

Culture Shock? A Brief Look at the Canadian Experience thus Far

By Jay Gilbert* and Tanya Karlebach

Introduction

This paper will explore systemic barriers – both cultural and practical - to access to government information within the context of the Canadian experience. In particular we will examine the nature and influence of senior government officials and the bureaucracy in how the Act is implemented; secrecy and the culture of confidentiality within government; poor information management practices; and pressures for reform. Our intent is not to condemn the Act or the institutions charged with administering it, but to identify lessons learnt from the Canadian experience and to suggest ways to remedy these issues.

Most commentators on access to information (ATI) issues generally agree that legislation alone is not enough to guarantee access. "There are too many ways for government officials... to frustrate the searching public if they choose to do so."¹ The fact that these officials often wish to limit access is clearly demonstrated within the Canadian context. Consequently the biggest challenge to introducing ATI is often not the development and passage of the legislation itself, but the development of a government culture which actively encourages openness and transparency.

Unfortunately achieving this culture is often hampered by government's innate desire for secrecy and its unwillingness to properly resource a back room function such as records/information management. This is important as, even in those cases where officials are willing to release information, the process can be complicated by poor information management practices which make it difficult to locate and provide the requested information within the statutory time limits. Additionally there is no acknowledgement about the increased burden the legislation will place on information staff and the requirements to enhance systems for identifying, tracking and retrieving information. The training provided to civil servants is often minimal and focuses on how to use the exemptions in the Act necessary to protect information, rather than developing new ways to facilitate the release of information and, further, encouraging staff to see access as a fundamental right.

Culture of Secrecy

Criticisms of deficiencies in existing ATI regimes are often based upon recognizing that the existing culture of most government agencies does not support the basic philosophy of open government. This is usually because the inherent conflict between the old culture of secrecy and bureaucratic anonymity and the new culture of transparency and accountability has not been satisfactorily resolved. By examining the response of the Canadian government to the introduction of access legislation we can see how this conflict has not lessened over time and continues to be one of the most significant barriers to achieving open government.

The Canadian *Access to Information Act* (ATIA) was passed in June of 1982 and proclaimed into force on July 1, 1983. The purpose of the legislation is clearly set forth in section 2(1) of the Act. This clause establishes that an enforceable right of access to records under the control of government institutions exists "in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."²

The ATIA was meant to complement existing procedures, rather than replace them. Over time, however, it appears that rather than directly facilitating access to government records, its primary purpose, the Act seems to imbue civil servants with the opposite – a greater degree of diligence in how information is provided to the public. As Blais and Marsden noted, it was

. . . intended to result in profound administrative reform that would shift the onus from the citizen having to justify what information should be released, to the government having to justify why information should be denied. But, instead, what we have seen is more formality in the way the government communicates with its citizens. Informal channels of communication have largely been replaced by a structured, and planned, communication approach.³

A primary driver of this reality is that “...neither at the time the Act came into force, not since, has there been a comprehensive strategy to raise awareness of, and support for, access to information in the federal public service.”⁴ Consequently, as will be illustrated below, civil servants continue to jealously guard the information held by the Government.

That the problem lies with the management of the Act and not the Act itself is made clear by John Reid, the Information Commissioner. Reid states that,

[s]ecrecy in government is deeply entrenched – primarily at the senior levels of the bureaucracy. Secrecy cloaks public servants in relative anonymity as the handmaiden of the notion of ‘ministerial accountability’. Secrecy, too, gives governments more control over the management of information flows to the public.⁵

Where does this desire for secrecy come from and why are public officials resistant to the idea of open government?⁶ Max Weber believed that as “bureaucratic officials gain in influence, policy making becomes transformed from a public into a more private and closed activity since ‘bureaucratic administration is according to its nature always administration which excludes the public’.”⁷ The reasons for this are many but can be summarised in the following ways:

- Governments and public servants “tend to have an ingrained conservatism over their role as custodian of information.”⁸
- There is an inherent misconception about who ‘owns’ government information and records. Many government officials do not understand “why any person should have access to *their* files or copies of *their* papers.”⁹
- Many civil servants consider the *Access to Information Act* “...an affront to their professional status. After all, why should the public be able to obtain access to departmental records in order to challenge the professional judgements and decisions made by the staff in the conduct of affairs?”¹⁰
- Government information has value not only for the government and citizens but often has political implications as well. Consequently there may be a politically vested interest in denying, or controlling, the release of information.

These various pressures result in a culture where there is no acknowledgement that the information generated by the government is in fact the property of the polity rather than the individual creator/owner. Furthermore, even if this right were to be acknowledged there would still be a number of competing interests which would militate against the willing release of the information. ‘In any organization there is no inevitable congruence between an employee’s material self-interest, the dictates of his conscience, the instructions of his immediate superiors, the objectives of the

heads of the organization, the interests of the organization's customers or clients and the interests of society at large.¹¹ The result is a situation in Canada where access requests are often viewed as an intrusion on the natural order of things and energy is directed at minimising this intrusion rather than embracing the culture of openness.

Obstruction of Access

To anyone reading the series of annual reports published by the Office of the Information Commissioner for Canada, it is clear that all of the information commissioners believe that a culture of secrecy continues to prosper in the federal government. It is also evident that this culture continues to severely undermine the effective administration of the Act. Support for this view also comes from many other informed commentators of the federal access law – other government officials (i.e. the Auditor General), academics, the media, and user groups - who have long noted that a majority of government departments have undertaken strategies designed to circumvent the requirement for transparency.

In recent years, the work of Alasdair Roberts has had an international influence and has directly contributed to a stronger social science analysis of ATI issues – particularly in the Canadian context.¹² One way that Roberts has provided structure to the debate is through the use of the concept of official adversarialism – that is, “the attempt by elected and non-elected officials to stretch [access to information] . . . laws in order to protect departmental or governmental interests”¹³ – which was shown to significantly undermine the spirit, if not the application, of the legislation. Further, Roberts usefully distinguishes between two distinct forms of official non-compliance; malicious and administrative.

Malicious non-compliance involves “a combination of actions, always intentional and sometimes illegal, designed to undermine requests for access to records.”¹⁴ Administrative non-compliance, on the other hand, seeks to undermine access rights through “. . . inadequate resourcing, deficient record-keeping, or other weaknesses in administration.”¹⁵ Overall, activities associated with administrative non-compliance serve to test the limits of the legislation without engaging in the obvious illegalities that characterize practices associated with malicious non-compliance.

Others have followed Roberts. In 2000, Gilbert's article used organizational theory models to evaluate the impact of access to information on the federal bureaucracy in Canada.¹⁶ Proceeding from the premise that federal government agencies are inherently conservative and change resistant it suggested that Canadian federal government departments and agencies have responded to increased pressures for openness in a recognizable pattern that fits contemporary social science's understanding of how change affects institutions.

Like Roberts, Gilbert employed a social science approach to structure his analysis – specifically a series of models related to organisational change developed by Richard Laughlin - and used Laughlin's taxonomy of rebuttal, reorientation, colonisation, and evolution to describe both the strategies utilised by government officials, and to explain why real change, that is a sustained move towards more open government, had not yet occurred in the Canadian federal context. A partial review of this approach offers a convenient method to summarize the resistance of federal agencies and civil servants to the impact of ATI.

Rebuttal

The rebuttal response involves attempts by government agencies and personnel to externalize the disturbance posed by ATI “so as to protect and maintain the organization *exactly* as it was before the disturbance.”¹⁷ The fact that organizations

have a tendency towards conservatism and wish to avoid fundamental modifications to their working culture helps to suggest that rebuttal is a primary reaction to change.¹⁸ In trying to deflect the challenge to its normal state of equilibrium, government bodies will attempt to minimize the degree of change necessary to do so and have thus undertaken strategies designed to rebut the intrusion that transparency represents.

One of the most common rebuttal strategies is to delay, or otherwise limit, the effectiveness of the ‘timely’ release of information. The Act clearly places the onus on government agencies to review records requested under the legislation in order to justify why particular records should not be disclosed. The law explicitly recognizes that this review of records takes time and allows the department thirty days to respond. The Act, however, also allows agencies to seek an extension of this deadline in limited circumstances.¹⁹ In reality, extensions are routinely sought – resulting in significant delays to the release of the information. This strategy is often seen by government departments as being effective because, as one information commissioner has observed, “sometimes timing is as important as the information itself”.²⁰

Upon assuming office, the current commissioner, John Reid, identified delay as his top priority, noting that “[t]he big problem with the right to know in Canada is that federal departments don’t obey [their] mandatory response deadlines. Many public servants have simply decided that, when it comes to the access law, illegal behavior is the norm.”²¹ Statistics compiled by Treasury Board (**See Table 1**) support this conclusion. They show that only 58.6% of all requests made between 1983 and 2002 were completed within the thirty day limit and that 23.9% of requests took 61 days or more - data which clearly illustrates a government wide crisis of delay in responding to access requests.

Table 1
Access to Information – 1983–2002
Time Required to Complete Requests²²

<u>Requests completed</u>	<u>100%</u>	<u>202, 170</u>
0 – 30 days	58.6%	118, 410
31 – 60 days	17.5%	35, 438
61 + days	23.9%	48, 322

A second obvious benefit of delay is that it allows time for the department to prepare for the eventual release of the information. In his 1997 – 98 annual report, Grace stated that in many instances where “information is withheld or delayed, it is because it serves not always disinterested purposes to control the context and the timing of what is given.”²³ Reid concurred, noting that, “too many . . . senior officials see it as their job to contain or delay the release of information until the circumstances for release are more [favorable] for the institution . . . or until the government’s public response has been carefully crafted and scripted.”²⁴

Often delays may result from having the review process extend to a variety of different officials rather than residing with a specific access officer. Part of the problem in having requests for access moved up the hierarchy for review – in addition to the obvious fact that it increases the time necessary to process the original request - is that the values guiding the decisions or interpretations of the Act will almost necessarily change. For example, a low level review should, in most instances, involve a straight interpretation and application of the legislation. A

higher level review will in many cases introduce political issues or other complicating factors into the process and thus not only contribute to delay but the possible increased use of exemptions.

This practice of stretching the use of the exemptions permitted under the Act is another key rebuttal strategy. Officials engaged in this form of activity utilize such tactics as treating discretionary exemptions as mandatory or applying unusually broad interpretations of the statutory language in order to justify the greater use of exemptions.²⁵ One way to measure the extent of this activity, which is a clear indicator of the propensity to withhold information, is to examine the percentage of requests that have resulted in the full disclosure of records. According to statistics compiled by Treasury Board, between the years 1983 and 2002 (see **Table 2**) only 34.8% of all requests resulted in the full disclosure of information. It is obvious that such a record does not correspond with the law which states that "necessary exceptions to the right of access should be limited and specific."²⁶

Table 2
Access to Information – 1983–2002
Disposition of Requests²⁷

<u>Requests completed</u>	<u>100%</u>	<u>202, 170</u>
All Disclosed	34.8%	70, 357
Some Disclosed	35.6%	71, 895
No Records Disclosed	3.7%	7, 529
Other	25.9	52, 389

In instances where departments find that they cannot withhold information using the available exemptions, they may resort to the threat of user fees to deter access. Based upon the statutory provision which allows for fees to be levied for the processing of certain requests, such activity involves presenting the requestor with high fee assessments that must be paid prior to the review taking place. Statistics compiled by Roberts show that an initial fee assessment of between 11 and 200 dollars results in a rate of abandonment of close to 10% while assessments over \$200 have a rate of abandonment well above 30%.²⁸ A side benefit is that the negotiation of such requests also serves to delay the release of information.

A fifth strategy is to significantly change record keeping practices through limiting both the creation and content of records. In his 1993-94 annual report, Grace observed that "some officials have no hesitation in admitting, even advocating, that important matters simply not be written down or preserved."²⁹ John Reid, acknowledging that access laws have directly contributed to fewer records being created, with less candour being expressed in those that are, has stated that this form of response is an unfortunate, yet consistent, feature of any access to information regime and that such activities render the right of access virtually meaningless.³⁰ He has also publicly lamented the long-term effect that this form of response will have on the corporate memory of the government of Canada.³¹

Reorientation

As the federal government experiments with alternative means of delivering public services, the delegation of service delivery and regulatory functions to new agencies results in even fewer opportunities for citizens to hold it accountable as

these new bodies are often exempted from the ambit of the Act completely as the new enacting legislation does not allow for their inclusion in Schedule 1 of the Act.

One prominent case was the transfer of the air traffic control function from Transport Canada to a new entity, Nav Canada. When responsibility for air traffic control rested with Transport Canada the activities related to the management of this function were directly subject to the Act as Transport Canada was a Schedule 1 institution. The new Nav Canada legislation, however, specifically states that it is not subject to the *Access to Information Act*.³² Like Roberts, the Auditor General of Canada has also lamented the practice of creating new agencies which fall outside of both the ATI and the Auditor General's sphere of scrutiny. In all, the Chrétien government alone has created at least twelve new federal entities that are excluded from the Act.³³

A more recent example of how such organizations fight to stay outside of the ambit of the Act was seen in late 2002. In its June 2002 report, the Access to Information Review Task Force recommended that the scope of the existing ATI Act be widened to include those Crown corporations currently exempted under the current Act. Two months later, senior government officials indicated support for this measure and stated that such a change would form part of the fall legislative agenda.³⁴ By early October, however, the planned reforms were under threat as aggressive lobbying by affected Crown corporations had sidetracked attempts to introduce such reforms.³⁵

Colonization

A significant challenge to effectively implementing the provisions of the Act is the lack of 'access champions' within individual agencies. The fact that departmental officials in general, and access coordinators in particular, "must live within . . . [their] departmental milieu . . . [and] that obedience to the access law is not rewarded, whereas . . . loyalty and obedience to . . . [their] institution . . . is very much expected and rewarded."³⁶ Many such instances are well described by the various Information Commissioners over the course of their annual reports. But, in October 2000, Reid documented how the situation was growing even worse.

In describing how senior bureaucrats had initiated "a full-scale counter-attack" against his office, Reid noted that there now existed a ". . . palpable animosity towards the right of access . . ." and alleged that members of his own staff had had their careers threatened ". . . in not so subtle terms . . ." by senior bureaucrats under investigation for withholding information.³⁷ "If members of the public service come to believe that it is career suicide to work, and do a good job, for the Information Commissioner, the future viability and effectiveness of the commissioner's office is in grave jeopardy," wrote Mr. Reid.³⁸ Such activity clearly serves to not only mitigate the ability of access officials to act as agents of cultural change, but significantly deters all other civil servants as well, as it sends an unmistakable message to all civil servants across government that transparency is not a value to be espoused.

Evolution

A final contributing factor is that the potential for change is related not only to the general level of commitment but, more specifically, which individuals in particular are ". . . committed either to the underlying ethos or an alternative and their respective position in the organization."³⁹ This factor is critical because in order for real change to take place, the 'dominant coalition' within the organization must be ready and willing to endure the necessary anxiety that comes with the anticipated uncertainty of change. Reid acknowledges the need for such transformational leadership when he states that "the prime agents for a change of culture to open government has to be the PM, [Cabinet], Deputy Ministers and especially, the

[guidance] of Justice [and] Treasury Board."⁴⁰ However, as reports by the Information Commissioners have consistently indicated, each of these agents has so far failed to provide the necessary direction that would allow even limited, much less fundamental change, to take place.

In his 1993-94 annual report, Grace indicated that there continued to be "a lack of clarity and focus in ministerial leadership which has slowed progress on information policy issues and, in its worst guise, served to signal to an already reluctant and nervous bureaucracy . . . that openness was not the order of the day."⁴¹ Three years later, Grace was even more direct when he stated that "what would improve this law above all else is a stronger institutional will, expressed at the highest levels of government."⁴² Without such genuine leadership and commitment to the principles of the Act by senior public officials, rank and file civil servants ". . . have [also] shown apathy and have nothing to gain through zealous compliance; there may even be rewards for noncompliance."⁴³

Material Barriers to Access

As Roberts has noted, administrative non-compliance is a significant factor in institutions being unable to effectively administer ATI. Even where all officials are willing to embrace a culture of openness, the inability to quickly identify relevant information remains a barrier to ATI. While the Act refers to access to information, in reality what is requested is "recorded" information. Therefore access is dependent upon government decisions and activities being recorded in some form as part of the business process and, latterly, valued and preserved as an important corporate resource.

All too often however, records (if they are even created as discussed below), do not end up into the formal repository of the department. As people use electronic systems, including email and personal computer drives, to conduct their business, the corporate record becomes increasingly fragmented. Records of government activity may exist on registered files, on shared drives, on personal drives, on floppy disks, on voicemail messages and often in an unmarked folder on someone's desk or even in their home.⁴⁴

With the diminishment of the centralised records office, controls over the registration and tracking of records disappear. So even when a record is identified it may take some time to actually locate it as its physical location may not be accurately recorded. Another result of this lack of tracking is that an audit trail may not be developed regarding who read, actioned or contributed to the file. The result is that when a request is made, it is often extremely difficult for the department to locate all the disparate records that might be related.

Even in those instances where a complete registry of all records exists - regardless of media - there are still significant problems with actually retrieving the information. Searching on unstructured systems is a time-consuming process with results varying depending upon the consistency of language used, or the knowledge of the business that is held by the searcher. Unstructured records systems are essentially a bucket in which the requestor may try to fish using as many terms/subjects as possible. This presents two separate problems. The first being that the requestor often has difficulty in developing a specific request, as accurate and concise descriptions of the information held by a department may not be available. The second problem is that these searches for information are often given to administrative or clerical staff who may have minimal knowledge of the business of the department and who are not in a position to request assistance or support from more senior members of staff.

The overall flaws in the information management system of government prompted the Access to Information Review Task Force to include a specific chapter which collectively refers to these failings as the 'information management deficit'. The Auditor-General Denis Desautels has also noted that the lack of a proper information management regime contributed to activities which directly damaged the audit trail necessary for both the ongoing administration of government but also future accountability. Such activities involved

efforts to reduce administrative overhead [which] appear to have resulted in disproportionate cuts in records management. My colleague, the Information Commissioner, has called attention to the reduced numbers of information handlers, librarians, records clerks and filing secretaries, a situation that he believes has devastated the records management discipline. This hampers not only the public's ability to gain direct access to government records but also the institutional memory of the departments themselves. The ability to audit decisions suffers as well.⁴⁵

While Canada has strict rules and provides detailed guidance on how to safeguard and manage financial and human resources, and the responsibility for managing such programmes is clearly assigned to an accountable officer, there is often no similar framework for the management of information.⁴⁶ Time lost searching for information, or creating duplicate records, is not counted as a real cost and the only time these problems are brought to light are when an external request causes disturbance. Unfortunately, as these requests are viewed as an extra burden rather than a core part of the business, they do not act as drivers of change. Consequently there is currently no framework or external pressure that will address the information management deficit – without this, the reality of making government information accessible is even more remote.

Much of the above analysis presupposes that government officials actually create recorded information as evidence of their activities and decisions. However, it is an unfortunate precept that the civil servants most likely to conduct business within an environment of secrecy, and not to make a record of such business, are those officials who are responsible for taking the most significant decisions. The Auditor-General Denis Desautels voiced his concerns about this understanding when he observed in his 2000 report that ". . . the poor quality of records kept in departments . . . [which] can be attributed to a certain paranoia over Access to Information rules and the traditional reluctance of senior public servants to keep records of direction from ministers or discussions of why decisions were made."⁴⁷

This reluctance has been exacerbated under ATI as previously there was no consciousness of documenting for the future but the introduction of ATIP has changed this as bureaucrats are now more conscious than ever that the records that they create today can be the subject of a request tomorrow. As noted above, this has led to a strong belief that "if every file has to be open to inspection, we can count on it that anything that matters will be done off the file."⁴⁸ Commentators such as John Reid and Ian Wilson, the National Archivist, are now arguing that there is a need to be more proactive in ensuring the protection of the public records as public accountability can no longer be assumed. Reid in particular is now lobbying for information creation standards which establish a specific duty to create proper records.

One final material issue which hampers access to government information is the limited resources available to manage an effective ATI programme. As the Access to Information Review Task Force noted,

from the start, departments have been asked to absorb the costs of access into their existing budgets. The steadily increasing cost of ATI over the last few years has led to a perception among senior management that they have to 'steal' from other programmes in order to fund an insatiable demand for access.⁴⁹

What Can Improve the Situation?

While we have identified a number of barriers to access in the current environment there are a few key reforms that could greatly improve the situation, many of which have recently been implemented or recommended in Access to Information Review Task Force report.

One issue is that the element of sanction associated with non-compliance has, until recently, been limited and the Act has therefore not been strong enough to shape individual or group behaviour in a way that would effect a move towards the acceptance of open government as the norm. To instigate change is a complex process involving ownership on behalf of those expected to change, a perceived benefit resulting from the change, a clear understanding of what is expected as a result of the change, some form of monitoring compliance with change and, as a last step, the ability to invoke some form of penalty if changed behaviour does not occur. In the Canadian experience the lack of education and instruction for civil servants regarding the Act is further exacerbated by the fact that they know that it is almost impossible for any punitive action to be taken against them.

The sole element of sanction in the Canadian ATIA was passed in early 1999 as an amendment to the original Act. Bill C-208 was introduced primarily in response to such high profile instances as the deliberate destruction of federal records by National Defence and Health Canada. This bill amends the Act by making it an offence to obstruct the right of access by destroying, falsifying, or concealing a record or to counsel such activity by others. Individuals found guilty of such actions are liable to a prison term of up to two years or a fine not exceeding \$10,000. It should, however, be noted that the amendment does not provide penalties for the most common activities associated with non-compliance such as continuing obfuscation of the Act through delay or otherwise wrongly refusing to release information.⁵⁰

Apart from trying to enforce compliance through the threat of sanction what other options exist to change the culture? Reid suggests that it is necessary to focus on the management culture by establishing a performance based accountability framework – perhaps by enacting accountability legislation – which identifies

. . . the principles and values underlying good public administration, identify the general responsibilities of government staff in supporting effective management practices and provide standards and guidelines for establishing and maintaining performance reporting and other accountability mechanisms.⁵¹

The review Task Force also makes similar recommendations, suggesting that accountability for information be specifically tied into performance agreements for managers.⁵²

Obviously one of the issues affecting performance is the requirement to adequately resource the ATI function. Indeed best practice would suggest that ATI should be managed as a distinct programme within government institutions. As the Review Task Force identifies a key element of successfully responding to access requests is the ability to “. . . explicitly identify and plan for resource requirements (skills, technology, money, etc.)”⁵³

Training which is part of a systematic change management programme would also go a long way to addressing the entrenched culture of secrecy. Many commentators agree that a primary problem with the effective implementation of the Act is the lack of political and senior level bureaucratic leadership – especially given the fact that these actors are the ones who may benefit from the continuation of the status quo. Training which inculcated the values of openness and transparency for all staff is essential, as is building these values into the Statement of Principles of the Public Service of Canada.⁵⁴

In order for civil servants to deliver service in accordance with these values it is critical to begin reform and enhance the information management systems of government. A government information management framework should be implemented with clear guidelines and common standards for how to create, manage and dispose of records.⁵⁵ Training should be provided to all staff on their responsibilities for information management, and particular guidance should be given within specific business areas regarding the documentation required to support business activity. The Task Force recommends that this framework should be further supported by the development of audit and evaluation tools and that compliance with the framework should be monitored.⁵⁶

Other nations which are in the process of introducing recently enacted ATI legislation, have sought to address some of the issues identified at the outset of their implementation. On the education front, Jamaica – which passed its Access to Information Act in mid 2002 – has instituted a training programme designed to prepare civil servants for the implementation of the new Act. Speaking at the opening session, Information Minister Burchell Whiteman said that the focus was on the need to “. . . improve the relationship between the citizen and the state in relation to the flow of information.”⁵⁷ More specifically, Burchell noted the importance of removing “. . . the gatekeeper and the gatekeepers’ mentality.”⁵⁸ The training is not viewed as a stand alone initiative and that an ongoing assessment of the legislation’s impact was critical. The programme is designed to last four months, ultimately involving 400 civil servants from a variety of departments and agencies, and will focus on such aspects as the provisions of the legislation, the fundamentals of change management, and the importance of records/information management.

In the United Kingdom, preparations for the eventual implementation of the new Freedom of Information Act have explicitly acknowledged the fundamental role of records management to the success of the initiative. Three years before the new act even received Royal Assent, the government’s White Paper *Your Right to Know* stated

an FOI Act can only be as good as the quality of the records which are subject to its provisions. Statutory rights of access are of little use if reliable records are not created in the first place, if they cannot be found when needed, or if the arrangement for their eventual archiving or destruction are inadequate . . . We therefore propose to place an obligation on departments to set records management standards which take these changes into account, having regard to best practice guidance drawn up by the Public Record Office.⁵⁹

Initial guidance on how to meet this obligation was subsequently set out in the *Draft Code of Practice on the Management of Records under Freedom of Information* developed by the Lord Chancellor’s Office.⁶⁰

Perhaps most importantly, preparations for the implementation of ATI in the United Kingdom have explicitly acknowledged the issue of culture. In *Your Right to Know*,

the government states that ATI “. . . must be a catalyst for changes in the way that public authorities approach openness [as e]xperience overseas consistently shows the importance of changing the culture . . . so that public authorities get used to making information publicly available in the normal course of their activities.”⁶¹ Such changes are necessary to help “. . . ensure that FOI does not simply become a potentially confrontational arrangement under which nothing is released unless someone has specifically asked for it”⁶² – in effect reflecting the same concerns observed by Blais and Marsden above with regard to the Canadian context.

Conclusion

What is evident from the above analysis is that there is a relative disconnect between the values espoused in the Purpose Clause of the Act and the way in which the Act is applied by government bodies. As the Review Task Force has noted, an effective right of access requires three elements:

- good management of the government's information holdings;
- a comprehensive base of information about the performance of institutions in meeting their access-to-information obligations; and
- a vibrant culture of support for access to information in the public service and at the political level.⁶³

This chapter explored these challenges to achieving the transparency envisioned by the introduction of ATI legislation and in particular those presented by the prevailing bureaucratic culture of secrecy and the inadequate attention given to information management. It has illustrated how federal departments have successfully attempted to avoid the change posed by the promulgation of the Act by limiting disclosure, delaying the processing of requests, transferring agencies out from under the control of the legislation, undertaking changes to documentary form and content, and, in some instances, through the malicious disregard for the tenets of the legislation itself.

Secrecy has been identified as a factor in the balance of power between public officials, the elected members of the legislature, members of the executive, and the public. This power partly derives from the concentration of knowledge and expertise within the bureaucracy and the subsequent ability to control and use this information to their benefit. It is also apparent, however, that much depends on the attitudes and interactions of the political leadership, civil servants and citizens, both in relation to the issue of secrecy in government and, also, in relation to secrecy within national systems of public administration. As the number of studies into access to information regimes in different countries grow, we continue to see how it is the respective “culture” that is the predominant factor in how open the government will be.⁶⁴

The key lessons learnt from the Canadian experience are: ⁶⁵

- the critical need to approach the implementation of ATI legislation with a planned programme to change the culture of secrecy;
- to ensure that civil servants are aware not only of the requirement to disclose information to the public but the absolute necessity of creating records of activity to ensure ongoing accountability;
- the need to ensure that information management structures support the efficient, capture, registration, tracking and retrieval of information for business purposes and as a corollary the requirements of ATI

- to develop legislation and regulations that allow for defined and specific penalties for failure to release information
- to recognise the costs of these activities and ensure that the implementation and maintenance of ATI is fully supported.

*The opinions expressed in this paper are those of the co-author and do not necessarily reflect the views of the Commonwealth Secretariat or the National Archives of Canada.

¹ Institute for Media, Policy and Civil Society, *Access to Information in the Context of Trade Negotiations: Definitions & Debates*, < http://www.impacs.org/pdfs/Access_to_Info_trade_negotiations.pdf >, 9.

² *Access to Information Act*, s. 2 (1).

³ Gabrielle Blais and Paul Marsden, 'In from the Cold: Secrecy and Its Impact on Management of Canadian Government Documents after 1989,' presentation to RLG 2001 Annual Meeting in Ottawa, Canada < <http://www.rlg.org/annmtg/blais-marsden01.html> >.

⁴ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians – Report of the Access to Information Review Task Force* (Ottawa: Treasury Board Secretariat, 2002), 157.

⁵ Information Commissioner of Canada, *Annual Report 2000 – 2001* (Ottawa: Office of the Information Commissioner, 2001), 17.

⁶ John Grace, the third and longest serving, Information Commissioner, supports this conclusion and states that "[t]he most telling tribute to the access law's power and importance is the continuing discomfort some public servants claim to experience at having to live the law." See Information Commissioner of Canada, *Annual Report 1995-1996* (Ottawa: Office of the Information Commissioner, 1996), 4. This theme has also been a feature of John Reid's addresses to various audiences since his appointment. In one telling statement he says that "[n]owhere in the world, not even here in Canada, have bureaucracies been the champions of freedom of information." See John Reid, 'Remarks to Conference on Access to Information Reform,' speech of 1 May 2000 Ottawa, Ontario, < <http://www.infocom.gc.ca/speeches/default-e.asp> >.

⁷ Max Weber, *Wirtschaft und Gesellschaft*, fifth edition (Tubingen, 1972), p. 573 as cited in Edward Page, *Political Authority and Bureaucratic Power*, second edition (London: Harvester Wheatsheaf, 1992), 9.

⁸ Stewart Dresner, *Open Government: Lessons from America* (London: Outer Circle Policy Unit, 1980), 81.

⁹ Peter Herson and Charles McClure, *Federal Information Policies in the 1980's: Conflicts and Issues* (Norwood, N.J.: Ablex Publishing Co., 1987), 63.

¹⁰ Jay Gilbert, 'Access Denied: The Access to Information Act and Its Effect on Public Records Creators,' *Archivaria* 49 (Spring 2000), 90.

¹¹ William Plowden, 'Preface' in *Politics, Ethics and Public Service*, B. Williams et al (London: Royal Institute of Public Administration, 1985), 9.

¹² The majority, if not all, of Alasdair Roberts's work in this area is available at < <http://faculty.maxwell.syr.edu/asroberts/research.html> >. Through his work Roberts has introduced an academic rigor to the evaluation of ATI and the relative performance of government that did not previously exist and has significantly moved the debate away from one of anecdote/perception to one of analysis and fact.

¹³ Alasdair Roberts, 'Limited Access: Assessing the Health of Canada's Freedom of Information Laws,' < <http://faculty.maxwell.syr.edu/asroberts/research.html> >, iii.

¹⁴ Roberts, 'Limited Access: Assessing the Health of Canada's Freedom of Information Laws,' 10.

¹⁵ Roberts, 'Limited Access: Assessing the Health of Canada's Freedom of Information Laws,' 12. Patrick Birkinshaw has labeled similar activity as 'maladministration' and suggests that it involves such behaviour as ". . . incompetence, delay, inattention, rudeness, turpitude, neglect, bias and so on." See Patrick Birkinshaw, *Government and Information: the Law relating to Access, Disclosure and Regulation* (London: Butterworths, 1990), 298.

¹⁶ See Gilbert, 'Access Denied: The Access to Information Act and Its Effect on Public Records Creators', 84 – 123. The description that follows under the rubric of rebuttal, reorientation, colonization, and evolution is largely distilled from this original article.

¹⁷ Richard Laughlin, 'Environmental Disturbances and Organizational Transitions and Transformations: Some Alternative Models,' *Organization Studies* 12 (1991), 216.

¹⁸ Laughlin, 'Environmental Disturbances and Organizational Transitions and Transformations: Some Alternative Models,' 223.

¹⁹ ". . . if the request is deemed to 'unreasonably interfere with the operations' of the department or, alternatively, the request requires third party consultation." See *Access to Information Act*, s. 8, 9, 10.

²⁰ Information Commissioner of Canada, *Annual Report 1997-1998* (Ottawa: Office of the Information Commissioner), 2. One common catchphrase associated with this problem is that 'access delayed is access denied'.

²¹ John Reid, 'Remarks to Justice Canada,' speech presented to Justice Canada 6 November 1998, < <http://www.infocom.gc.ca/speeches/default-e.asp> >.

²² *Info Source Bulletin*, Number 25, August 2002, 19.

²³ Information Commissioner of Canada, *Annual Report 1997-1998*, 2.

²⁴ John Reid, 'Remarks to the ATIP Coordinators,' speech presented to the Information Policy Directorate 17 November 1998, < <http://www.infocom.gc.ca/speeches/default-e.asp> >. In fact, new computer tracking systems are being utilized by many departments to flag 'hot' requests so that sensitive issues can be brought directly to management's attention.

²⁵ There have also been instances where government departments have relied ". . . on statutory exemptions as an excuse for withholding records even when, in previous cases, they have been told by the information commissioner that the exemption should not be applied." See Roberts, 'Limited Access: Assessing the Health of Canada's Freedom of Information Laws,' 12. A particularly interesting example of this sort of activity is the decision by the Privy Council Office to rename or reclassify many of its records, i.e. background papers relating to policy analysis and options, so as to prevent their release through the use of section 69(1)(b) - a mandatory exemption. Reid has challenged this interpretation and has asked the Federal Court to intervene and make these records available under section 69(3)(b) of the Act. See Reid, 'Remarks to Conference on Access to Information Reform,' 11-13.

²⁶ *Access to Information Act*, s. 2(1).

²⁷ *Info Source Bulletin*, Number 25, August 2002, 19.

²⁸ Alasdair Roberts, *An Evidence-Based Approach to Access Reform*, Queens University School of Policy Studies Working Paper #22 (July 2001), 25.

²⁹ Information Commissioner of Canada, *Annual Report 1993-1994* (Ottawa: Office of the Information Commissioner, 1994), 4. Grace has returned to this point several times. In his 1996-97 annual report he noted existence of the "don't-write-it-down school" and its dangers. The following year he stated that "[i]f bold boasts are to be believed, some have taken to adopting the motto attributed to an old New York Democratic boss: 'Never write if you can speak; never speak if you can nod; never nod if you can wink.'" See Information Commissioner of Canada, *Annual Report 1997-1998*, 1.

³⁰ John Reid, 'Remarks to the Standing Committee on Human Resources Development and the Status of Persons with Disabilities,' Ottawa, Ontario 28 March 2000, < <http://www.infocom.gc.ca/speeches/default-e.asp> >.

³¹ Reid, 'Remarks to the Standing Committee on Human Resources Development and the Status of Persons with Disabilities,' 3. Reid, 'Remarks to Conference on Access to Information Reform' and John Reid, 'Remarks to Freedom of Information Seminar,' 7 February 2000, < <http://www.infocom.gc.ca/speeches/default-e.asp> >. This practice has not been limited to the federal government of Canada. The creation of 'safe' records by public officials was also found to be one outcome of the implementation of the *Freedom of Information Act* in Victoria, Australia as it was determined that ". . . in certain areas of government, advice . . . [became] less extensive and more circumspect . . . [as less was] being committed to paper." See Spencer Zipcak, 'Freedom of Information in Principle and Practice: the Victorian Experience', *Australian Journal of Public Administration*, 313.

³² *Civil Air Navigation Services Commercialization Act*, Statutes of Canada 1996, c. 20.

³³ These include the following: The Canadian Foundation for Innovation, The Canadian Millennium Scholarship Foundation, Genome Canada, Canadian Blood Services, Nav Canada, all major airport authorities, The Canada Pension Plan Investment Board, the Canadian Foundation for Climate and Atmospheric Sciences, The St. Lawrence Seaway Management Corporation, Canada Health Infoway Inc., and the Waste Management Organization. In April 2002, the new Auditor General of Canada, Sheila Fraser, followed up on this theme in her first report to Parliament. In a chapter entitled 'Placing the Public's Money Beyond Parliament's Reach' she described how the legislation establishing these special purpose entities often place them beyond the bounds of parliamentary scrutiny and fail to provide adequate provisions to ensure that citizens have the right to access information under their control.

³⁴ Canadian Press, "Spotlight to fall on Crown corporations," *The Globe and Mail*, 5 August 2002.

³⁵ Campbell Clark, "Crown firms sideline reform of access act, Liberal MP says," *The Globe and Mail*, 9 October 2002, A4.

³⁶ Reid, 'Remarks to the ATIP Coordinators'. The priority of departmental interest – rather than broad commitment to the legislation – is exemplified through instances where the same document is requested

through several related agencies. As departments seek to protect themselves they interpret the Act and sever the document according to their own interests. The result is that the whole document can often be “pieced back together” from the different severed copies. This is known colloquially as “the mosaic effect”.

³⁷ Information Commissioner of Canada, *Annual Report 1999-2000* (Ottawa: Office of the Information Commissioner, 2000), 9 - 11. See also Jeff Gray, “Liberals hammered over secrecy report,” *The Globe and Mail*, 17 October 2000 and Ian Jack, “Grits assail public’s right to know, bureaucrats threatened, agency says,” *The National Post*, 17 October 2000.

³⁸ Information Commissioner of Canada, *Annual Report 1999-2000*, 11.

³⁹ Laughlin, ‘Environmental Disturbances and Organizational Transitions and Transformations: Some Alternative Models,’ 223.

⁴⁰ Reid, ‘Remarks to the ATIP Coordinators’.

⁴¹ Information Commissioner of Canada, *Annual Report 1993-1994*, 3.

⁴² Information Commissioner of Canada, *Annual Report 1996-1997* (Ottawa: Office of Information Commissioner, 1997), 3.

⁴³ Information Commissioner of Canada, *Annual Report 1987-1988* (Ottawa: Office of the Information Commissioner), 6.

⁴⁴ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 141.

⁴⁵ Auditor General of Canada, *Reflections on a Decade of Serving Parliament* (Ottawa: Auditor General of Canada, 2001), 87.

⁴⁶ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 145.

⁴⁷ Auditor General of Canada, *Reflections on a Decade of Serving Parliament*, 86 - 87.

⁴⁸ Sir Kenneth Couzens, ‘The Principle of Public Service’ in *Politics, Ethics and Public Service*, B. Williams et al (London: Royal Institute of Public Administration, 1985), 47.

⁴⁹ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 121.

⁵⁰ These changes are set forth in section 67.1 of the Act. John Reid has already voiced concerns regarding the implementation of section 67.1 by the government and has stated that the process “. . . has all the appearance of damage control . . .” See John Reid, ‘Remarks to Canadian Access and Privacy Association Conference,’ Ottawa, 20 October 1999, < <http://www.infocom.gc.ca/speeches/default-e.asp> >. It is relevant that some recent acts, such as the UK FOI legislation, have taken on board the need for applying sanctions and included this element into their Act from the outset.

⁵¹ Information Commissioner of Canada, *Annual Report 2000 – 2001* (Ottawa: Office of the Information Commissioner, 2001), 30.

⁵² Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 146.

⁵³ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 121.

⁵⁴ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 160.

⁵⁵ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 148.

⁵⁶ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 146.

⁵⁷ “Civil servants begin classes to prepare for Information Act,” *The Jamaica Observer* (24 January 2003).

⁵⁸ “Civil servants begin classes to prepare for Information Act,” *The Jamaica Observer* (24 January 2003).

⁵⁹ Chancellor of the Duchy of Lancaster, *Your Right to Know: the Government’s Proposal for a Freedom Information Act* (London: The Stationary Office, 1997), s. 6.12.

⁶⁰ *Draft Code of Practice on the Management of Records under Freedom of Information* (London: Lord Chancellor’s Department, 2000).

⁶¹ Chancellor of the Duchy of Lancaster, *Your Right to Know: the Government’s Proposal for a Freedom Information Act*, s. 2.17.

⁶² Chancellor of the Duchy of Lancaster, *Your Right to Know: the Government’s Proposal for a Freedom Information Act*, s. 2.17.

⁶³ As summarized by John Reid. See Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament* (Ottawa: Office of the Information Commissioner, 2002), 28. It should be noted that while Reid is in broad agreement with this understanding he strongly disagrees with the fact that the Review Task Force does not support legislative changes to encourage reforms in these areas. As Reid notes, “[t]he Task Force does not face up to the reality that, after 20 years of leaving it up to public servants to get their records, attitudes and statistics in order, they haven’t done so. Since even government insiders agree that these fundamentals for an effective right of access are in serious disrepair, it is vital for Parliament to nudge along the process of cultural reform by imposing some, limited, statutory obligations.”

⁶⁴ For a brief analysis of the less than positive experience in Japan see Mark Magnier, "Citizens seeking government documents under new disclosure measures are disappointed that officials are stymieing them," *L.A. Times*, 15 April 2002.