

From Secrecy to Openness

How to Strengthen Canada's
Access to Information System



July 2001

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policy paper of



Open Government Canada is a nation-wide coalition of non-profit groups fighting government secrecy and pushing for greater access to public information. OGC groups represent citizens, journalists, librarians and lawyers.

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by Open Government Canada
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"The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions should be limited and specific and that the decisions on the disclosure of government information should be reviewed independently of government."

Subsection 2(1) of the federal *Access to Information Act*

"The overarching purpose of access to information legislation--is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."

Mr. Justice LaForest, speaking for the Supreme Court of Canada in its 1997 judgment on *Dagg v. Canada* (Minister of Finance)
2 S.C.R. 403 at 432

"By 2004, our goal is to be known around the world as the Government most connected to its citizens, with Canadians able to access all government information and services on-line at the time and place of their choosing."

Speech from the Throne, October 1999

I. Background

In the same way our economy can't function without money, our democracy can't function without access to information from government.

Unfortunately, since it came into force on July 1, 1983, the effect of the federal *Access to Information Act* (*ATI Act*) has not ensured the easy, regular access to federal government information that is so vital to our democracy. Instead, the government's administration of the law has been a source of frustration for individual requesters and the public generally, mainly as a result of undue delays and denials by federal government institutions of access to public information. Government institutions regularly refuse to release information and records that should, under the law, be regularly released. A statutory review by a parliamentary committee in March 1987 made many good and unanimous recommendations for strengthening the *ATI Act* but these recommendations have been ignored by successive governments.

In addition, the former Information Commissioner, John Grace, commissioned three major evaluative studies upon the tenth anniversary of the *ATI Act*, again with no significant response from the federal government. Despite numerous pleas for change from many other sources, including private members' bills (e.g. Bill C-206 of the last Parliament by John Bryden), only two minor amendments have ever been made to the *ATI Act*.

Open Government Canada (OGC) is a coalition of organizations dedicated to improving access to public information in Canada. It provides education and assistance to support informed public participation in Canadian society.

OGC is generally concerned about loopholes and gaps in access to information laws in Canada, and secretive and undemocratic practices by governments in the implementation of these laws.

The organizations involved in OGC represent citizens, journalists, librarians, media lawyers, and academic researchers. People involved in these organizations are some of the most experienced users of the federal *ATI Act* and provincial access laws. Many have been documenting significant problems with current laws, and many have been waiting for years for significant reforms to the federal *ATI Act*.

OGC is participating in the consultation by the Access to Information Review Task Force with reservations and serious concerns about the process, as detailed below. As a result, this position paper sets out recommendations not only for major improvements to the access to information system, but also for major improvements to the government's consultation process concerning the *ATI Act*.

We sincerely hope that the review process currently beginning will lead to a full and fair evaluation of the federal access to information system that involves the public in meaningful ways, and that the federal government will, finally, respond constructively to the many broadly supported proposals for improvements to the system.

II. Current Consultation Process - Significantly Flawed

"How to modernize access to federal government information in a way that promotes open and effective government and an informed citizenry in a knowledge society, while respecting the principles of privacy, ministerial responsibility, Canada's commitments, and the need for full discussion of issues in the public service and frank advice to Ministers."

The Overall Problematique of the Access to Information Review Task Force recommended by the Assistant Deputy Ministers (ADM) Advisory Committee at its inaugural meeting of December 8, 2000 (subject to constant revision at monthly meetings, but to date not revised on the Task Force website)

Unfortunately our analysis of the Access to Information Review Task Force (the Task Force) process to date has revealed many flaws which point to continued internal resistance to fundamental change to the federal access to information system.

In addition, the Task Force's consultation process violates several provisions of the draft "Policy Statement and Guidelines on Consulting and Engaging Canadians," which essentially requires all government institutions to undertake open, meaningful, fully resourced, and extensive consultation processes on such matters.

(a) Conflicts of Interest Make Effective Review Impossible

First, the Task Force is made up of representatives of the departments and agencies regulated by the *ATI Act*. As a result, the Task Force is in a fundamental conflict of interest. The federal government has never allowed regulated entities to conduct and control the review of the regulations that apply to the entities, and it is completely undemocratic to conduct the review of the federal access to information system in such a manner.

Second, the government departments and agencies represented on the Task Force, the Privy Council Office, the Treasury Board Secretariat, and the Department of Justice, have drafted and implemented policies in the past several years that have narrowed the scope of the *ATI Act*. Again, this places Task Force members in a fundamental conflict of interest that precludes their ability to review the *ATI Act* impartially.

Third, the federal government is involved in litigation in which it is defending restrictive interpretations of the *ATI Act*, and restrictive interpretations of the powers of the Access to Information Commissioner. Again, its position in this litigation contradicts the principles of an impartial, comprehensive and effective review of the *ATI Act*.

(b) Lack of Independent Oversight Further Undermines Integrity of Review

The External Advisory Committee for the Task Force was, finally, appointed in April 2001, fully eight months after the Task Force began to operate, and only five months before the Task Force is scheduled to release its report. As result, the External Advisory Committee has had no role in shaping the research or public consultation processes of the Task Force.

The terms of reference for the Committee also limit it to a very passive role. In addition, the criteria and process through which the Committee members selected has not been made public.

All of these factors make it clear that the External Advisory Committee has insufficient oversight power over the Task Force to ensure a comprehensive and impartial review of the federal access to information system.

(c) Lack of Information and Resources Undermines Participation in Review

While the Task Force's budget is estimated to be \$1.5 million, the Task Force is not providing any funding for research or presentations by the public.

In addition, the Task Force's public consultation paper was not available until April 30, 2001, fully eight months after the review began, and then the public was given only one month to respond.

Further, the Task Force and the Minister of Justice are both withholding key information from the public concerning the review, even when the information has been requested under the *ATI Act*, as follows:

- the Task Force's overall work plan;
- detailed minutes of all of the Task Force's meetings, including meetings with the Assistant Deputy Ministers Advisory Committee and the External Advisory Committee;
- the Task Force's research topics, identity of researchers, and results of research (including any polls or surveys of any kind), and;
- government department and ATI Coordinator position papers and/or views on access to information.

The lack of all these resources seriously undermines the ability of the public to participate effectively in the review, and is compounded by the very short period of time the Task Force has given the public to intervene.

The one research paper available on the Task Force website is the "Review of the Costs Associated with Administering ATIP Legislation (2000)." The availability of only this research report suggests to the public that costs of the system are a central issue for the Task Force, despite the purpose of the *ATI Act* and the Task Force's mandate, neither of which highlight costs. In addition, the website does not include any critiques of this review report, even though the Information Commissioner publicly stated that:

"In my view the study is profoundly flawed, because there was no effort to determine fairly the "per request" costs in departments which manage well the access function and compare that cost with the "per request" cost in departments which manage the function poorly."

Recommendation 1: The Task Force's work plan, including research topics, identity of researchers, and results of research, should be made available to the public and published on the Task Force's website as soon as possible, and definitely well before the Task Force completes its report.

Recommendation 2: Documents that have been produced since 1993 that in any way concern the views of federal government departments, ATI officers and coordinators should be made available to the public and published on the Task Force website as soon as possible, and definitely well before the Task Force completes its report.

Recommendation 3: The Task Force should put a contract to public tender to conduct a review of the benefits, in terms of money saved and likely potential harms and wrongdoings prevented, resulting from the requirements of the *ATI Act* and the access to information system.

Recommendation 4: Given the significant flaws in the Task Force Review process, the federal government should provide all information gathered by the Task Force as well as sufficient funding to a more independent entity (such as the Law Reform Commission of Canada; a Joint Senate-House of Commons Committee; the

Information Commissioner; a public inquiry) to conduct a full and more independent review of the federal *ATI Act* before amendments to the law are introduced by the government. Such a review should include public hearings across Canada, and follow the new draft “Policy Statement and Guidelines on Consulting and Engaging Canadians.”

III. Scope of the Law

(a) Range of Institutions

In the last two decades of downsizing, privatization, deregulation and fiscal restraint, more and more traditional government functions, such as airports and air traffic control, postal services, and the provision of blood and blood products, have been transferred out of the civil service. More and more governmental responsibilities are being devolved to multi-governmental partnerships, government-industry consortia, trade associations, consultants and advisory groups.

In 1999, the Auditor General investigated the situation at the federal level in Canada and found “that the federal government had entered into at least 51 collaborative arrangements with other levels of government or the private or voluntary sectors to deliver services, at a cost to the federal taxpayer of about \$4.5 billion each year . . . and 26 arrangements where the federal government had delegated decision making to a partner.”

As these functions leave government so, too, does accountability for and accessibility to the records of these new institutions. The Auditor General’s audits found that, often, “essential accountability mechanisms” were not in place such as performance reports to Parliament, complaint and redress mechanisms and rules on conflict of interest.

Other jurisdictions that have created these new instruments of governance have not allowed records to escape coverage of access to information laws and policies.

The following recommendations are aimed at ensuring that the *ATI Act* covers these institutions:

Recommendation 5: As in the United Kingdom, the *ATI Act* should be amended to require Cabinet to add an institution to the list of institutions covered by the law if the institution (or information it maintains):

- is funded in whole or in part by the federal government;
- is an administrative part of the institution of Parliament (including Minister’s offices);
- is wholly or majority owned by the federal government;
- is owned by a parent institution, which is wholly or majority-owned by the federal government;
- it or its parent institution managed by one or more people appointed under federal law;
- performs functions governed by federal law; or
- performs essential public interest functions (i.e.. in the areas of health, safety, environmental protection, economic security).

Recommendation 6: The *ATI Act* should be amended to require that all contracts entered into by institutions covered by the law include a clause that ensures records generated during the contract remain in the control of the institution and covered by the access law.

Recommendation 7: The *ATI Act* should be amended to explicitly cover records held in the offices of Ministers and the Prime Minister, which relate to their functions as public officials or their departments.

(b) Exemptions and Exclusions

Subsection 2(1) of the *ATI Act* states that “necessary exemptions should be limited and specific” that bar the availability to the public of government information. Unfortunately, experience has shown that several exemptions and exclusions in the *ATI Act* are not limited or specific enough to ensure that key information is publicly available.

The 1987 House of Commons Justice Committee, successive Information Commissioners and several other commentators have recommended, based on several case situations, changes to exemptions and exclusions to remedy this problem. One of the key, overarching proposals is to change some excluded documents (which cannot be reviewed by the Information Commissioner or the courts) into exempt documents (which can be reviewed).

The following recommendations, in part based upon the recommendations of others, are aimed at ensuring that the spirit of subsection 2(1) is upheld:

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

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

Recommendation 10: All exemptions in the *ATI Act* should be discretionary, not mandatory.

Recommendation 11: A proof-of-harm test and public interest override (as in B.C. and Alberta) should limit the discretion, under all exemptions, to withhold a record.

(c) Conflict with Other Laws (Paramountcy Issue)

Issues concerning scope of the *ATI Act* arise in another way. The “paramountcy” rule in section 24 states that information collected under several other laws is excluded

from access requirements. Both the 1987 House of Commons Justice Committee report and successive Information Commissioners have highlighted the problem for access rights that section 24 causes, as the number of listed laws has grown from 33 in 1983 to 52 today.

Recommendation 12: Given that the *ATI Act* contains more than adequate exemptions and exclusions, section 24 of the law should be repealed.

IV. Fees - The Public Should Not Have to Pay Twice

As noted above, the Task Force has made public only one research paper, and it addressed the financial costs of administering the *ATI Act*. The release of this paper, other past statements by government officials, and the federal government's current policies on "cost recovery" have made it clear that the government is focused upon the financial costs of providing access, as opposed to the financial and other costs of secrecy and the financial and other benefits of open and transparent government.

Fees in an access to information system are clearly a deterrent to access, especially if the fees are high or payment is required not only for basic access applications and search time, but also to recover the costs of creating the information in the first place. Such cost-recovery fees are contrary to the spirit of access to information, are wholly unjustifiable and serve only to reinforce unequal access to information based on ability to pay. The public pays the costs of government, including the costs of creating all government records -- they should not have to pay excessive costs to gain access to these records.

As in many other areas, the cost-benefit analysis conducted by government concerning fees for access likely neglects to take into account key factors. For example, the current \$5 application fee results in the administrative costs of recording and depositing the fee payment (including financial institution service charges), costs that would be eliminated if the application fee were eliminated.

The following recommendations are aimed at ensuring that fees are not in any way a barrier to access:

Recommendation 13: Because fee changes can have a significant impact on the use of the law, they should only be made based on solid evidence about the likely effect of proposed changes.

Recommendation 14: Given that it is an unnecessary and unjustifiable barrier to access to information, and that processing the payment of the current \$5 application fee results in administrative costs for the federal government that exceed the application fee, the application fee should be eliminated.

Recommendation 15: The 5 hours of search time included with each access request for no extra charge should be increased to 10 hours given that the lack of an efficient information management system in many departments currently causes excessive

search time, and the current \$10 per hour search and preparation fee should not be increased.

Recommendation 16: No requester should be required to pay a fee simply to view records.

Recommendation 17: Copying fees should be standardized across the federal government and strictly limited to reflect the fact that the public already pays for the creation and maintenance of all government information, and should never exceed market rates.

Recommendation 18: The criteria for waiving fees should be expanded to include a consideration of whether the payment will cause financial hardship for the requester, as in Ontario.

V. Administration Issues - Barriers to Access Must be Lowered, Not Raised

As the Information Commissioner notes in his 2000-2001 annual report:

“There is a belief, widespread in government, that the right of access is being abused by frivolous requesters and bulk or business requesters. That belief is demonstrably false.” (p.17)

The strength of this belief in government could lead to changes to the system to add clearly unnecessary barriers to access. This belief has become one of the government’s regular excuses for unnecessary delays in providing access, instead of addressing in constructive ways the demands caused by increases in the number and range of information requests.

The recommendations set out below are aimed at ensuring that unnecessary administrative barriers are not added to the system, and aimed at lowering current barriers.

Recommendation 19: The federal government should provide adequate funding and staff, including increasing the resources of the office of the Information Commissioner and offices of access to information coordinators, to ensure that all information management measures and tasks are carried out to the highest standards of conduct.

Recommendation 20: The federal government should not, in any way, amend the *ATI Act* or change the access to information system to give the government the right to deny access based on an opinion that the request is frivolous or abusive.

Recommendation 21: The federal government should not, in any way, amend the *ATI Act* or change the access to information system to limit the number of requests per person or entity in a specified period of time.

Recommendation 22: The federal government should not, in any way, amend the *ATI Act* or change the access to information system to require dissatisfied requesters to await the completion of a departmental review process before making a complaint to the Information Commissioner.

Recommendation 23: The current prohibition in the *ATI Act* on disclosure of the identity of a requester without the consent of the requester should be maintained.

Recommendation 24: The *ATI Act* should be amended to include electronically stored information (e.g. voice-mail, E-mail, computer conferencing etc.) explicitly in the definition of recorded information, and to give requesters the right to request a record in a particular format if it exists in various formats.

Recommendation 25: The federal government should not sell government databases or other data or information assembled or compiled in a particular format but instead should provide a reasonable number of copies of such records to any requester for free.

Recommendation 26: The federal government should allow unrestricted copying or other means of reproduction of government information without payment of a copyright fee.

Recommendation 27: The federal government should increase its public education program concerning the access to information system.

VI. Enforcement Measures- Must be Strengthened

The importance of enforcement measures, whether the powers of the Information Commissioner, government policies and disciplinary systems, protections for those who report violations, or penalties, should not be underestimated. Past experience throughout the history of Canada makes it clear that, without strong and effective enforcement, laws and regulations are literally “paper tigers.”

While it may be debatable exactly which enforcement measures have exactly what effects, it is clear that for any legal system to work the overall incentives to comply with the rules of the system must outweigh the incentives to violate the rules.

Currently, the incentives to violate the federal access to information system in many ways outweigh the incentives to comply. Changes to enforcement measures are key means of reversing the current situation to encourage strict compliance with the rules of the system.

(a) Powers of the Information Commissioner - Must be Expanded, Not Restricted Further

The Information Commissioner, of course, plays a key role in enforcing the *ATI Act* and administration of the system. However, the Commissioner lacks key powers that

have proven to be, if not essential, at least very effective in ensuring systemic compliance with access to information laws in other jurisdictions.

The recommendations set out below are aimed at ensuring that the powers of the Information Commissioner are expanded in key ways:

Recommendation 28: The *ATI Act* should be amended to give the Information Commissioner the following explicit powers:

- as in the United Kingdom, Ontario, B.C. and Quebec, to order the timely release of any record covered by access rights in the *ATI Act*;
- as in the United Kingdom, to order the release of any record if the release is in the public interest;
- to order that an institution be covered by the *ATI Act* if the Commissioner is of the opinion that the institution falls within criteria for coverage in the *ATI Act*;
- as in Ontario, the power to obtain from government institutions any statistics concerning administration of the law in order to prepare performance-based reports on the institutions;
- to order the amendment of government policies or guidelines, including fee schedules, if the Commissioner is of the opinion that the policies or guidelines do not adhere to the spirit and intent of the *ATI Act*;
- as in the United Kingdom, to issue directives (including requiring the submission of a compliance plan) to correct patterns of violations of the *ATI Act* by government departments, and to penalize violators of the *ATI Act* or related government policies and guidelines.

Recommendation 29: The *ATI Act* should be amended to require the government institution to prove that the withholding of information meets the criteria of any exemption or exclusion.

Recommendation 30: The current powers of the Information Commissioner should not be further restricted in any way.

(b) Delays - Penalties Must be Imposed

Under subsection 10(3) of the *ATI Act*, access delayed beyond the time limits in the law amounts to access denied. Despite this clearly stated principle, and concern expressed by the 1987 House of Commons Justice Committee and successive Information Commissioners, between 40-50% of all complaints lodged with the Information Commissioner still concern delays.

The recommendations set out below, based on the recommendations of others, are aimed at curing what former Commissioner John Grace called the “festering, silent scandal” of the federal access to information system.

Recommendation 31: The *ATI Act* should be amended to prohibit the use of any of the discretionary exemptions if the response time limits in the law are exceeded.

Recommendation 32: The *ATI Act* should be amended to prohibit the charging of any fees if the response time limits in the law are exceeded.

Recommendation 33: The *ATI Act* should be amended to prohibit extensions of the response time limits in the law beyond one year without the permission of the Information Commissioner, and to permit complaints about delays beyond one year with the permission of the Information Commissioner.

Recommendation 34: The *ATI Act* should be amended to require government institutions to report annually the percentage of requests received which were not responded to within the response time limits in the law, and to provide reasons for the delays.

(c) Implementation - Clarity, Accountability and Training Will Help End the Culture of Secrecy

Both the former Auditor General and successive Information Commissioners have repeatedly identified the "culture of secrecy" as the main obstacle to openness and accountability.

In his final report of February 2001, the recently retired Auditor General summarized his conclusions about the causes of this culture:

"Part of the problem is the nature of Canadian politics. There is a reluctance to let Parliament and the public know how government programs are working, because if things are going badly you may be giving your opponents the stick to beat you with. And even when a minister is not personally concerned about this, senior public servants assume this fear on the minister's behalf. The people who write government performance reports seem to try to say as little as possible that would expose their department to criticism.

. . . In every Westminster-style government, ministers are responsible to Parliament for the state of their departments. Unlike other countries, however, Canada has never modernized its doctrine to distinguish between the minister's area of public responsibility and that of his senior public servants. To me, there is a certain lack of realism in holding ministers ultimately accountable for everything. Overall, our system makes it difficult to be candid and therefore Parliament has a hard time in discussing certain issues with officials." (p. 86)

In his 2000-2001 report, the Information Commissioner stated that:

"The greatest shortcomings in the right of access are not shortcomings in the words of the Act but in the deeds of those who administer the Act." (p.16)

"Despite the strong legislative exhortation to openness, and the narrowly worded exemptions from the right of access which I referred to previously, the Act is administered all too often as a secrecy statute. All too often the test used by

officials is: "if in doubt, keep it secret" - a test which has been specifically rejected by the Federal Court."(p.19)

These references to Information Commissioner and Auditor General concerns are brief overarching statements that reflect concerns documented in several reports by each office that have detailed extensive problems in many areas, and solutions.

The following recommendations, based in part on these reports and also on practices in other jurisdictions, are intended to open up the culture of secrecy by strengthening the overall accountability framework regarding information management:

Recommendation 35: As in other countries, Canada should modernize its doctrine to distinguish between a minister's area of accountability and that of senior public servants to help ensure that secrecy is not used unjustifiably to protect ministers from accountability.

Recommendation 36: The federal government should establish a clear and comprehensive information management policy and administrative framework based on effectively fulfilling the legal requirements of the *ATI Act* and adhering to the following key, democratic principles (which could also be added to the *ATI Act*):

- maintenance of government information as an essential national resource;
- routine disclosure and active dissemination of most government information to the public; and
- complete and easily accessible assistance to help the public find and gain access to government information.

Recommendation 37: As in the U.S., United Kingdom, Australia and New Zealand, the federal government should amend the *ATI Act* or enact a separate law to require a clear, accurate, detailed, meaningful and useable record be created and routinely disclosed (and preserved for an appropriate period) of each government institutions' organization, functions, policies, decisions, procedures and essential transactions to ensure that the details of each action by the institution are accessible to the public.

Recommendation 38: The federal government should amend the *ATI Act* to require all government institutions to maintain a public register listing all records, including all public opinion surveys, maintained by the institution, and all records which have been released under the law.

Recommendation 39: The federal government should implement a public Internet access system for the Coordination of Access to Information Requests System (CAIRS) database so that the public can easily track the subjects and government institutions about which information has been requested.

Recommendation 40: The federal government should clearly define and assign responsibility for information management in all government institutions, and clearly coordinate this responsibility with key information management government institutions (e.g. Office of the Chief Information Officer, National Archives,

Information Commissioner, Privacy Commissioner, Auditor General, National Library).

Recommendation 41: The *ATI Act* should be amended to clearly define the role, responsibilities and legal duties of access to information coordinators to ensure that coordinators have a clear mandate, powers and discretion to release records as required by the law.

Recommendation 42: The federal government should establish orientation and training programs to raise the awareness of all public servants of their responsibilities for government information under the *ATI Act* and related government policies and guidelines, and to increase the skills of public servants in access to information management.

Recommendations 43: The federal government should, as it does with finance, equipment and human resources, regularly audit the information systems of government institutions.

Recommendation 44: The *ATI Act* should be amended to require all government institutions to participate fully in the Depository Services Program (DSP), to ensure that all government publications, regardless of format, are regularly and consistently made available to the public by being deposited into the network of libraries across Canada covered by the program.

Recommendation 45: The federal government should amend all laws that concern government information management to include an anti-avoidance measure that makes it a violation to fail to uphold the spirit and intent of each law.

(d) Whistleblower Protection - A Much-needed Protection

The Information Commissioner, and several other commentators, have recommended protections for so-called “whistleblowers” -- public servants who report government wrongdoings -- as a key measure for opening up government, in addition to the measures set out in the section above.

The following recommendations are aimed at creating an effective system of whistleblower protection.

Recommendation 46: The federal government should enact a whistleblower protection law that has the following characteristics:

- applies to public servants and political staff;
- creates an entity that has full investigative powers and adequate resources, and that reports only to Parliament;
- gives whistleblowers the right to complain anonymously to the entity about violations of laws, regulations, government policies or guidelines;
- protects whistleblowers who reveal their identity from retaliation of any kind if their complaint is proven true; and

- rewards whistleblowers whose claims are proven true with a portion of the financial penalty assessed against the violators of whichever law has been violated.

Recommendation 47: In accordance with the above-recommended enactment of a whistleblower protection law, the federal government should change its guidelines for public servants to replace the principle of “loyalty” with a duty “to obey the law.”