Force concluded that the existing exemption in the ATIA adequately protect business confidences.²¹ Section 20 is a mandatory exemption for confidential business information, which has been frequently considered by the Federal Court and is generally considered to provide robust protection for legitimate corporate secrets. In addition, Crown corporations would be able to avail themselves of the protections afforded by section 18 (“economic interests of Canada”) or, in the case of the Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail Canada Inc., the newest exemption, section 18.2 (“trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential” by these entities). Moreover, all provincial Crown corporations are covered by the B.C. FIPPA, as in other provinces. No particular difficulties in this regard seem to have emerged.

²¹ See, e.g., Research Report #19, Murray Rankin, Kathryn Chapman, *Third Party Provisions* which concluded as follows:” [T]he third party provisions of the Act provide a good framework that balances the public interest in disclosure of government information with the public and private interest in ensuring that valuable commercial information is protected.”

(c) The statutory duty to assist

In the 2006 amendments to the ATIA, the following provision was added to section 4:

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

This scope of this responsibility has yet to be clarified. However, similar obligations found in provincial legislation have been the subject of many orders over the years, in which the scope of the “duty to assist” has been addressed.²² Often institutions voluntarily create records in order to satisfy a requester and particularly where it is expedient to do so. The duty to assist requesters under the legislation, together with the principle of openness contained in the purpose clause within the legislation, has meant that the *creation* of a record, even though not mandated, has been held to be within the spirit of the legislation.²³

8. THE OFFICE OF THE INFORMATION COMMISSIONER: POSSIBLE REFORMS?

(a) Time for Merger?

From time to time, since the early 1990s when the Mulroney government announced its intention to merge the offices of the Information and Privacy Commissioners under a single commissioner (an initiative which was not abandoned), the pros and cons of such an initiative have been debated.²⁴

²² See, B.C. Order 01-10 (Commissioner Loukidelis).

²³ See Ontario Order P-99 (October 3, 1989). See also Orders MO-1396 (February 15, 2001), MO-1989 (November 7, 2005) and PO-2484 (July 16, 2006).

²⁴ Annual Report: 2005-2006 of the Office of the Information Commissioner of Canada, Chapter 1.

In June of 2005, former Justice La Forest was appointed to inquire into, and make recommendations concerning, the merits of merging the Information and Privacy Commissioners' offices. Dr. La Forest made the following recommendations:

- There should not be either a full merger of the offices of the Information Commissioner and the Privacy Commissioner or an appointment of one commissioner to both offices. These changes would likely have a detrimental impact on the policy aims of the *Access to Information Act*, the *Privacy Act*, and *PIPEDA*.
- If the Government and Parliament decide to proceed with a merger or cross-appointment, implementation should be delayed for a considerable period of time. The transition should take place gradually, and only after the challenges facing the current access and privacy regimes have been thoroughly studied and addressed.
- Caution should be exercised in proceeding with any attempt to share the corporate services personnel of the offices of the Information and Privacy Commissioners. Care must be taken to establish mechanisms ensuring adequate accountability and control.
- Government must do much more to foster a "culture of compliance" with access and privacy obligations. With respect to access, it should:
 - make it clear to officials that access should be provided unless there is a clear and compelling reason not to do so;
 - develop better information management systems;
 - ensure adequate training for access officials;
 - create proactive dissemination policies; and
 - provide adequate incentives for compliance.

With respect to privacy, it should:

- pay greater attention to the implications of programs involving the sharing, matching, and outsourcing of personal information;
 - ensure adequate training for privacy officials; and
 - develop comprehensive privacy management frameworks.
- The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction. Ideally, there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage.
 - The *Access to Information Act* and the *Privacy Act* should be amended to recognize the role of the commissioners in educating the public and conducting research relevant to their mandates.
 - The option of granting order making powers to the Information and Privacy Commissioners should be studied in further depth.

The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to engage in mediation and conciliation.²⁵

Following publication of Dr. La Forest's endorsement of two separate offices, the Privacy Commissioner and the Information Commissioner made a joint request to the Clerk of the Privy Council that their two offices be separately listed in Schedule 1.1 of the *Financial Administration Act*. This separate listing would give legal recognition to the separate status of the two offices – a result which has also been recommended by the Auditor General in order to ensure that the two offices could have separate general ledgers. According to the Auditor General, separate general ledgers would improve the accountability of the two offices. As of this writing, there has been no response from the Privy Council Office.²⁶

²⁵ La Forest Report, pp. 55-56.

²⁶ Annual Report: 2005-2006 of the Office of the Information Commissioner of Canada, Chapter 1.

Despite these powerful submissions by Dr. La Forest and the Commissioners, including Robert Marleau, it is nevertheless urged that it is time for a fresh review of this issue. First and foremost, it is difficult to understand why separate offices are considered necessary at the federal level while in every province and in the United Kingdom there is a unified Office dealing with both privacy and information access matters. It seems that the benefits of a merger outweigh the costs and risks. Providing common corporate services would likely result in cost savings. In a merger model, there might still be two separate commissioners addressing the separate statutory mandates, should that be considered necessary. An alternative may be to have a Commissioner with two assistant commissioners responsible for the separate statutory mandates. The case for entirely separate offices seems increasingly difficult to sustain.

(b) An Ombudsman or an Order-making Tribunal?

Currently there is a two-tiered redress process under the ATIA, consisting of an Ombudsman role, by which the Information Commissioner makes recommendations and there is judicial review available before the Federal Court. The Information Commissioner, as an ombudsman, has the power to investigate and recommend, but not to decide. This is entirely inconsistent with the role played by commissioners under most provincial legislation.

In *Access to Information: Making it Work for Canadians*, the Task Force stated that “not all issues can be solved through negotiation and suasion. There will always be cases where it is appropriate for the Commissioner and for the government to go to court to resolve, in a final manner, honest and often long-standing differences of view on the interpretation and application of the Act. Good case-law can provide a more robust basis for interpreting the Act.”²⁷

²⁷ At p.111.

The Task Forces identified that some of the disadvantages of the Ombudsman model are that it is mostly designed for the case-by-case resolution of disputes, and it is less likely to result in the consistent approach and clear rule-making. They argued that there is now a need for the increased coherence, rigour and transparency that are more likely to be achieved in an order-making model. They believed the access system is now in need of more clarity in its rules, fairness in its process, consistency in its application, rigour in its analysis, and predictability in its outcomes. Additionally, under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less *ad hoc* than the Ombudsman model.

In Canada, the order-making model is in place in British Columbia, Alberta, , Ontario, Québec and Prince Edward Island; requesters and government officials in these provinces would appear to consider it to be very successful. Moreover, the order-making model is not inconsistent with a very robust mediation role played by these Commissioners: indeed, the experience at the provincial level is that there is a very high proportion of mediated resolutions. Commissioners with order-making powers are essentially administrative tribunals that issue public decisions, with reasons offered in support of their decisions. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied.

In their analysis, the Task Force concluded that the structural model in place in most jurisdictions, namely, a quasi-judicial body with order-making powers combined with a strong mediation function, would be the model most conducive to achieving consistent compliance and a robust culture of access.

In Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament by the former Commissioner does not specifically comment on the Task Force's recommendation concerning order-making power but nevertheless is clear in his opposition to recommendations designed to make the Commissioner's investigative role conform to what he inaccurately characterized as "the lawyer-dominated, adversarial model of dispute resolution which is designed for the ordinary courts and for quasi-

judicial tribunals having the power to make binding decisions”²⁸. The former Commissioner argued that this model is not appropriate for an investigative agency, inquiring into allegedly secret information, which has only the power to make recommendations for disclosure. He stated that the strong investigative powers now conferred upon the Information Commissioner are essential for thorough, independent investigations which hold government to account for the proper administration of the *Access to Information Act*. At all times, in the exercise of these powers, the Commissioner is subject to the oversight of the Federal Court.

With respect, however, such resistance to order-making may not be adequately informed by the wealth of experience at the provincial level. As noted, the mediation role undertaken by the Office of the Information Commissioner’s provincial counterparts has been extremely successful. Rather than discerning the Commissioner’s positions by reviewing annual reports, speeches and testimony, the orders of the various provincial commissioners speak for themselves. Credibility among requesters is much greater when the government is ordered to disclose information. The clarity and consistency of the resulting jurisprudence is enhanced through the wide dissemination of orders. Moreover, to confer such order-making power in an amended ATIA is not inconsistent with the Commissioner continuing to be able to play an ombudsman role in other aspects of his statutory mandate. In short, it is submitted that the time has come for the ATIA to provide the Information Commissioner with order-making authority.

CONCLUSION

The purpose of any discussion paper surely is to generate discussion: that is what I have intended to do here. Perhaps inevitably, I have my own, often strongly-held views on some of the subjects canvassed. My conclusion, quite simply, is that it is now time for action.

²⁸ See p. 25 et. seq.

At a personal level, the goal of greater government transparency has been a personal preoccupation since my university days. I was involved in lobbying for the initial ATIA legislation before its enactment, representing the Canadian Bar Association. I completed my thesis at Harvard Law School on this topic. I was deeply involved with the House of Commons Committee that produced the *Open and Shut* report in 1987, helping to pen its unanimous recommendations on reforming the ATIA at that time. Subsequently I wrote or contributed to several of the research papers used by the Task Force in its deliberations.

However, very few legislative changes have emerged over the years. On the basis of this experience, I confess that I am not optimistic that current reform efforts will be any more productive than they have been the past. Yet, in the immortal words of Alexander Pope, “Hope springs eternal ...”.

ANNEX A

HISTORICAL OVERVIEW (PRE-LEGISLATION)

There is little present utility in recounting the history of the various reform proposals culminated in Bill C-43, which in turn became the ATIA. A useful summary of these efforts can be found in a leading text authored by Messrs. Drapeau and Racicot.²⁹ In summary, here are key milestones leading to the federal legislation:

- The US Congress adopted its *Freedom of Information Act* in 1966.
- Nova Scotia introduced its freedom of information legislation in 1977, with New Brunswick following in 1978, Newfoundland and Labrador in 1981, and Québec in 1982.
- Barry Mather, an Opposition MP, introduced the first freedom of information bill in a Canadian legislature in April 1965. The bill died on the House of Commons Order Paper, failing to receive second reading.
- Gerald Baldwin, a Conservative MP from Alberta, introduced a private member's bill in 1969, and re-introduced it in subsequent sessions until 1974. The 1974 bill was referred for study to the Standing Joint Committee on Regulations and Other Statutory Instruments, where it remained under consideration from February 1975 until June 1978.

²⁹ M.W. Drapeau and M.-A. Racicot, "the Completed Annotated Guide to Federal Access to Information 2002 9Carswell, 2001) at pages 3 – 213. See also T. Onyshko, "The Federal Court and the Access to Information Act", (1993) 22 MAN. L.J. 73.

- The Government released a Green Paper, “Legislation on Public Access to Government Documents” in 1977.³⁰
- The minority Progress of Conservative government of Prime Minister Joe Clark made access to information legislation a campaign promise, and introduced Bill C-15, the *Freedom of Information Act*, which made it to second reading before the government fell.
- The Liberal government introduced Bill C-43 in 1980.
- The *Access to Information Act* received Royal Assent in July, 1982, and came into force on July 1, 1983.

Bill C-43 differed from Bill C-15 in that it included exclusion for Cabinet confidences, not merely an exemption as found in other legislation. This exclusion emerged in the final stages of the legislative process. In 1981, Professor John D. McCamus said of Bill C-43: “Certainly, Bill C-43 must be considered to be a rather pale imitation of the American Freedom of Information Act. Indeed, on close inspection, the Bill has, in many respects, all the appearance of a freedom of information law drafted by individuals who have little sympathy for the basic objectives of such a scheme.”³¹

³⁰ At the time, the present writer characterized this Green Paper as “a passionate attempt to avoid any meaningful legislation”: See T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) at 2.

³¹ John D. McCamus, “Bill C-43: The Federal Canadian Proposals of 1980” in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) 266 at 299. Similarly, I called the final Act “very seriously flawed”: Murray Rankin, “The New Access to Information and Privacy Act: A Critical Annotation” (1983) 15 *Ottawa L. Rev.* 1 at 1.

REFORM PROPOSALS (POST-LEGISLATION)

As noted above, virtually since the ATIA was enacted, there have been calls for its reform. Some of the key events subsequent to its enactment were well summarized in the 2002 Report of the Access to Information Review Task Force³²:

- **March 1987.** The House of Commons Standing Committee on Justice and Solicitor General released its review of the Act, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Later the same year, the Government released its response, *Access and Privacy: The Steps Ahead*. Subsequently most of the administrative recommendations of the committee report were implemented, but none of the legislative recommendations.
- **November 1998.** In the wake of the Somalia Affair and the “tainted blood Scandal”, a private member’s bill introduced by Liberal MP Colleen Beaumier was passed, adding section 67.1 to the Act. This made it an offence for anyone to destroy, falsify or conceal a record, or to counsel anyone else to do so. The offence is punishable by a maximum of two years in prison or a fine up to \$10,000.
- **June 2000.** A private member’s bill introduced by Liberal MP John Bryden to overhaul the Act was defeated at second reading by a vote of 178 to 44.
- **August 21, 2000.** Justice Minister Anne McLellan and Treasury Board President Lucienne Robillard announced the establishment of the Access to Information Review Task Force, with a mandate to review both the legislative and administrative issues relative to access to information.

³² *Access to Information: Making it Work for Canadians*. Report of the Access to Information Review Task Force (June 2002), Annex 8.

- **November 28, 2001.** Bill C-36, the “Anti-terrorism Bill” was passed amending the *Access to Information Act*. Bill C-36 was granted Royal Assent on December 18, 2001.
- **June 2002.** *The Report of the Access to Information Review Task Force* was released. No statutory amendments to ATIA have resulted.
- **September 2002.** Information Commissioner Reid issued the *Response to the Report of the Access to Information Review Task Force: a Special Report to Parliament*.
- **February 1, 2006.** The Report of the Gomery Commission of Inquiry into the Sponsorship Program and Advertising Activities was released. Phase 2 of the Report contained certain recommendations for reform of the ATIA, which were that were generally supportive of the submissions of the former Information Commissioner.
- **April 11, 2006.** *Government’s Action Plan for Reform: Strengthening the Access to Information Act*
- **April 2006.** the former Information Commissioner issued his *Response to the Government’s Action Plan for Reform of the Access to Information Act (2006)*

REPORT OF THE ACCESS TO INFORMATION REVIEW TASK FORCE

The June 2002 Report, produced by a task force chaired by Andrée Delagrave, was a milestone event. The Department of Justice and the Treasury Board set up this Task Force which in turn undertook a great deal of consultation, commissioned a number of research reports and established both an internal advisory committee of Assistant Deputy Ministers as well as an external advisory committee to assist it in its deliberations. Its

key findings and recommendations will be listed below, followed by a summary of the rather scathing critique of work of the task force provided by the former Information Commissioner.

Findings

- Canadians are making a relatively modest, but increasing, and more sophisticated, use of the *Access to Information Act*. In coming years, more and more Canadians will expect to have ready access to government information, and will be increasingly motivated to seek it out in a variety of ways.
- In a knowledge-based society, information is a public resource and essential for collective learning. If Canada is to thrive and compete, government information must be made available as widely and easily as possible, through a variety of channels. Technology provides powerful and cost-effective ways to disseminate a great deal of this information. The formal process under the Act cannot meet all the needs of Canadians for government information, nor was it ever intended to.
- After 20 years, the Act is still not well-understood by the public, requesters, third parties who supply information to government, or even the public service. There is a pressing need for more education about access to information.
- There is agreement that the principles set out in the purpose clause of the Act are the right ones.
- Many requesters feel that the essence of the Act is sound, but it continues to be applied inconsistently and in such a way as to contradict the principles of openness, transparency and accountability that underlie it. Delays, fees and inconsistency are major complaints.

- Public servants express concern about the time and resources required to respond to increasingly large and complex requests, about a lack of clarity in the rules, and about the way in which investigations into complaints are conducted.
- The Information Commissioner is critical of what he perceives to be a deeply entrenched culture of secrecy in government, and a lack of commitment to the principles of the Act.
- Journalistic use of Access to Information has evolved since 1983 when the Act was introduced. The number of requests has grown but so has their focus. Requests are now sharper and to the point. The way in which information is used has also grown in complexity.
- The performance of the federal access to information regime is largely similar to that in other jurisdictions in Canada and abroad. The challenges and issues are strikingly the same: timeliness of responses, information management, transparency of new service delivery public bodies, managing growth in demand, resourcing of the access program, effective oversight and resolution of disputes, and creating and maintaining support for access to information both at the political level and in the public service.
- Overall, the Act is basically sound in concept, structure and balance. However, there is a need to modernize some provisions – such as bringing Cabinet confidences under the Act – to clarify some others, and to address gaps.
- The scope of the Act is generally more restrictive than comparable legislation in other countries and Canadian provinces. There are no criteria for consistent and principled decisions on coverage of new institutions.
- Fees were not intended as a cost-recovery mechanism and should never be an obstacle to legitimate requests. They should act as an incentive for focused

requests and as a safeguard for the sustainability of the system. These objectives would be better met with a fee structure that differentiates between commercial requests and general requests, and provides a mechanism to manage the exceptional costs of very large requests.

- The Office of the Information Commissioner is an important Canadian institution that should be supported, and equipped with the powers and resources, to continue to fulfill its challenging role of oversight in the future.
- Resolution of individual complaints through negotiated solutions is highly successful. Good tools to deal with systemic issues, however, are missing.
- The great majority of complaint investigations are conducted informally. However, there has been, in recent years, a noticeable increase in the use of formal investigative powers, raising new procedural issues that need to be addressed.
- At every stage of the access process – from the receipt of requests to complaint investigations – there is an overwhelming need for more rigorous processes, clearer and more widely understood rules, and greater consistency in outcomes, both for requesters and for government institutions. There is a need to move from a reactive approach to a program delivery concept of access to information. Adequate resourcing of all the components of the system (ATI units, programs, central agencies providing support, and the Office of the Information Commissioner), is critical. Access to information needs to be resourced in the same way as any program delivered by the Government of Canada.
- Access Coordinators and their staffs are key to an effective access regime. The government is facing a looming crisis in the recruitment and retention of these skilled professionals. Officials administering the Act need more support, training, career development, and better technology and tools.

- Public servants do not have the training, tools and support they need. Access work has to be juggled with other operational priorities. It is often not perceived as “valued” work or part of their “real” job. The principles of access have not yet been successfully integrated into the core values of the public service and embedded in its routines.
- There cannot be better access to information without better information management. There is an urgent need for leadership and government-wide action in this area.
- There is no magic solution to the shortcomings of the system. A healthy access to information system needs all its parts functioning well in order to deliver the outcomes intended by Parliament: the right systems to process requests, skilled staff, supportive managers and Ministers, adequate resources, good information management, good understanding of the principles and the rules by all, including third parties, and effective approaches to oversight.
- The total costs of administering the Act are in the order of \$30 million annually or less than \$1 per Canadian per year. This is a modest cost, in light of the significant public policy objectives pursued by the Act: accountability and transparency of government, ethical and careful behaviour on the part of public officials, participation of Canadians in public policy design, and a better informed and more competitive society.

Proposed Directions

In the report, there were 139 recommendations for change. They can best be understood under several broad themes:

- enhancing the understanding of principles of access to information and expanding the right of access in an era of globalization (Chapter 1);
- modernizing the scope of the Act by adopting consistent and principled criteria for determining which institutions should be covered, and applying the criteria to expand coverage to a significantly wider range of federal institutions (Chapter 2);
- clarifying what records should be covered by the Act (Chapter 3);
- modernizing the exemption and exclusion provisions (e.g. by making Cabinet confidences subject to the Act), and ensuring the balance provided in the Act results in maximum responsible disclosure and the appropriate protection of sensitive information where it is in the public interest (Chapter 4)
- making the process of formal access to information requests work better for both requesters and for institutions, to ensure that Canadians get access to disclosable information in a simple, timely and effective way while safeguarding the sustainability of the access system (Chapter 5);
- enhancing the effectiveness, fairness and transparency of the complaints process, explicitly giving the Information Commissioner the tools needed to fulfill his mandate, and suggesting that consideration be given to replacing the current ombudsman model with full order-making powers (Chapter 6);
- ensuring that access to information staff have the necessary skills, training, tools, and resources, and that technology is applied to make access easier for Canadians (Chapter 7);
- putting in place a comprehensive strategy to provide information to Canadians through a variety of channels outside the Act, complemented by access under the Act as a last resort (Chapter 8);

- enhancing information management in government, especially through training and support for all public servants (Chapter 9);
- improving the performance measurement and reporting of the access activities of federal institutions in order to support operational improvements and allow for better monitoring by Parliament (Chapter 10);
- creating a culture of access to information in the public service (Chapter 11); and
- promoting sustained dialogue on access to information and enhancing parliamentary oversight (Chapter 12).

THE FORMER INFORMATION COMMISSIONER: RESPONSE TO THE REPORT OF THE ACCESS TO INFORMATION REVIEW TASK FORCE: A SPECIAL REPORT TO PARLIAMENT, SEPTEMBER 2002

The former Commissioner dismissed the Task Force's recommendations as being unbalanced and pro-government. He began by stating that if implemented, the Report's recommendations would change the balance in favour of secrecy. The task force made 4 recommendations to reduce the current level of secrecy, he said, and it made 15 recommendations to increase the level of secrecy.

- **Expanding the Act's Coverage**
 - He was sharply critical of the tentative and conservative approach of the task force to the issue of the scope of the Act's coverage, claiming that task force's proposals fell far short of what was expected and needed – particularly in the context of the coverage of Crown corporations.
- **Relaxing Cabinet Secrecy**

- He was also concerned that in this context less vigorous oversight would emerge if the task force's recommendations were implemented. For example, the task force proposed that there be only a one-step process of review, directly to the Federal Court.
- More secrecy for policy options – e.g., the task force's recommendation that more information be swept into the proposed mandatory Cabinet confidence exemption.
- Making it mandatory to assert the Cabinet confidence privilege and no mechanism by which privilege may be waived.
- **Additional Obligations on Requesters**
 - Unnecessary punitive effects of the recommendations.
 - He claims that the task force proposed that requesting access be made more onerous, more expensive, slower and more controlled by government.
- **Changing the Information Commissioner's Role and Powers**
 - 4 proposals do no more than enshrine in law activities which are already being undertaken by the Commissioner.
 - 8 recommendations would profoundly change the Commissioner's role - they are designed to make the Commissioner's investigative role conform to the lawyer-dominated, adversarial model of dispute resolution, which model is inappropriate for an investigative agency, which has only the power to make recommendations for disclosure.

- **Non-Legislative Changes: Fixing the Foundations**
 - Information management - the Commissioner claims that the task force described what needed to be done but not where the responsibility and accountability should lie for developing the framework.
 - Performance statistics – the task forces’ recommendations fall short of what is needed: he asks why one should have confidence that the designated minister will now do what is necessary. The task force recommends “give the good news” while the former Information Commissioner suggests “give the whole story”.
 - Creating a culture of openness – the Commissioner supports vigorously the task force’s proposal for promoting a culture of openness in the public service

- **Next Steps**
 - President of Treasury Board – The former Commissioner asks that the Treasury Board must decide whether or not to proceed with the administrative changes. He states that with the exception that fees be raised, the administrative recommendations are positive and should be proceeded with
 - Minister of Justice – It is this Minister who must decide how to deal with the proposed legislative changes. The former Information Commissioner urges the Minister not to draft new legislation based on the task force’s recommendations.

LEGISLATIVE RESPONSE

The new Government's *Action Plan for Reform: Strengthening the Access to Information Act* was released on April 11, 2006. A cornerstone initiative of the Conservative Government of Prime Minister Harper was the *Federal Accountability Act*. Amongst the reform proposals it contained were amendments to the ATIA. The Action Plan responded to Commissioner Reid's recommendations to Parliament, particularly focusing on coverage of other entities, the issue of Cabinet confidences, the duty to document, and the exemptions scheme of ATIA. Some reforms were introduced as part of the *Federal Accountability Act* while others were said to require "further consultation, analysis and development before additional reforms can be drafted and introduced".³³ The new *Federal Accountability Act* added Agents of Parliament, parent federal Crown corporations and three foundations to the ATIA. Such entities as Canada Post, the CBC and the Canadian Wheat Board are now covered.

After suggesting that they be considered by a parliamentary committee, the following key issues were suggested for further analysis:

- **Coverage of the ATIA:** should entities under provincial jurisdiction, but receiving federal funding be covered or required to accept a regime of proactive disclosure? What about the Canadian Broadcasting Corporation and its special needs relating to journalistic sources? With the Office of the Information Commissioner now covered by the ATIA, the Action Plan questioned how decisions concerning complaints to that office ought to be handled. These issues will be considered below.
- **Offices of Ministers, Members of Parliament, the House of Commons, the Senate and the Library of Parliament:** previous governments consistently

³³ "Strengthening the Access to Information Act: a Discussion of Ideas intrinsic to the Reform of the Access to Information Act (April 11 2006), at page 2 – 3.

considered that the ATIA does not apply to records held within ministers' offices, interpreting the Act to treat ministers' offices as separate and distinct from the government institution or department for which the minister is responsible. Not all Commissioners have agreed with that position. Historically, it was just the executive branch of government that was covered (although in some provinces, the privacy provisions of freedom of information and privacy legislation extended to the legislative and judicial branches of government). The Action Plan raises this issue at the federal level.

- **Cabinet Confidences:** Noting that the former Commissioner had proposed a mandatory exemption for cabinet confidences (as exists in many provincial statutes) in place of the existing exclusion from the ambit of the act, the Action Plan offers an option by which a certification and review process would be legislated in the ATIA that would parallel the process contained in the *Canada Evidence Act*. In this way, cabinet confidences would be certified and only challenged where information for which the privilege was claimed does not on its face fall within the statutory definition of cabinet confidences or where it could be shown that the Clerk of the Privy Council had improperly exercised the discretion conferred. A proposal that the Act be amended to grant the Information Commissioner a limited right of review of the issuance of certificates by the Clerk of the Privy Council was suggested, in order to ensure that the Commissioner could review Cabinet confidences.

- **Exemptions Scheme**
 - Structure of the current exemptions scheme. The Action Plan does little more than to review the present exemptions in the Act and whether they are “class-based” or subject to an injury test or are “mandatory” or “discretionary” in nature. It sets out various considerations for reform but offers no recommendations. It also raises the question of whether there should be a broader “public interest override”, as found in several

provincial statutes and the relatively new United Kingdom statute.

- **Administrative Reform**

- Universal access: should the Act be extended to provide a right of access to those who are not Canadian citizens nor present in Canada? This issue will be addressed below.
- Public register: the Action Plan notes that the government currently does not make public the nature of records disclosed under the ATIA. Until May, 2008, the Treasury Board, through policy, required government institutions to register their requests in an internal coordination system known as the Coordination of Access to Information Request System (CAIRS). Summaries of requests were logged into the system and disclosed on a monthly basis. The government has now announced that as a cost-saving measure, this initiative has been cancelled.
- Timeframes: noting that the ordinary 30-day response contained in the Act can be extended for various reasons, the Action Plan proposed that there be clarification as to when extensions can be granted.
- Notification of Deemed Refusals: noting that a deemed refusal status can occur after the original 30-day period or extended period has elapsed and that the Commissioner recommended the Act be amended to require notification in these circumstances, no conclusion is reached in the Action Plan.
- Fees: noting that the ATIA Regulations came into force over 20 years ago, and that the Commissioner had recommended amendments to the fee structure along with criteria for fee waivers, no recommendation is made.

- Format: The ATIA gives applicants a right to either examine the records or to receive a copy; the Regulations clarify that the head of the government institution may decide which should occur. The Commissioner had recommended that applicants be allowed to choose the format, so long as the choice was reasonable. No recommendation is made, although it is noted that “electronic records are becoming increasingly popular with requesters as the \$.20 per page reproduction fee is not applied” (page 33)
- Duty to Document: noting that there are certain other federal statutes requiring records to be created in certain circumstances and the recommendation for a statutory duty to create records was proposed by the Commissioner, the Action Plan comes to no conclusion in this regard.
- Roles, Powers and Mandates of the Information Commissioner:
- Proposals: the Commissioner had proposed that for a self-initiated complaint, he no longer be required to have “reasonable grounds to investigate”. This proposal seems to have been rejected.
- New grounds for complaints: the ability to reject improper or vexatious requests, something found in other jurisdictions, was proposed, subject to approval of the Information Commissioner. He also proposed a 120-day time limit for completing his investigations, subject to possible extensions, after which requesters would be able to proceed to Court without a finding of the Commissioner. This was not accepted in the Action Plan.
- Neutral adjudicator vs. advocate: The Action Plan addressed the perennial issue of whether the Commissioner should render binding orders as Commissioners are empowered to do in many of the Provinces as well as in the United Kingdom and the United States. It also considered a number

of other proposals to provide the Commissioner with legislative authority to monitor the administration of the ATIA, comment on proposed legislative initiatives or government programs, public training and the like. Noting the need to coordinate respective roles between the Commissioner and the Treasury Board, the government welcomed some of the proposals, including the ability for the Commissioner to advise on proposed legislation or programs and to conduct research into matters related to his duties or functions.

THE FORMER INFORMATION COMMISSIONER: RESPONSE TO THE GOVERNMENT'S ACTION PLAN FOR REFORM OF THE ACCESS TO INFORMATION ACT (2006)

The former Information Commissioner then made a Special Report to Parliament to respond to the government's Action Plan and reform discussion paper.

PART I: Federal Accountability Act

- **Coverage and Exemptions.**

- He first noted that the *Federal Accountability Act* (FAA) adds 19 new entities to Schedule 1 of the ATIA. As for new exemptions, he pointed out that the FAA adds 10 new exemptions to the ATIA, “authorizing additional reasons for secrecy beyond those available to the institutions which are already subject to the *Access to Information Act*”. The ten new exemptions were then listed in his Report. Next, he pointed out that two new exclusions would be added by the FAA: one respecting the CBC and the other relating to Atomic Energy Canada Ltd. Finally, he offered several observations with respect to these proposed new exemptions and exclusions, which can be summarized as follows:

- They favour secrecy over openness
 - They infringe on the principle that he previously articulated to the effect that exceptions to the right of access should 1) be discretionary, 2) require a demonstration that a defined injury, harm, or prejudice would probably result from disclosure, and 3) be subject to a public interest override.
 - The proposed addition of the two new exclusions is intended to infringe the principle that exceptions to the right of access should be subject to independent review.
- **Investigative Information**
 - Many of the mandatory class exemptions have no time limits relating to institutions which carry out investigative or audit functions.
 - The contention that the newly added institutions require more secrecy for their investigative and audit functions than do police, security and intelligence agencies is without merit.
- **Crown Corporation Information**
 - The FAA gives a right of access to information about the general administration of the added Crown Corporations; however, it prohibits access to information about the mandated activities of these institutions. In other words, access as of right is given primarily to information which already appears, or should appear, on websites and in public, corporate reports.

- **Other Proposed Amendments to the *Access to Information Act***
 - There are 6 proposed amendments that the Commissioner then endorses:
 1. The requirement for consultation with the leaders of all Opposition parties prior to nominating a person for the position of Information Commissioner.
 2. The imposition of a duty on government institutions, without regard to the requester's identity, to assist access requesters and to respond accurately and completely and to provide access in the requested format.
 3. The consequential amendments to existing exemptions in the ATIA to take into account the officers and directors of Crown Corporations.
 4. The change of the deadline for complaints to the Information Commissioner from one year from the date of request to 60 days from the date of answer.
 5. The increase of the number (from 4 to 8) of Information Commissioner staff to whom may be delegated the power to investigate refusals of access under s. 13 (1)(a) or (b) or s. 15 of the ATIA.
 6. The obligation on the President of the Treasury Board to collect, annually, statistics which will facilitate the assessment of the performance of the access to information program across government. (Although he questions why there is no obligation

placed on the President of the Treasury Board to report annually to Parliament on the health of the access system).

- **His Observations Concerning What Has Been Left Out of the *Federal Accountability Act***
 - Of the approximately 100 amendments proposed in the *Open Government Act*³⁴, the government has included (to some degree) only 10 of them in the FAA.

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The former Information Commissioner then addressed the key issues contained in the government's discussion paper as follows:

- **Duty to Create Records and Related Offences**
 - He claimed that the right of access has no meaning if government institutions, officers and employees do not create records to document their decisions, actions, advice, recommendations and deliberations.
- **Records Held in the PMO and Ministers' Offices**
 - The government now objects to extending the reach of the right of access into the PMO and ministers' offices, which he contests strongly.
- **Treatment of Cabinet Confidences**

³⁴ The *Open Government Act* was tabled by the Information Commissioner at the Standing Committee on Access to Information, Privacy and Ethics on October 25, 2005 (at the request of the Committee).

- He claimed that the government seems to have backed away from its pre-election pledge to make the cabinet confidence exclusion into an exemption subject to review by the Information Commissioner.

- **Structure of Exemptions**

- He claimed that the government also seems to have backed away from its pre-election promise to make exemptions discretionary and subject to an injury test and a public interest override.