

**REPORT ON CONSULTATIONS TO REVIEW THE ACCESS TO
INFORMATION ACT AND ITS IMPLEMENTATION**

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*This report was prepared by David Zussman,
President, Nancy Averill, Director of Research
and Methodology, and Geneviève Lépine,
Research Assistant.*

*The report reflects the issues identified by
stakeholders in roundtables, written
submissions and telephone interviews.*

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1.0 EXECUTIVE SUMMARY

Open and accountable government is the foundation for public trust in government. The ongoing validation of a government's legitimacy is the ability of citizens to hold it accountable for decisions taken. Effective accountability depends on citizens having access to the information upon which these choices are made.

In 1983, the *Access to Information Act*, (the *Act*), was enacted by the Government of Canada to provide Canadians with the broad legal right of access to information recorded in any form and controlled by most federal government departments.

In August 2000, the federal government launched a comprehensive review of the Access to Information (ATI) framework and in March 2001, the Public Policy Forum (PPF) was awarded a contract to conduct roundtable consultations with stakeholders outside government with an interest in access to information. The PPF issued 480 invitations and convened four roundtables between May 23 and June 6. A total of 59 participants from public interest groups, the media, business, academia, and labour attended the roundtables. The PPF interviewed and received written inputs from approximately 100 invitees and experts.

By and large, stakeholders agreed that the *Act* continues to provide a comprehensive legal framework for its intended purpose. They support the concept of an act of Parliament setting out the principles that citizens have a right to government information, that this right has limitations and that decisions taken on whether or not to release information should be independently reviewed. Continued equality of access to all Canadians and permanent residents of Canada was strongly supported.

Much roundtable discussion centred on the changes in the relationship of citizens to their government in the last 18 years. Technology has had a major impact on government record keeping systems and on citizens' expectations for record availability. The *Act* anticipated and provides coverage for records in a variety of formats including electronic records. Internet access, however, has given Canadians the capacity for instant information retrieval and government is now challenged to create both a technology based access process and a record management system that provides more on-line information.

A major concern for consultation participants was the lack of commitment by government to the spirit of the *Act*. As originally drafted, the *Act* was meant to complement existing mechanisms for access. Over the years, however, stakeholders have noticed a discernible shift in focus to managing and expanding exemptions. We were told that requests often take years to process, that expensive search fees are often assessed as a deterrent to filing requests, and that inconsistent records management systems mean that some records cannot be found. Many feel that the *Act* has become a shield to deny access rather than a guide to providing openness.



Many of these administrative irritants could be mitigated if Treasury Board assumed the management responsibility vested in it by the *Act*. Standardizing government record management systems, establishing criteria for automatic release of most records and setting government-wide performance standards for processing requests would go far to meet stakeholder expectations and to promote the climate of openness originally intended by the *Act*.

Stakeholders also identified areas where the *Act* requires legislative revision. Exemptions for information received from a third party, maintaining Cabinet confidences for 20 years and charging a fee for records were all considered areas where the *Act* had not kept pace with citizens' expectations.

Government business is increasingly conducted in partnership with private entities and by a variety of Crown corporations and government agencies that carry out public responsibilities. Currently, the records of many of these public-private partnerships are not accessible because of the third party exemption provided by the *Act*. Access to records of Crown corporations varies depending on whether or not they are listed in the *Act*'s schedules. Stakeholders were adamant in recommending that access to records of public-private partnerships and of Crown corporations be expanded and subject to a test based on the relevance of the information to the public interest rather than on the institution that holds the record.

Cabinet confidences are currently exempt from access for a period of 20 years. The 20-year period was considered arbitrary and most participants recommended a more pragmatic system for earlier release.

A \$5.00 application fee is currently charged for each access request. Additional processing fees for file searches and photocopying are sometimes also charged. Most stakeholders were of the opinion that fees should not be charged at all and that the cost of providing citizens with access to government documents should be borne as a cost of good government.

This roundtable consultation process has collected the inputs and recorded debate among non-government stakeholder interests. The ATI Task Force review process also includes separate consultations with the public service, research, the advice of an external advisory group and the receipt of submissions from the public. Clearly, revisions of the *Act* must balance the interests of four groups: the public, Parliamentarians, the Cabinet and the public service.



2.0 INTRODUCTION

2.1 Context

In August 2000, the Government of Canada launched a review of all components of the Access to Information (ATI) framework, including the *ATI Act* itself, the policies and regulations that guide it, and its implementation.

The ATI Review Task Force was given the mandate to conduct a broad review of the legislative and administrative aspects of access to information and to make recommendations for improvement to the Secretary of the Treasury Board (TBS) and the Deputy Minister of Justice in the fall of 2001.

The *Access to Information Act*, adopted in 1983, gives Canadians and any person present in Canada the broad legal right of access to information under the control of most federal institutions - with some exceptions such as personal information or information related to national security. The *Act* created the Office of the Information Commissioner (IC), an Ombudsman appointed by Parliament to investigate complaints from people who believe they have been denied their rights under the *Act*. The Minister of Justice is responsible for the access to information legislation and the President of the Treasury Board is responsible for its administration.

Why a review?

The federal government has deemed it important to review the *Act* and its application and determine whether they are still current in light of the many changes in policy making and in the context in which the *Act* has operated over the last 18 years.

The *Act* was previously evaluated under a number of review initiatives by Parliament. In July 1983, Bill C-43 was proclaimed into force, providing for a comprehensive review by a Parliamentary Committee of both the *Access to the Information Act* and the *Privacy Act* to begin within three years. In March 1987, the Standing Committee on Justice and Solicitor General released its review of the *ATI Act*, entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Later that year, the Government released its response, *Access and Privacy: The Steps Ahead*, and most administrative recommendations of the committee report were implemented, but not the legislative ones.

In 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* to make it an offence for anyone to destroy, falsify or conceal a record, or to counsel anyone else to do so.

In 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.



In addition, annual reports by the Information Commissioner provide an ongoing review and assessment of the workings of the *Act*.

External Environment

The external environment in which the *Act* operates has changed tremendously over the course of its existence. We have undeniably entered the information age. The exponential increase in the movement of information, technology, goods, services, knowledge and people across borders, otherwise known as globalization, has transformed citizens' views of the role of their governments, and has altered their expectations in terms of services. The public now expects to receive more information more quickly and about more subjects than in previous decades.

The structure of government has changed as well, as a result of management trends, privatization, the creation of new independent agencies, and the increasing use of complex financial and management partnerships with the private sector and with non-governmental agencies.

New information technology

Information and communications technologies have emerged that provide opportunities for new strategies to link citizens with their governments. The World Wide Web, the Internet, and electronic mail pose challenges in terms of defining what constitutes information, a record, how government-held information can be aggregated, linked and disseminated, and how it can be accessed by citizens. However, initiatives such as government-on-line and e-government have the potential to truly capture the opportunities for providing government-held information to citizens that the new knowledge economy presents.

In electronic format, government records can be inventoried, classified, updated and transmitted. Government-held information has the potential to become a tradable commodity and this creates a whole series of issues regarding the realization of value for information while providing the right of access.

While information technology has enabled the creation and transmission of comprehensive databases of government-held information, these new technologies have also created concerns about protection of individual privacy.

New expectations

Alternative Service Delivery (ASD), e-government, and the concept of citizen-centred services have also created increased expectations in terms of the speed and effectiveness of information transfer between governments and their citizens. As a result, the *Act* must be reviewed to ensure that it meets these expectations.



2.2 Methodology

Consultative Roundtable Process

At the request of the ATI Review Task Force, the Public Policy Forum undertook a consultative roundtable process. The Public Policy Forum is a neutral, independent organization capable of receiving, analyzing and reflecting the viewpoints of all interested parties. As such, we have tried to ensure that the views expressed in this report fairly and accurately reflect all expressions of support and concern about the *Act* and its implementation.

From May 23 to June 6, the Public Policy Forum convened four roundtables involving those outside of government with an interest in access to information.

During the consultation process, every effort was made to ensure maximum input and transparency. To achieve this goal, the following methods were applied:

- 1) The Public Policy Forum established and maintained a Web site to enable interested parties to consult relevant material, including background material, a Convening Paper summarizing inputs received by stakeholders, and roundtable outcomes reports. (See details in *Stages of the Consultative Roundtable Process* below.)
- 2) The Public Policy Forum identified and sent out invitations to some 480 organizations and individuals to participate in roundtables and / or to submit comments.
- 3) In cases where individuals or associations were unable to attend a roundtable, the PPF sought to conduct telephone interviews to ensure that their views were included.

All interviews and written comments received were summarized into a Convening Paper, which was posted on the PPF Web site. All written comments were considered for this final report. The Convening Paper has been appended to this report (Appendix C).

Stages of the Consultative Roundtable Process

A number of groups were identified as being the primary stakeholders of access to information, such as publishers of government information, academics with an interest in access to information and its implementation, public interest groups, the media, business, etc. The Public Policy Forum and the ATI Review Task Force sought to identify key representatives from each of these groups, as well as individuals who are active in the access to information process.

Examples of the primary sectors identified include:

- ⌚ Aboriginal groups;
- ⌚ Academics having published articles related to access to information;
- ⌚ Academics with an interest in governance;

- ⌚ Associations representing genealogists and historians;
- ⌚ Business and business associations;
- ⌚ Former Information Commissioners, federal or provincial;
- ⌚ Journalists who are users of or have reported on access to information or closely related governance and public administration issues;
- ⌚ Labour unions;
- ⌚ Lawyers in the field of access to information;
- ⌚ Non-governmental organizations with an interest in access to information; and,
- ⌚ Individuals or organizations who have self-identified and who meet the above criteria.

A preliminary list of 397 potential participants (groups and individuals) was developed after consulting with a variety of sources, including the PPF database, PPF members, and known ATI experts and users. In addition, the ATI Review Task Force identified 120 stakeholders. The two lists were combined to create a stakeholder list of 420 names. Where possible, umbrella organizations that could represent the interests of a specific group of users were identified.

Telephone calls were made to all 420 identified stakeholders to determine their interest in attending a roundtable on access to information. During these verification calls, another 60 stakeholders were identified. A final list of 480 stakeholders was prepared.

The 480 identified stakeholders were sent a letter of invitation to attend one of the four roundtables. The letter requested that the invitation be circulated to any other potential participants. Many umbrella groups circulated the letter of invitation to their member organizations. Therefore, the invitation received a broader circulation than the 480 original invitations. Anyone who was interested in participating in one of the roundtables, but did not receive an invitation, had the opportunity to complete a registration form on the PPF Web site or to contact the PPF via electronic mail.

The invitation letter requested that participants submit one or two pages of written comments in point form highlighting their key concerns and issues by May 4, 2001. These points would be summarized to help guide roundtable discussion. Many invitees had not yet responded by the registration deadline of May 1, 2001. Initial discussions with potential participants indicated that, for many, there was insufficient time to prepare written inputs. An interview protocol was then designed to facilitate over-the-telephone interviews.

The PPF called 305 invitees to determine whether they had received the invitation and to offer them the opportunity to provide their input through written comments or by telephone interview, regardless of whether they planned to attend.

In addition, the PPF consulted with numerous individuals to obtain a variety of perspectives on the context of access to information, to seek advice on the design of the consultation process, and potential participants. In total, the PPF obtained written inputs, interview comments and advice from approximately 100 individuals and organizations.



Information on the roundtables was posted on the Public Policy Forum’s Web site to generate additional participants and inputs.

Many invitees were unable to attend the roundtable designated for their group and were permitted to attend any one of the four scheduled roundtables. A total of 159 declined invitations were received. Reasons given for not participating included unavailability due to schedule, an insufficient amount of time between the date invitations were received and the date of the event, and concern over the review process not being sufficiently transparent.

A total of 77 invitees registered to attend a roundtable session. The final participant count was 59 individuals (See Appendix B for the Technical Report and Appendix E for the final Roundtable Participants List.)

All roundtables were conducted on a “not for attribution” basis, so that participants could feel free to voice any concerns or criticisms of the current *Act* and its administration.

The roundtables took place on the following dates: May 23, May 24, May 29, and June 6.

Because of time constraints, it was deemed logical by the ATI Review Task Force to hold all roundtables in Ottawa. Requests for assistance to cover travel costs were managed directly by the ATI Review Task Force.

An outcomes report was prepared after each roundtable and was sent to participants for review prior to being published on the Public Policy Forum’s Web site and on the ATI Review Task Force’s Web site. These have been appended to this report (Appendices E, F, G and H).

Table 1. Summary of Roundtable Statistics¹

Roundtable Invitees	480
Invitations Declined	159
Roundtable Registrants	77
Roundtable Participants	59
Inputs Received	+/- 100

¹ The Access to Information Review Task Force also convened a roundtable on March 26 with 17 participants, primarily historians, librarians, genealogists and archivists.

2.0 GENERAL OBSERVATIONS

Stakeholders tend to agree that the *Act* is essentially valid as it was written in 1983. They support the principles that underlie the *Act* and feel that the intent of providing public access to government-held information, as outlined in the *Act*'s purpose clause, reflects the importance of information-sharing between a government and its citizens in a democratic system. Freedom to access government-held information must be balanced against individual privacy, commercial confidentiality, security and frank communication needed for effective policy-making.

They also recognize that there are legitimate boundaries to what government-held information should be accessible given our tradition of parliamentary government decision-making based on both public debate and private advice. Defining or redefining the boundaries of accessibility will be a complex process to accommodate a wide variety of expectations, ideologies and practical administrative realities.

The major irritant with the *Act* relates to its implementation and administration, that is fees, delays, and inconsistency in its application. Many stakeholders feel that although the essence of the *Act* is sound, it continues to be applied inconsistently and in such a way as to contradict the principles of openness, transparency and accountability that underlie it. Some of the broader observations we heard were that:

- ⌚ The spirit of the *ATI Act* is not being enforced, as there is no political will to do so. The people who have the power to change it are the people who benefit most from its not working effectively.
- ⌚ The federal government has developed a culture of secrecy or siege mentality.
- ⌚ Access is impeded by a lack of consistency in the way information is stored.
- ⌚ There is concern regarding the improper withholding of information. Participants perceive that there are no punitive measures applied for this type of behaviour.²
- ⌚ There is also concern that the requester is at a disadvantage during the appeal process.
- ⌚ A change in the legislation will not eliminate the misuse of the *Act*.
- ⌚ Without changes in attitude at the top, changes at the edges of the *Act* would be pointless.

As the consultation was not based on specific reform options or results of research and analysis, the discussion remained at the general level, based on personal experience and perceptions. Many participants felt that the roundtable discussions would have been enriched if based on research findings, comparative analysis from other jurisdictions

² There is a provision in the legislation, Section 67.1, making it an offence to obstruct the right of access under the *Act*.



and/or reform proposals. The PPF proposes that consideration be given to further citizen engagement once the government has framed options for legislative and administrative reform

A final issue for the Public Policy Forum in conducting this consultative roundtable process was related to the various levels of understanding of the intent and scope of ATI legislation among the participants. ATI policy is an essential aspect of the accountability of government to its citizens and of our country's democratic health. Yet, a lack of understanding of the intent, scope and limits of ATI legislation among most of those who are affected by it became very clear to us during this consultative roundtable process. For example, participants were concerned that ministers were "meddling" in application processes. The *Act* specifically states that the Minister is responsible for deciding whether to refuse or grant access to documents. This responsibility is a constitutional one making the Minister accountable to Parliament, and ultimately to the public, for the actions taken.

Participants were also uncertain about the difference between privacy legislation and ATI legislation. This reflects confusion about where the reach of one *Act* ends and the scope of the other begins. A fundamental challenge facing those responsible for reviewing the *ATI Act* is to strike a balance between the public right to know and the need to protect individuals and the confidentiality of decision making.

There was also confusion about the distinction between Cabinet confidences and advice to ministers, as well as between exemptions made on the basis of Third Parties and exemptions made on the basis of personal privacy.

The ATI review could consider which public education strategies could enhance public awareness of access to information and of the *Act*.



3.0 ISSUES WITHIN THE SCOPE OF THE *ATI REVIEW CONSULTATION PAPER*

This section is based on the views of roundtable participants and stakeholders. It will address four broad issues related to access to information: Context, Scope (including Institutions, Information, and Right of Access), Implementation, and Redress.

3.1 Access to Information Context

In assessing how the Canadian ATI framework is working, it is important to look first at the general context in which the *Act* is administered: the evolution of the environment of government, of citizen expectations, and of the management of government-held information. Roundtable participants and interviewees had many comments regarding the current context for access to information.

Impact of access to information legislation

The statistics in the Annex of the *Access to Information Review Consultation Paper* (see Appendix A) indicate that Canadians do not use the *Act*. Stakeholders told us that:

- ⌚ The number of requests in one year (19,000) represents a small number of users, especially when frequent requesters are factored in.³
- ⌚ They could get the information they need without recourse to the ATI process, through “informal requests.”

Is the Purpose Clause still adequate?

The Purpose Clause (Section 2) of the 1983 legislation states that

- 1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions 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) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

We were told that the wording of the Purpose Clause and its intent were less an issue than the lack of commitment to access legislation. The fundamental issue is that everyone should be working from the same set of values.

³ The *ATI Review Consultation Paper* provides a calculation of the number of requests for the year 1999-2000: 19,294, but no information is collected regarding frequent users.



- ⌚ Most stakeholders suggested that the preamble to the legislation should speak of basic rights and the government’s responsibility to help citizens with access, but understood that the “purpose behind the *Act*” will not work unless those administering it believe in free and open information.
- ⌚ The majority of stakeholders felt that decisions regarding information release could be based on the content of the information itself rather than on the political interests of the government in releasing or withholding the information in question.
- ⌚ A few stakeholders argued that this review process should strive to increase public accountability, and emphasized that accountability is not the same as transparency. “Glass is transparent but can also be a barrier,” one participant stated.
- ⌚ Several stakeholders mentioned that the Purpose Clause of the *Act* should no longer refer to “records under control of the government,” but should be amended to read “under control of or in partnership with.” This would extend the scope of the *Act* to give access to some, but not all, private company information—only that relevant to public work.
- ⌚ The ATI legislation is sound in intent, but it was prepared as a fallback mechanism to access information. It was introduced on the premise that most government-held information would be made available automatically, with only a few exceptions. However, the *ATI Act* has become the first step in accessing government-held information.

Impact of technology on access

The wording of the 1983 *Act* reflects the mindset of its time. Expectations regarding access to information have risen in the last 18 years as a result of technology and real-time news. People now expect to be able to find answers to their questions with the click of a computer mouse. These expectations will continue to rise, and there are questions as to how the *Act* will accommodate the public’s increasing use of new information and communication technologies, as well as how government will make its electronic information available. We heard:

- ⌚ Government Web sites need to be completely redesigned as they load too slowly, and information is difficult to find on these sites. Web designers should be connected with those whose expertise lies in providing accessible information on the Web.
- ⌚ Not all sites are completely bilingual and a wealth of access to information expertise is unavailable to unilingual Canadians. In order to post information on federal government Web sites, the information must be translated, which can be costly.
- ⌚ Stakeholders emphasized that the *Act* would be more effective if it addressed better records management (including electronic mail) and the need for government-wide standards



Materials that should be routinely available

There was a general view that all government-held information should be made public, since its creation is funded by taxpayers. There seemed to be a strong view that the “grey area”—where there is a genuine issue of whether or not a document can be made available—should be relatively small. The people who pay for government—the taxpayers—have a right to see what government generates. Most government-held information should be accessible without formal filing of a request.

The *ATI Act* should be used as a last resort, as initially intended, to challenge a decision to deny access, and to help (over time) define and narrow the “grey area.” Instead, citizens are often told at the outset of a search for government-held information to file a request under the *Act*. Participants also made the following comments:

- ⌚ The hype and anxiety generated within the public service by the ATI process is out of proportion to the sensitivity of the material, given the innocuous type of information that is often being sought.
- ⌚ According to a number of stakeholders, all information should be considered accessible and public servants should be trained on how to obtain and provide it upon request.
- ⌚ One department, the Department of National Defence, provides a summary of the ATI requests to which it has responded.
- ⌚ Create guidelines regarding document classification that reflect a spirit of openness and train public servants on how to classify. Some public servants routinely classify documents as secret. Justify information classification by reference to the disclosure exemptions of the *Act*, or by “stale date,” the date after which an exemption on the release of a piece of information expires.
- ⌚ Delays are sometimes imposed to give the government time to make policy decisions. They are not due to a staffing shortage. In these cases, the information often comes through shortly after a policy decision is announced. Polls on which budget decisions are based often become available after the budget has been made public.
- ⌚ It may be justifiable to withhold the advice of an assistant deputy minister to his or her minister, but the non-disclosure of the data on which this advice is based is not justified.
- ⌚ A more prescriptive injury test—weighing the potential damage from the release of information against the benefit—might be a useful tool for determining whether or when information can be released.
- ⌚ Release *all* documents—including census data and Royal Canadian Mounted Police (RCMP) files—after the passage of a certain period, perhaps 40 or 50 years, suggested some stakeholders.



Denying access

Participants expressed the following concerns:

- ⌚ What was intended as the maximum amount of information to be released has become the minimum amount. The concept of openness must “start at the top” and public servants must be rewarded for openness.
- ⌚ Public servants now seem to be increasingly aware that the information they generate is a record, taking care to code and protect material they do not think should be released. They are concerned about the consequences of certain information being released. In many cases, public servants are not destroying or concealing documents—they are simply not creating them. The result is that knowledge regarding the decision-making process is lost.
- ⌚ Those providing advice to a minister sometimes produce “out-of-the-box” thinking. However, many do not commit it to paper, lest it be accessed and reported in the media.
- ⌚ Resources are applied to keep information from being released. A request often triggers a search for leaks, because it is thought to be the result of a tip-off. The incentives in the *Act* to deny access are much greater than the incentives to comply and give access.

In Summary

Stakeholders acknowledge the principle of access to government-held information as a keystone of our democratic system and process. They see the Purpose Clause of the *Act* as an accurate reflection of the principles necessary for openness between a government and its citizens.

However, the majority of stakeholders feel that there is a disconnection between the spirit of the *Act* and the way in which the *Act* is applied. There is a need to alter the culture of government, which tends toward managing exemptions rather than promoting openness, to ensure that the principles that guide the *Act* permeate the actions of all public servants. Most stakeholders proposed making public servants accountable for providing access to government-held information and to move from a mindset focused on ownership of information to one where public servants are “stewards” of public information.

Innovations in information and communications technology, along with a shift in the way government provides services to citizens, have raised expectations in terms of what should be accessible, the timeliness of response, and the quality of services.

Many stakeholders proposed a system where ATI legislation becomes a tool of last resort, with most information proactively and routinely disclosed by government.



3.2 Scope of the Act – Institutions

Should Crown Corporations be covered by ATI?

Some Crown corporations, such as the Canadian Broadcasting Corporation (CBC), Canada Post, and Atomic Energy Canada Limited (AECL), as well as some quasi-private organizations like NAV Can and the Canadian Medical Review Board, are not subject to the current *Act*. The PPF heard many comments about the anomalies created by these exemptions. For instance:

- ⌚ Some participants argued that CBC journalists make regular use of ATI in their work but, in a “flagrant conflict,” the CBC has used its exempt status to refuse to release information about itself. Over the years, a “culture of secrecy has strangled the place.” Salaries of television hosts on TV Ontario are disclosed under provincial law, while those on CBC are not as the latter is a federal Crown corporation not subject to the *Act*. This is an example of what happens to institutions that are not open, and it was argued that the CBC and other Crown corporations should be included under the *Act* for this reason.
- ⌚ Participants noted that potentially controversial information about AECL’s activities was exempted from ATI because the operation is a Crown corporation. It was argued that AECL must be competitive both in business and technology. AECL ultimately reports through a minister to Parliament, however, and is audited by the Auditor General, so there are public records of its activities. While AECL’s need to protect business secrets was acknowledged, there appeared to be a consensus among stakeholders that Crown corporations should not be exempted from the *Act* on that basis.

Public funding and confidentiality

We heard arguments that the price of public funding is the loss of a certain degree of privacy and confidentiality.

- ⌚ There was strong support among many stakeholder groups for the idea that no organization doing business with government and accepting public funding should be exempt from the *Act*. However, a blanket requirement to make all information available as a basis for doing business with the government would be impractical.
- ⌚ The issue of access to information on private or quasi-private government partners is growing in importance with the increased use of Alternative Service Delivery, which includes privatization of public sector organizations and the creation of publicly funded arms-length agencies.

When public sector organizations are privatized, access to information on their activities is usually lost. For instance, a non-profit organization housed at Corrections



Canada is exempt from the *Act*. There is no information available on the organization's spending of the public funds it receives.

- ⌚ The Canadian Medical Review Board, which has a volunteer board of members, provides full disclosure of its information. It was contrasted with the Canadian Foundation for Innovation (CFI), whose board members are paid, but which does not disclose information even though it uses public funds and acts for the public good.
- ⌚ Exempting private bodies even if they are performing a public function could be the “recipe for another Walkerton.” Commercial contractors should be considered public if they are performing a public function. A function does not cease to be public simply by virtue of being contracted out.
- ⌚ Business and business association representatives, on the other hand, argued in favour of maintaining some level of privacy and confidentiality in dealing with public-private partnerships to protect trade secrets and ensure their corporate competitiveness.

Cabinet confidences and advice to ministers

There was some confusion in stakeholders' minds as to the difference between Cabinet confidences and documents relating to advice to ministers. Section 21 of the *Act* deals with advice and recommendations to ministers, while Section 69 addresses Cabinet confidences, that is, information exchanged in the context of Cabinet meetings. The confusion arises from the fact that ministers, including Cabinet ministers, base their decisions on advice and recommendations received from the public service. Therefore, the two concepts are often discussed together.

Cabinet confidences

The current exemption of most Cabinet documents from the provision of the *Act* for a period of 20 years was a source of much debate but no resolution on reform measures. While the majority view was that there was a need for security of information around Cabinet decisions, the 20-year period was considered arbitrary. We heard the following recommendations:

- ⌚ We must define precisely what must be confidential. A stakeholder argued that the *Act* ought not to include Cabinet minutes.
- ⌚ The life of a Cabinet confidence should not extend beyond an election, argued some roundtable participants. Some felt that this should apply even if the government is re-elected.
- ⌚ Several stakeholders argued in favour of a clear timeframe after which Cabinet confidences would be disclosed. Release information within 30, 60 or 90 days of a decision. It is important to know what went into a decision; what options and



considerations were being weighed by decision-makers; what data they did and did not have; what information they chose to ignore.

- ⌚ The 20-year limit on Cabinet confidence disclosure may have been established to protect people until they died, but the time limit could be based on a lesser number of years or on the importance of maintaining a particular secret. For example, information regarding a Cabinet decision could be released when the government changes or when the decision is made. There could be value to having access to the underlying information sooner rather than later.
- ⌚ Some stakeholders emphasized that Cabinet *does* need to be protected. A roundtable participant argued that the Cabinet is not a Board of Directors running the country: it is both a co-ordinating device for government and a partisan group that operates as “a steering committee guiding the House of Commons.” Political parties are institutions of civil society and party business cannot be thought of as public information unless politicians are taking care of party business on public time.
- ⌚ Canada is the only one among the so-called Freedom-of-Information nations (Great Britain, New Zealand, Sweden) where Cabinet confidences can be excluded without any consideration.
- ⌚ A stakeholder argued that, at the Cabinet table, everyone is elected. They make comments that they know will be public at some point. This debate is only about when they will be public. If they are embarrassed, it will be because of the decisions made and the words spoken, regardless of the time elapsed.

Advice to ministers

Any consideration of earlier release of documents regarding advice and recommendations to ministers will have to take into account both political and practical considerations including Cabinet solidarity in decision making, national security and the ability of public servants to provide non-partisan advice in confidence.

- ⌚ A participant argued that any documents that might give the impression that a Cabinet minister made an uninformed decision should not be released. This is the point at which the confidentiality of information given to a minister becomes a matter of national security.
- ⌚ Cabinet ministers may not follow the “practical” advice of the public service. That advice may, in fact, be ill-founded. Politicians may be reluctant to say “I made the decision for political reasons,” but not all valid decisions are business-based.
- ⌚ If information regarding the Prime Minister and Cabinet is no longer to be exempted, then by the same logic, argued a participant, the diary from the leader of the Opposition could also be made available. Party information such as information about supporters threatening to pull funds unless certain action is taken could also be disclosed.



In Summary

What is private and what is public information when a private or quasi-private institution partners with government? While there are legitimate business concerns regarding disclosure, the majority of stakeholders felt that disclosure should be determined not on the basis of the organization which holds the information, but based on the content of the information itself in relation to the public interest.

Some participants argued that information generated using public funds should be available to the public. Private or semi-private institutions, as well as those Crown corporations that are currently exempt from the *Act*, should accept the loss of some confidentiality when doing business with government. Openness is a cost of being a partner with the federal government in business ventures.

Some participants called for a definition of the institutions covered by and exempted under the *Act*. There is a sense that it is unclear to many stakeholders how the *ATI Act* relates to other public policy acts in terms of institution coverage. Perhaps what is needed to ensure consistency and the elimination of gaps is harmonization with other public policy acts, such as the *Privacy Act*.

We noted uncertainty regarding the distinction between Cabinet confidences and advice to ministers.

With respect to Cabinet confidences and advice to ministers, there was no solid consensus among stakeholders in favour of a particular way of dealing with these issues. However, there appeared to be a near consensus in favour of a more pragmatic way of dealing with Cabinet papers than withholding them for 20 years.

Any proposed change requires a careful analysis of the broader implications for Cabinet's functions within our system of government. A solution to this issue that provides both flexibility and clarity is one of the biggest challenges the PPF foresees in the redrafting of the *Act*.



3.3 Scope of the Act – Information

Third Party information

Throughout the roundtable process, we noted uncertainty as to the distinction between Third Party information and personal information. Section 20 of the *Act* protects certain kinds of information furnished to a government institution by a Third Party. A Third Party is defined in the *Act* as any person, group of persons or organization other than the person that made the request or a government institution. Section 20 is designed to protect trade secrets, corporate financial or technical information, in that if the information were released, it might have an adverse impact on a group or an organization's competitive position.

As stated in the *ATI Act*, a record containing personal information as defined in Section 3 of the *Privacy Act* cannot be disclosed unless the individual to whom it relates consents to the disclosure; the information is publicly available; or the disclosure is in accordance with Section 8 of the *Privacy Act*.

Some participants were of the opinion that the Third Party exemption was used too often to deny access. Others were concerned that seemingly mundane information can compromise a business if made public. We heard:

- ⌚ Individuals and organizations whose information is held by government are concerned about what might be released, and want to maintain certain exemptions. Companies fear the impact that disclosure of information may have on their competitive positions.
- ⌚ An industry representative complained that because originators of requests cannot be identified, “we do not understand the context, and in many cases we would probably agree to their release but are forced to hire legal counsel to argue against the release.”
- ⌚ During a request for proposal (RFP) bidding process, an access request was received for the names and qualifications of employees listed on the bid. The subject of the request, the Third Party, had no way of knowing if the requester was a competitor or a head-hunting firm.
- ⌚ There are concerns about both cost and confidentiality when government requests information from private companies.

The Third Party exemption in particular is open to abuse. The best-drafted access legislation can be rendered useless by an overuse of the exemption. Use exemptions sparingly and on the basis of a thorough and persuasive rationale. An indication of the injury “intended to be avoided” by an exemption is required.



Balancing the public interest in access with privacy of individuals and confidentiality of business information

How can any information be provided without exposing personal information or threatening some private competitive advantage? The line between the public's right to know and the individual's right to privacy is an indistinct one. The discussion of public interest and privacy touches upon a range of issues (such as Third Party and personal information). We heard a number of suggestions on how to create this balance:

- ⌚ Make protection of confidentiality subject to the public interest override. Similarly, override the injury exemption if it appears that the *provable* public benefit of disclosure outweighs the potential injury to the individual or organization.
- ⌚ Make the class and injury tests in the present *Act* subordinate to a distinction based on a time limit⁴. There is no reason to protect RCMP documents regarding the 1919 Winnipeg General Strike or decades-old documents relating to the Cold War on grounds of “national security.”
- ⌚ The significance of some pieces of information may vary according to the context. For example, prison guards and RCMP officers have expressed safety concerns over the release of their names through the *Act* while unions have expressed frustration at not having access to information pertaining to overtime that they maintain might indicate abuse of employees. Stakeholders provided instances where the *Privacy Act* had been used to withhold this type of information.
- ⌚ A stakeholder suggested that the protection from release of information regarding police sources should end with the source's death.
- ⌚ The highly secretive process of food regulation is loaded with confidentiality and access issues. On the one hand is the security of very costly private sector research; on the other, public health and safety.
- ⌚ Health care is our largest spending area, yet much information is exempted. Accountability, authority, and sanctions are needed.

There seemed to be agreement that the ultimate test for confidentiality should be the question, “Does it serve the public good?” Although some concerns were expressed over individual confidentiality, there also appeared to be a consensus that too much information was being held back.

Information Management

Sometimes a simple phone call from an access officer to a requester to clarify exactly what is being requested could save a lot of time and effort. We were told that buried in

⁴ The *Access to Information Review Consultation Paper* states that an exemption based on the type of information is a class test, while assessing a possible adverse result from disclosure is an injury test.



the 18.7 percent abandonment rate for access requests is the “simply cannot find it” factor. It was suggested that perhaps a group of librarians could both categorize information and make it machine-readable and available electronically. Information management issues we heard:

- ⌚ A participant noted that drafts are often not dated, so the sequence of documents cannot be determined. Better use of electronic technology could eliminate this.
- ⌚ Even within government, it is extremely difficult to review 10 years’ worth of records because of the variety of electronic formats—many of them obsolete—in which the information is stored. There is a need for the standardization of information formats.
- ⌚ Some stakeholders suggested that government does not know what information it has. The information should be inventoried. Current information management practices are not designed to ensure that access is considered throughout a document’s lifespan; ATI requests should be anticipated.
- ⌚ Many stakeholders felt that the onus should be on government to expand its resources to make sure it can follow its own guidelines -- the 30-day deadline for response to a request, for example. This is necessary to ensure transparency.
- ⌚ In the past a file contained all the history of an issue. Today, a public servant taking over a file starts from scratch, and has no one to hand it over to when he or she leaves. Given the disorganized state of information within government, public servants are reluctant to spend the time required to become more open and transparent.
- ⌚ The lack of information management was and still is deplorable and contributes to the cost of ATI. Cutbacks have only made the problem worse.
- ⌚ While more resources would help, they will not change the fact that the information management task has been neglected at the business unit level. Records management protocols have not been followed, even though they are in place, and there is no accountability.
- ⌚ Make managers of business units within federal departments as accountable for information handling as they are for budgets. They often have limited knowledge of what information they hold and they do not apply the same importance to information as they do to managing their budgets.
- ⌚ In Quebec, it is mandatory to inventory all documents.



3.4 Scope of the Act – Right of Access

Should access be limited to Canadians or persons in Canada?

Currently, only Canadians and those present in Canada have a right of access under the *Act*. While some stakeholders felt that this issue was not crucial, those who addressed it generally saw no reason to limit access to information to “Canadians or persons in Canada.”

This clause was also considered to have been overtaken by technology—in the 21st century it might be a relatively simple matter for someone to find a person residing in Canada to submit a request for them.

The right of access discussion raised important questions regarding fees and fee structure. Stakeholders believe that originally, Section 4, which restricts access to Canadian citizens or persons resident in Canada, was included in the *Act* to ensure that in case of a flood of requests, Canadian taxpayers would not be paying the cost of requests by non-Canadians. A stakeholder suggested that a dual fee schedule be used as a compromise to provide access to non-Canadians. There was no resolution of this issue, although most stakeholders were not in favour of a dual fee schedule.

In Summary

Stakeholders were divided on the issue of right of access. Some felt that there should be equal treatment for all, whereby information is available openly to Canadians and non-Canadians alike, for the same price. Others felt that access to information is a service paid for by taxpayers, and that only taxpayers should have access to the information that they paid to create.

The majority of stakeholders felt that the exemptions provided in the *Act* are too broadly applied. The definitions of exemptions are too subjective. This is conducive to improper application of the *Act* by ATI co-ordinators and public servants in general.

When public funds are used to create information, these records become public information. Non-disclosure must be justified, and more detail should be given in cases of non-disclosure.

A shift in focus from one of secrecy to one of openness could be reflected in a policy of proactive release, where documents are classified for release automatically.

Participants generally agreed that more information should be made available more quickly, but that due consideration had to be given to protection of Third Party information for competitive purposes, as well as Cabinet confidences and documents pertaining to advice to ministers.



3.5 Implementation of the Act

Could the process for making access requests be made simpler and more effective?

Most of the criticisms of the *Act* concerned its implementation, more specifically the fee mechanism, delays incurred, and the lack of consistency that characterizes the application of the *Act* within and across departments. Most of the suggestions for improving the ATI process involved either human factors or technological solutions.

On the human side:

- ⌚ Otherwise intelligent and well-meaning public servants have come to see the release of information as a threat to their careers.
- ⌚ Public servants tend to regard themselves as owners rather than stewards of public information, and people working on access to information requests have an interest in *not* releasing the information.
- ⌚ ATI co-ordinators are “diligent and, in many cases, anxious to assist” in getting information quickly.
- ⌚ Some ATI co-ordinators are very good, especially to people who make a lot of requests, but taking one’s job seriously and trying to do it well may, for an ATI co-ordinator, be a career-limiting move.
- ⌚ Several stakeholders suggested having more “user friendly” ATI co-ordination as a potential solution. A simple phone call to a requester might avoid thousands of dollars in copying costs for pages that meet the wording of the request but do not contain the information sought. In addition to clarifying requests, such a phone call could redirect requests to more relevant source departments or individuals.
- ⌚ Except for ATI staff, no other public service job descriptions include ATI work. It falls under “other duties.”
- ⌚ There is a need for certification and training programs for ATI professionals. One college is looking into providing such a program.
- ⌚ Stakeholders agreed that a solution might imply simplifying the process. “It is not worth my time, as an amateur, to go through the *Act*.”
- ⌚ Those outside government often know more about programs than those working inside government do, since public servants can rotate through job assignments every 24 months.



On the technology side:

- ⌚ Online submission of ATI requests could be facilitated, with the fee automatically charged to a credit card. While some departments have online registration systems for other purposes, the ATI process is not yet equipped with such a mechanism.
- ⌚ Online access will only work if staff are trained to correctly classify documents as they are created. Online access mechanisms are only one component of an integrated information management system.
- ⌚ According to most stakeholders, good search engines and databases searchable by keyword or name would facilitate access by users. We are now training a computer-literate generation who will not automatically depend on a co-ordinator, but who will want to do research themselves.
- ⌚ Most stakeholders argued in favour of making all holdings available unless there is a reason to exclude a particular item, thus putting the emphasis on disclosure rather than exemption. They felt that most information should simply be placed on a publicly accessible electronic information system.

Timeliness

The *Act* provides for a response to an ATI request within 30 days. There is a perception that access requests are seldom processed in 30 days, and delays are a major irritant to applicants. The *ATI Review Consultation Paper* states that in 1999-2000, 63% of requests were dealt with within the 30-day limit. However, it should be noted that some participants argued that the process for compiling these statistics was flawed due to a lack of standardization in the application of the *Act* across departments.

- ⌚ Delays of up to two years were reported. The problem is not only the delay: no justification is given for the delay, nor any indication of when the information may become available.
- ⌚ Some stakeholders remarked that requests take longer today than they did five years ago, and that government applies the *Act* very subjectively.
- ⌚ There are fines and jail terms for non-co-operation with income tax and census laws. It was suggested that penalties also be applied for non-compliance with the *ATI Act*. However, it would be difficult to assess who is ultimately responsible for delays in replying to access requests.

Fairness of access and services

There was little interest in the concept of categorizing and classifying users: all requesters—including the media—should be treated equally. We were told that:



- ⌚ ATI requests from journalists and Opposition Members of Parliament do get special treatment—what the Information Commissioner described in a speech as “slower service, closer scrutiny and more conservative treatment from a misguided sensitivity to the Minister’s needs.”
- ⌚ Often the walls of secrecy go up when it is learned that a requester is from the media, but only when applying the public interest override should the source of the request become a factor.
- ⌚ Some stakeholders pointed out that the media may not necessarily know what the public wants, and there may be a limit to what the media needs to know. The onus, however, must be on the government to demonstrate that an exemption is necessary.
- ⌚ The first people to receive information should be the Members of Parliament, not the media, argued some stakeholders.
- ⌚ In the United States, requests from media are expedited, because they are considered to be in the public interest and speed is usually an issue. In Canada, our Parliamentary system of government makes public interest considerations less relevant.

Limiting access requests

- ⌚ Frequent requesters—typically people who are in the business of using the *Act*—are disruptive to the system, but if the *Act* were as easy to use as it ought to be, most of them would go out of business.
- ⌚ Frequent requesters were considered a symptom of the inefficiency of the *Act* as it is currently applied. Application processes vary from department to department, and within departments, so that only experts can successfully manage requests.

Fees

Currently, there is a \$5 application fee for every access request. Additional fees are calculated on the basis of \$10 for every hour of search and preparation over five hours, and the cost of reproduction of the record.

For many stakeholders, the charging of any fee for obtaining access to government-held but publicly funded information was a contentious idea. Many felt that mechanisms for cost-recovery ought not to be applicable to an instance where the creation of information has already been paid for by taxpayers.

A participant suggested that the costs related to ATI functions, compared to the total cost of government communications, is most likely “a drop in the bucket.”

Fairness



- ⌚ The majority of stakeholders felt that creating a hierarchy of users based on their ability to pay fees is contrary to the spirit of the *Act*. This is true when requesters are not-for-profit organizations. However, large organizations such as the Canadian Bankers Association and the Canadian Petroleum Products Institute are nominally not-for-profit organizations. Any waiver of fees designed to target organizations of modest means must therefore be carefully worded.
- ⌚ The views of most stakeholders reflect that it is the job of government to make information readily available. The premise of free dissemination is and should be the government mind set. Therefore, there should be concerns regarding the principle of charging fees for data.

Deterrence

- ⌚ According to stakeholders, the fee system was designed to avoid a flood of requests. Some roundtable participants suggested that there should be no fee for ATI requests for a trial period, to see if that assumption was justified.
- ⌚ Other participants noted that the government would not be inundated with ATI requests if there was no fee.
- ⌚ Even though large media organizations can afford the expense of ATI fees, it is often not within the budget of a particular program within such an organization, argued many participants. Many smaller, local media organizations do not have “deep pockets.”
- ⌚ Some stakeholders suggested that estimated charges tend to be “high-balled” in order to deter users.
- ⌚ The “not unimportant work” of a small organization without government funding could be side-tracked or killed outright by large ATI fees, according to a stakeholder.

Cost Recovery

- ⌚ Some stakeholders argued that the cost of collecting the \$5 fee probably exceeds \$5.
- ⌚ A participant noted that 18,000 requests for information were handled at a cost of \$20 million and a cost recovery of \$217,000. Cost recovery is not necessary if the object of the *Act* is to provide information. It should be perceived as a cost of good government.
- ⌚ Cost recovery is prohibitive to many people looking for information in the health and safety field. They turn to the Internet, where the information is not always reliable or useful.
- ⌚ According to a number of stakeholders, cost recovery could be “stamped out.” The public has already paid for the information by financing its creation.



- ⌚ Fees should be limited to covering the cost of copying.

In their discussion of fees, participants agreed to the basic principle that access to information should not be blocked. Information is a basic right in its facilitation of public debate. Many said that *any* changes to fees will have an impact on the use of ATI.

Accessing access statistics

- ⌚ Some participants remarked that ATI officers sometimes provide “discouraging” statistics to requesters on the number of cases “resolved” and the success rate. They indicate that the outcome is not likely to be in favour of the requester⌚without offering specifics. The Information Commissioner should have the authority to publish statistics on these outcomes and information release decisions.
- ⌚ It would be valuable to be able to use a database to see if a request had ever been made and answered before.
- ⌚ All access requests, updated with progress and results, should be made available on the Web, argued several roundtable participants.

Inconsistency and lack of co-ordination

Unpredictable disclosure decisions, lengthy delays and the inconsistent application of fees across government departments are symptomatic of a lack in co-ordination and information management.

- ⌚ Stakeholders have proposed that in order to address this problem, there needs to be a shift in the mindset of public servants, whereby they acknowledge that they are bound by the *Act*, and whereby access underlies their daily decisions regarding information management.
- ⌚ More work needs to be done at the front end of the classification process to ensure that non-disclosure is justified. Better information management could assure that information is easier to locate and to make available.

In Summary

Problems with implementation; delays; large fees; and the inconsistency of application across government departments could be resolved by a comprehensive information management system, and better trained ATI co-ordinators.

Specified timelines for response to applicants are frequently missed. Departments often fail to provide the information requested within the 30-day deadline indicated in the *Act*, and use the deadline instead to indicate to applicants that more time is needed to process their request.



In terms of fees, the crux of the debate centres on determining whether or not provision of government information to citizens should be absorbed as a cost of government or whether government should recuperate part of the cost of providing the service.

The lengthy delays and high costs levied for searches are symptomatic of the lack of consistency and co-ordination in the application of the *Act* across government departments. There is a need to improve and standardize the current information management system.

The development of centralized information management system was proposed as a means of reducing delays and costs.

3.6 Redress Process

The redress process serves as a tool for dealing with complaints regarding the ATI implementation process, including delays, fees, and disclosure / non-disclosure decisions. Here are some of the concerns expressed by stakeholders regarding the redress process:

- ⌚ Since results of redress are after the fact ⌚ after “useless” information has been received ⌚ most people give up and do not bother with the redress process. The really dangerous and disturbing trend is that by not providing information, the government has achieved what it intended. How is the public to find out about fundamental issues such as Somalia and the blood supply?
- ⌚ The government is in a conflict of interest, trying to administer the *Act* while fighting it in the Courts, claimed some stakeholders.
- ⌚ It is important to recognize that the redress process can be used equally by a party denied access to information and a party injured through the release of information.
- ⌚ A number of participants complained that the Office of the Information Commissioner should not be exempt from the scope of the *Act*.

Powers of the Information Commissioner

The Federal Information Commissioner plays multiple roles in investigating and resolving complaints and promoting access rights. The Commissioner makes recommendations to government institutions on individual cases and systemic issues, and makes regular reports to Parliament. As an Ombudsman, independent of government, he has extensive investigative powers but no power to make binding orders for the disclosure of records.

- ⌚ Some stakeholders suggested that the Information Commissioner’s budget should be voted on by Parliament as a separate item.
- ⌚ Giving the Information Commissioner order-making powers would legitimize the ATI process and result in greater access and develops binding precedents.



- ⌚ While order making powers could be a mechanism to expedite access requests, as a political appointee, the Information Commissioner should not be able to make binding ATI decisions without the participation of a board of advisors.
- ⌚ It was suggested that all departmental ATI co-ordinators could report to the Information Commissioner, just as all lawyers are attached to the Department of Justice.
- ⌚ Other stakeholders proposed that the Information Commissioner have judicial powers of decision, subject to appeal.

Investigative Powers

Many access to information users felt that the Information Commissioner would have more power to enforce the *Act* and fulfil his mandate if he or she had the right to collect information about the retrieval process, compliance, and delays in order to see where the problems are.

- ⌚ Under this model, it would be possible for the Information Commissioner to track a request through the system.
- ⌚ Some stakeholders were in favour of allowing the Office of the Information Commissioner to have the resources to monitor statistics, including departmental records on response to ATI requests.
- ⌚ The process and powers of the Ontario Information and Privacy Commissioner are superior to those of the federal Information Commissioner, and many argued that the Information Commissioner should have broader powers, including power over the government's information management system.

Improving the redress process

- ⌚ Many stakeholders recognized that a fatal flaw in the *Act* is that it lacks provisions for enforcement, and there are no incentives for voluntary compliance.
- ⌚ Canadian public servants might be less reluctant to share information if they had the sort of immunity from personal liability that their American counterparts enjoy.
- ⌚ Providing the Information Commissioner with the power to levy penalties was proposed as a potential solution. Lack of penalties rewards delays, exemptions and non-compliance. The penalty should be like a library fine, increasing with the delay.
- ⌚ Create a specialized tribunal to adjudicate compliance issues rather than the current model involving the Information Commissioner and the Federal Court.



In Summary

The redress process lacks the teeth necessary to enforce the principles of access to information legislation. Among proposed solutions, most dealt with increasing the independence and the powers of the Information Commissioner.

There was no consensus on whether or not the Information Commissioner should have the authority to issue binding orders to departments, and whether he or she should report to the Minister of Justice.



4.0 ISSUES OUTSIDE THE SCOPE OF THE CONSULTATION PROCESS

A number of participants commented on areas of concern outside the scope of the discussion paper. These concerns could be addressed in any potential future review of access policy. The following is a reflection of comments received both in written inputs and during the roundtable discussions.

4.1 The Consultation Process

A number of participants were unsatisfied with aspects of the consultation process. In particular, some were concerned that their participation in these discussions might be construed as an endorsement of the process. Some participants attended primarily to voice objections to the process, rather than to participate in the consultation itself. One participant voiced the hope that this would not be the only opportunity for consultation, that the public should be consulted in a meaningful way, following best practices in citizen consultation.

Specific objections from stakeholders included:

The compressed timeframe for the consultations. Although most invitations were sent in mid-April for roundtables taking place at the end of May and beginning of June, some invitees only had three weeks to register for a roundtable and to provide written inputs. All invitees were encouraged to forward invitations to other potential stakeholders and given that many invitations were issued to associations and umbrella groups, who forwarded invitations to their members, the turn-around time for many invitees seemed too short.

- ⌚ The process violates the draft guidelines for public participation now before Treasury Board.
- ⌚ Choosing the groups allowed to participate in the roundtable, rather than holding public hearings, is a “semi-privatization of the democratic process.” The ATI Review Task Force should consider contacting the 19,000 requesters of information from last year.
- ⌚ Some people declined to participate because they said they feared the process would be a “whitewash” of their opinions.
- ⌚ An academic who had written on ATI tried to obtain documents from the Department of Justice on previous work on revising the *ATI Act* and found that some were held back. He is not taking part in the process, as he felt participation would appear to be an endorsement.
- ⌚ The few minutes spent discussing exemptions at this roundtable did not really amount to an analysis or study. Public funds should be devoted to some basic research on the benefits and value of ATI.



Some participants felt that this roundtable had barely scratched the surface, and expressed disappointment that it was a major element of the public consultation process.

4.2 Merging Access and Privacy

Access and privacy are often seen as two sides of the same coin. Do we really need a separate Commissioner for each (they already share staff) or can the roles be merged?

- ⌚ Many stakeholders expressed the need for someone to focus solely on information. The focus on privacy is already overdone.
- ⌚ In the opinion of several stakeholders, if the roles were merged, privacy would always rule. Having two Commissioners prevents an imbalance in favour of either privacy or access. A participant noted that both roles are fulfilled by a single Commissioner in Quebec, and that Quebec very often leans towards increasing the protection of information.
- ⌚ Access issues are not privacy issues, a participant stressed. Privacy exemptions are used too much. There are real privacy issues but within the *ATI Act*, the protection of privacy is used to justify non-disclosure.
- ⌚ Another group of stakeholders felt that the roles of the Information and Privacy Commissioners should be merged. While the Information Commissioner must always balance the two values of privacy and access, the Privacy Commissioner is only concerned with “keeping it in.”
- ⌚ There is a definitive conflict between access to information and privacy. The purpose of the *Privacy Act* is to keep a “lock box” around information, while the principles guiding the *ATI Act* are rooted in openness.

A significant majority felt that the tension between the Offices of the Privacy Commissioner and the Information Commissioner provided an important balance.

4.3 Co-ordinating ATI across government

By order-in-council, government responsibilities for the *Act* are split between the Department of Justice and the Treasury Board. As a result, the Minister of Justice has the mandate to propose changes to the legislation as well as to provide legal advice to departments covered by the *Act*. The President of the Treasury Board has authority for day-to-day administration of the legislation across government institutions, issuing policies covering the *Act*'s interpretation and implementation as well as broader information policies. In discussions of the Treasury Board Secretariat's role in administering the *Act*, the recurrent theme was sharing of information and co-ordination of effort.

- ⌚ Costs could be reduced and speed improved if the TBS worked to co-ordinate performance standards and responses across departments.



- ⌚ TBS could work to identify and disseminate departmental best practices: for example, some departments post their ATI responses on message boards or in a “reading room.” TBS could standardize this practice across government.
- ⌚ A stakeholder offered an example whereby identical requests were placed with several departments, which in some cases yielded entirely different results. In other cases where identical requests were placed with several departments, the requester received the same document from all departments, but with different sections “blacked out” in such an inconsistent fashion between departments that the requester could piece together the document.
- ⌚ Alternative Service Delivery may further fragment the already-confusing body of government information, and adds weight to suggestions that systematic and consistent record-keeping is a necessity.

The *Act* was described as difficult to use because researchers may not know what the record they are seeking is called, or even if it exists. Departments should inventory their records in a common electronic format, searchable by a variety of criteria. This might go a long way to improve the present situation of “no rules and no standards.”

The necessary level of coordination cannot, however, be achieved without the involvement of a central agency.

During the consultative roundtables, we heard concerns from a few stakeholders over the release of historical data. These stakeholders argued that timelines for protecting historical information should be shortened, and that the information should be more readily available for research purposes. This issue was discussed extensively in a previous roundtable organized by the ATI Review Task Force, which collected the views of historians, librarians, archivists and genealogists about the *Act*.

5.0 CONCLUSION

The Public Policy Forum was very pleased to undertake this consultation of stakeholders and experts outside government on the review of the *Access to Information Act* and its administration. Public access to government information is an enabling feature of government's accountability to its citizens. A review of the practices and processes of access legislation is an opportunity for citizens and their government to mutually define a system that balances competing public interests against the realities of public administration. The issues raised and discussed in written inputs, in interviews and at the roundtables are of concern and relevance to all Canadians.

This report represents a summary of the viewpoints expressed on the contents of the current legislation, its practices and processes and possible areas of improvement by individuals and representatives from a wide variety of non-government interests.

Interested readers will find more detailed information in the summaries of each roundtable and the summary of inputs in the appendices, which follow.

This report has been posted on the Public Policy Forum Web site at www.ppforum.ca and the Task Force Web site at www.atirtf-geai.gc.ca.



Appendix A – Access to Information Review Consultation Paper



Government
of Canada

Gouvernement
du Canada

**Access to Information
Review Task Force**

**Groupe d'étude
de l'accès à l'information**

Access to Information Review Consultation Paper

March 30, 2001

We welcome your submission or written comments **by June 1, 2001**.
You may send your submission or comments to us by:

The Web : www.atirtf-geai.gc.ca

E-mail: ATIRTF@tbs-sct.gc.ca

Fax: (613) 946-6198

Mail: Access to Information Review Task Force
P.O. Box 1178, Station B
Ottawa, ON K1P 5R2

Access to Information Review Consultation Paper

Access to Information Review Task Force

The Access to Information Review Task Force was established in August 2000 by the President of the Treasury Board and the Minister of Justice. Its mandate is to conduct a broad review of the legislative and administrative aspects of access to information. The Task Force is scheduled to report this fall.

Accessing governmental information

Canadians access government information via web sites and 1-800 numbers, as well as through publications and other written materials. Complementing these ways of obtaining information is the *Access to Information Act*.

The 1983 *Act* gives Canadians and any person present in Canada a right of access to information under the control of federal institutions - with some specific and limited exceptions such as personal information or information related to national security. The *Act* established the Information Commissioner as an Ombudsman appointed by Parliament to investigate complaints from people who believe they have been denied their rights under the *Act*.

The Minister of Justice is responsible for the Access to Information legislation and the President of the Treasury Board is responsible for its administration.

Why a review now?

The *Access to Information Act* was proclaimed 17 years ago. Since then, Canadian society has changed and so have the aspirations of Canadians and their relationship with their government. The structure and processes of the federal government have changed. There has been a revolution in information technology. We are now firmly in the information age.

Our understanding of government's accountability, participation of Canadians in the public policy debate, government services, and the role of government in disseminating information have evolved as well.

It is time to reassess our expectations of the *Access to Information Act*.

Review objective

The objective of the review is to suggest ways to bring the *Act* and its administration up to date by incorporating new insights, and anticipating future developments.

The Task Force is looking at how to modernize access to government information in a way that promotes open and effective government and an informed citizenry in a knowledge society. This must be done in balance with the principles of privacy, ministerial responsibility, respect of Canada's commitments to other governments, and the need for full discussion of issues in the public service and frank advice to Ministers.

The Task Force is gathering data, conducting research, and consulting with individuals, organizations, the federal public service, the provinces, and other countries.

The intent of this paper

This paper is intended to explore possible avenues for reform and encourage public participation in the review process.

The questions posed in this paper underline concerns that have been raised in the past in relation to the *Act* or conveyed to the Access to Information Review Task Force during the course of its work so far. **They are in no way indicative of views on the part of the Task Force.**

Performance data is provided in Annex A on access to information.

We welcome your comments on some or all of the issues raised in this discussion paper or on any other issues relevant to access to information.

We welcome your submission or written comments **by June 1, 2001**. You may send your submission or comments to us by:

The Web : www.atirtf-geai.gc.ca

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1. Access to Information Context

In assessing how the Canadian Access to Information framework is working, it is important to look first at the general context in which the *Act* is administered: the evolution of the environment of government, of citizen expectations, and of the management of government-held information.

1.1 Most jurisdictions acknowledge that their access to information legislation has resulted in more transparency in government business and greater communication of government information to the public, both informally and formally under their *Act*. Would you say the 1983 *Access to Information Act* has had the same kind of impact in Canada? Has it changed the way Canadians perceive government and governmental information? What impact has the *Access to Information Act* had on you and/or your organization?

1.2 In your opinion, have citizens' needs and expectations of their right of access to information held by the government changed over the last 17 years? If so, in what way? How do you see the needs and expectations of Canadians evolving in the next 15 years or so?

1.3 What type of information does the government hold that would be of interest to you / your organization / your business in the future? What method would you prefer to use to access this information?

1.4 What types of information do you think should be routinely available from the government without a request under the *Access to Information Act*?

1.5 A request under the *Access to Information Act* can be for one page of records or over a million pages. The access to information legislation in many countries provides for practical limits on a citizen's right of access, such as excessive costs to the taxpayers of providing the information, the undue disruption of governmental operations or repetitive requests. Do you think that there should be some limits set in the Canadian legislation? If so which ones? In your view what should be the criteria?

1.6 The 1983 legislation states that

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 exceptions 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.

This *Act* is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Do you think that this purpose clause is still adequate?

1.7 In your view, what changes need to be made in the federal government / the federal public service to further the purpose of the *Act* and facilitate effective access by Canadians to information?

2. Scope of the *Access to Information Act* – Institutions

The list of federal government institutions covered by the *Access to Information Act* is provided in Schedule 1 to the *Act* (copy attached at Annex B). With some variations, the legislation in other countries also applies to all government corporations and the administrative records of the courts, Parliament and Parliamentary officers such as the Information Commissioner, and the Privacy Commissioner.

- 2.1** In your view, is the current coverage of institutions under the *Access to Information Act* adequate?
- 2.2** What criteria should be used to determine whether or not an institution would be subject to the *Act*?
- 2.3** By what mechanism should institutions be added or removed from the list of those subject to the *Act*? (For example, legislation would require Parliamentary approval while regulations would require the approval of Cabinet.)

3. Scope of *Access to Information Act* – Right of access

- 3.1** Currently only Canadians and those present in Canada have a right of access under the *Act*. In a globalized world, does this restriction still make sense?

4. Scope of the Act - Information

Under the Act, exceptions to the right of access to information must be limited and specific in nature. The table below summarizes the grounds for exempting records from disclosure, and indicates whether the exemption is based on the type of information (class test) or a possible adverse result from disclosure (injury test), as well as whether the information must be exempted by the institution (mandatory exemption) or, the institution has a choice to disclose the information (discretionary exemption).

Some records are totally excluded from the application of the Act, notably published materials and Cabinet confidences.

	Class test	Injury test
Mandatory exemptions	<ul style="list-style-type: none"> ⌚ Personal information * ⌚ Trade secrets of Third Party ⌚ Commercial or technical information received in confidence from Third Party ⌚ Information received in confidence from other governments ⌚ Information protected by other, listed statutes ⌚ RCMP provincial or municipal policing 	<ul style="list-style-type: none"> ⌚ Loss or gain to Third Party ⌚ Prejudice to competitive position of Third Party * ⌚ Interference with contractual negotiations of Third Party *
Discretionary exemptions	<ul style="list-style-type: none"> ⌚ Solicitor-client privilege ⌚ Advice or recommendations to government ⌚ Information to be published in 90 days ⌚ Government negotiation plans ⌚ Government management plans ⌚ Trade secrets, valuable technical and commercial information of Canada ⌚ Information collected by listed investigative bodies 	<ul style="list-style-type: none"> ⌚ Injury to federal-provincial relations ⌚ Injury to conduct of international affairs ⌚ Injury to defence of Canada or allied states ⌚ Injury to economic interests of Canada ⌚ Threat to safety of individuals ⌚ Prejudice to use of audits or tests ⌚ Injury to law enforcement or conduct of lawful investigations ⌚ Disclosure that could facilitate commission of criminal offence

* This information may be disclosed where the public interest in disclosure outweighs the interest protected by the mandatory exemption

4.1 Do you think that these exemptions / exclusions provide the appropriate balance between the right to information held by the government and the necessary exceptions to that right? Do you think the balance between the mandatory and discretionary exemptions is the right one? Do you think that any exemptions should be removed or added?

4.2 The Act provides that certain types of third party information may be disclosed where the public interest as it relates to public health, public safety, or protection of the environment, outweighs the likely injury to the third party. Do you think the Act should provide a public interest override for any other exemption? Should there be a general public interest override instead of specific ones?

5. Access Process

- 5.1** Do you think the processes for making and responding to requests under the *Act* could be made easier and more effective? How?
- 5.2** Are there ways to reduce the costs of processing access to information requests? Are there ways to make the process more efficient?
- 5.3** Currently all requests are treated the same, whether the results are for personal use, commercial use or a public interest use. Should different categories of requests or requesters be treated differently under the *Act*? (For example: general public / Members of Parliament / commercial users / media / non-profit associations / professional requesters who resell the information.) If so, what criteria should be used to distinguish between requesters? And what different treatment should they receive?
- 5.4** Currently there are no limits on the number of requests that one person or organization can make to any institution at any time. Should the *Act* limit the number of requests from a single requester to be processed at one time? By one institution? Within a year?
- 5.5** Currently there is a \$5 application fee for every access request. Additional fees are calculated on the basis of \$10 for every hour of search and preparation over five hours, and the cost of reproduction of the record. How should the fees for Access to Information requests be determined? Should the nature of the request, the purpose of the request, the volume of information sought, the speed with which it is required, the timeframe for processing the request or other factors affect the amount of fees charged?
- 5.6** Should the handling of access requests under the *Act* be an entirely open process itself? This could mean public availability of information on the content of information requests, the status and content of responses and the names of requesters.

6. Redress Process

- 6.1** In jurisdictions with similar access to information laws, a range of models to deal with complaints is found, from direct appeal to courts of law or to administrative tribunals, quasi-judicial information commissions, Information Commissioners with order making powers and traditional ombudsman models.

The Federal Information Commissioner plays multiple roles in investigating and resolving complaints and promoting access rights. The Commissioner makes recommendations to government institutions on individual cases and systemic issues, and makes regular reports to Parliament. As an Ombudsman he has extensive investigative powers but no power to make binding orders for the disclosure of records.

In your view, is this still the best redress model to support access to information? If not, which one do you suggest? If the current redress model is the right one, could any improvements be made or clarification brought to the current powers and responsibilities of the Information Commissioner?

- 6.2** In many countries, institutions are required to provide a fast internal review mechanism. This mechanism is often successful in resolving issues before they result in a formal complaint to the Information Commissioner. Should Canada consider this?

6.3 Currently the role of the Federal Court is limited to determining whether the government improperly applied the law in a decision to exempt records from disclosure. Should the Court have the authority to start over and decide whether records should be disclosed? Should the Court have the authority to make decisions about fees, time extensions, and other access issues?

Access to Information
Disposition of Requests - 1999-2000

Requests received ¹		19,294
Requests completed (Includes requests brought forward from previous year)	100.0%	18,489
Disposition of requests completed:		
All disclosed	40.6%	7,491
Some disclosed	33.7%	6,234
No records disclosed - excluded	0.3%	62
No records disclosed - exempted	2.8%	521
Transferred	1.7%	306
Treated informally	2.3%	433
Could not be processed (Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)	18.6%	3,442

1. A request can cover one page of information or a million pages of information. Statistics are not kept on size or complexity of requests.

Requesters per category 1999-2000

	Number	%
Requests received	19,294	100
Public *	7,857	40.7
Business	6,167	32.0
Media	2,774	14.4
Organizations	2,291	11.9
Academia	205	1.0

* It is estimated that about 7% of these requests are from Parliamentarians

Source: Info Source Bulletin, 1999-2000

Ten Institutions Receiving Most Requests - 1999-2000

Requests received by all institutions	100.0%	19,294
Citizenship and Immigration	24.5%	4,726
National Archives	11.0%	2,114
Health	7.2%	1,389
Human Resources Development	5.6%	1,073
National Defence	5.5%	1,063
Public Works and Government Services	3.8%	737
Royal Canadian Mounted Police	3.4%	661
Immigration and Refugee Board	3.3%	643
Canada Customs and Revenue Agency	3.1%	594
Foreign Affairs and International Trade	2.9%	561
Other Departments	29.7%	5,733

Time Required to Complete Requests - 1999-2000

Requests completed	100.0%	18,489
0 - 30 days	63.2%	11,686
31 - 60 days	16.4%	3,036
61 + days	20.4%	3,767

The Act provides that the requests must be dealt with within 30 days. This time limit may be extended for a reasonable time if the request is for a large number of records or necessitates search through a large number of records or consultations are necessary.

Exemptions claimed - 1999-2000

Total exemptions	100.0%	16,155
Section 19 - Personal information	28.0%	4,526
Section 20 - Third party information	26.0%	4,177
Section 21 - Operations of government	17.6%	2,836
Section 16 - Law enforcement and investigations	6.8%	1,106
Section 23 - Solicitor-client privilege	5.5%	889
Section 15 - International affairs and defence	5.0%	801
Section 13 - Information obtained in confidence	4.6%	748
Section 14 - Federal-provincial affairs	2.3%	373
Section 18 - Economic interests of Canada	2.0%	326
Section 24 - Statutory prohibitions	1.4%	224
Section 22 - Testing procedures	0.3%	56
Section 17 - Safety of individuals	0.3%	53
Section 26 - Information to be published	0.2%	40

Costs and Fees for Operations - 1999-2000

Requests completed	18,489
Cost of operations ¹	\$17,143,480
Cost per request completed	\$927
Fees collected	\$217,832
Fees collected per request completed	\$12
Fees waived	\$165,564
Number of completed requests where fees waived	8,680

1 Departmental salaries and administration costs, including training and consultation.

Disposition of complaints - 1999-2000

CATEGORY	FINDING				TOTAL	%
	Resolved	Not Resolved	Not Substantiated	Discontinued		
Refusal to disclose	276	3	222	36	537	35.0
Delay (deemed refusal)	685	-	27	37	749	49.0
Time extension	70	-	59	5	134	8.8
Fees	31	-	16	8	55	3.6
Language	-	-	-	-	-	-
Publications	-	-	-	-	-	-
Miscellaneous	26	-	26	3	55	3.6
TOTAL	1088	3	350	89	1530	100.0
%	71.2	0.1	22.9	5.8	100.0	

Source: Annual Report, Information Commissioner 1999-2000

Cost of access to information

A comprehensive review of the cost of administering the *Federal Access to Information Act* was conducted in 1999 by Canada Audit and Consultation on behalf of the Treasury Board Secretariat. The survey included all departments and agencies subject to the legislation, as well as the costs of the Information Commissioner Office, central agencies, legal services units and the Federal Court.

	1998-99	
<u>Direct Costs</u>		
<i>Handling Costs</i>	\$1,625,000	
Search		
Preparation	2,380,000	
Review	9,105,000	
Administration and Other	3,060,000	
Total Handling Costs	\$16,170,000	
Complaints	\$1,405,000	
<u>Total Direct Costs</u>		\$17,575,000
<u>Indirect Costs</u>		
<i>ATIP Unit Overhead Costs</i>		
General Management	\$2,225,000	
Training and Orientation	1,090,000	
Other O&M	585,000	
Facilities	1,925,000	
Minor Capital	90,000	
Total ATIP Unit Overhead Costs	\$5,915,000	
TBS/Justice/PCO/Federal Court	\$1,455,000	
Information Commissioner	\$3,900,000	
<u>Total Indirect Costs</u>		\$11,270,000
Total Costs		\$28,845,000
Average Cost per Completed Request (14,340 Completed Requests)	\$2,010	

**COVERED INSTITUTIONS
ACCESS TO INFORMATION ACT
(SCHEDULE I)**

Departments and Ministries of State

Department of Agriculture and Agri-Food

Department of Canadian Heritage

Department of Citizenship and Immigration

Department of the Environment

Department of Finance

Department of Fisheries and Oceans

Department of Foreign Affairs and International Trade

Department of Health

Department of Human Resources Development

Department of Indian Affairs and Northern Development

Department of Industry

Department of Justice

Department of National Defence

Department of Natural Resources

Department of Public Works and Government Services

Department of the Solicitor General

Department of Transport

Department of Veterans Affairs

Department of Western Economic Diversification

Other Government Institutions

Atlantic Canada Opportunities Agency

Atlantic Pilotage Authority

Bank of Canada

Belledune Port Authority

British Columbia Treaty Commission

Business Development Bank of Canada

Canada Council

Canada Customs & Revenue Agency

Canada Deposit Insurance Corporation

Canada Employment Insurance Commission

Canada Industrial Relations Board

Canada Information Office

Canada Lands Company Limited

Canada Mortgage and Housing Corporation

Canada-Newfoundland Offshore Petroleum Board

Canada-Nova Scotia Offshore Petroleum Board

Canadian Advisory Council on the Status of Women

Canadian Artists and Producers Professional Relations Tribunal

Canadian Centre for Management Development

Canadian Centre for Occupational Health and Safety

Canadian Commercial Corporation

Canadian Cultural Property Export Review Board

Canadian Dairy Commission

Canadian Environmental Assessment Agency

Canadian Film Development Corporation

Canadian Food Inspection Agency

Canadian Forces

Canadian Forces Grievance Board

Canadian Government Specifications Board

Canadian Grain Commission

Canadian Human Rights Commission

Canadian Human Rights Tribunal

Canadian Institutes of Health Research

Canadian International Development Agency

Canadian International Trade Tribunal

Canadian Museum of Civilization

Canadian Museum of Nature

Canadian Nuclear Safety Commission

Canadian Polar Commission

Canadian Radio-Television and Telecommunications Commission

Canadian Security Intelligence Service

Canadian Space Agency

Canadian Tourism Commission

Canadian Transportation Accident Investigation and Safety Board

Canadian Transportation Agency

Copyright Board

Correctional Service of Canada

Defence Construction (1951) Limited

Director of Soldier Settlement

The Director, The Veteran's Land Act

Economic Development Agency of Canada for the Regions of Quebec

Energy Supplies Allocation Board

Ethics Counsellor

Farm Credit Corporation

Federal-Provincial Relations Office

Fisheries Prices Support Board

Fraser River Port Authority

Freshwater Fish Marketing Corporation

Grain Transportation Agency Administrator

Great Lakes Pilotage Authority, Ltd.

Gwich'in Land Use Planning Board

Gwich'in Land and Water Board

Halifax Port Authority

Hamilton Port Authority

Immigration and Refugee Board

International Centre for Human Rights and Democratic Development

Hazardous Materials Information Review Commission

Historic Sites and Monuments Board of Canada

International Centre for Human Rights and Democratic Development

International Development Research Centre

The Jacques Cartier and Champlain Bridges Inc.

Laurentian Pilotage Authority

Law Commission of Canada

Mackenzie Valley Environmental Impact Review Board

Mackenzie Valley Land and Water Board

Merchant Seamen Compensation Board

Military Police Complaints Commission

Millennium Bureau of Canada

Montreal Port Authority

Nanaimo Port Authority

National Archives of Canada

The National Battlefields Commission

National Capital Commission

National Capital Commission

National Farm Products Council

National Film Board

National Gallery of Canada

National Library

National Museum of Science and Technology

National Parole Board

National Research Council of Canada

National Round Table on the Environment and the Economy

Natural Sciences and Engineering Research Council

North Fraser Port Authority

Northern Pipeline Agency

Northwest Territories Water Board

Office of Privatization and Regulatory Affairs

Office of the Comptroller General

Office of the Co-ordinator, Status of Women

Office of the Correctional Investigator of Canada

Office of the Inspector General of the Canadian Security Intelligence Service

Office of the Inspector General of the Canadian Security Intelligence Service

Office of the Superintendent of Financial Institutions

Pacific Pilotage Authority

Parks Canada Agency

Patented Medicine Prices Review Board

Pension Appeals Board

Petroleum Compensation Board

Petroleum Monitoring Agency

Port Alberni Port Authority

Prairie Farm Rehabilitation Administration

Prince Rupert Port Authority

Privy Council Office

Public Service Commission

Public Service Staff Relations Board

Québec Port Authority

Regional Development Incentives Board

Royal Canadian Mint

Royal Canadian Mounted Police

Royal Canadian Mounted Police External Review Committee

Royal Canadian Mounted Police Public Complaints Commission

Saguenay Port Authority

Sahtu Land and Water Board

Sahtu Land Use Planning Board

Saint John Port Authority

Security Intelligence Review Committee

Sept-Îles Port Authority

Social Sciences and Humanities Research Council

St. John's Port Authority

Standards Council of Canada

Statistics Canada

Statute Revision Commission

The Federal Bridge Corporation Limited

The Seaway International Bridge Corporation, Ltd.

Thunder Bay Port Authority

Toronto Port Authority

Treasury Board Secretariat

Trois-Rivières Port Authority

Vancouver Port Authority

Veterans Review and Appeal Board

Windsor Port Authority

Yukon Surface Rights Board

Yukon Territory Water Board

Appendix B – Technical Report **Access to Information (ATI) Consultation Process**

In developing the ATI stakeholders database, stakeholders were categorized as follows:

- | | |
|-------------------------------------|--|
| Ⓢ Academic & legal communities; | Ⓢ ATI experts; |
| Ⓢ Media; | Ⓢ Labour, Aboriginal & ethnocultural associations, and NGOs. |
| Ⓢ Business & business associations; | |

A **preliminary list** of 397 potential participants (groups and individuals) was developed after consulting with a variety of sources, including the PPF database, PPF members, and known ATI experts and users. The Task Force identified 120 stakeholders, many of whom had been identified in step 1). The two lists were combined to create a stakeholder list of 420 names.

Telephone calls were made to all 420 identified stakeholders to determine their interest in attending one of 5 planned roundtables. During these **verification calls**, another 60 stakeholders were identified. A final list of 480 stakeholders was prepared.

Identified stakeholders (480) were sent a **letter of invitation** in mid-April to attend one of the four roundtables held at the end of May and the beginning of June. The letter requested that the invitation be circulated to any other potential participants. Many invited umbrella groups sent out the letter of invitation to their member organizations. Therefore, in addition to the 480 invitations sent, an unknown number of invitations were issued.

The invitation letter requested that participants submit one or two pages of **written comments** in point form by May 4, 2001, which would be summarized to help guide roundtable discussion. Many invitees had not yet responded by the registration deadline of May 1, 2001. Therefore, 305 invitees were called to verify their participation and to suggest their providing inputs (through written comments or by telephone interview), regardless of whether they planned to attend. Altogether, the views of approximately 100 stakeholders were collected.

Information on the upcoming roundtables was posted on the Public Policy Forum's **Web site** to generate additional participants and inputs.

Many invitees were unable to attend the roundtable reserved for their group and asked if they could attend on another date. Participants were accommodated and invited to attend any one of the four roundtables. A total of 159 **declined invitations** were received. Reasons given for not participating included unavailability due to schedule, an insufficient amount of time between the date invitations were received and the date of the event, and concern over the review process not being sufficiently transparent.

Throughout the period from early April until mid June, the PPF held **bilateral consultations** with numerous individuals in the private sector who have an interest or expertise in access to information or the review process. A total of 77 **invitees registered** to attend a roundtable session. Four **roundtables** were held on May 23, 24, 29 and June 6, 2001. The final participant count was 59 people.

Appendix C – Convening Paper **Summary of Inputs from Stakeholders**

The following comments represent a summary of the observations received by the Public Policy Forum through stakeholder inputs and interviews, and as such may not reflect the entire range of views of the stakeholder community. This convening paper is aimed at informing the debate and identifying positioning opportunities and strategies for improving the current Access to Information Act and process.

SECTION I – EXTERNAL ENVIRONMENT

Since the *Access to Information Act* was passed in 1983, emerging information and communication technologies, as well as new directions in policy and decision-making, denote that the principles guiding the Act may need to be examined to ensure that they are reflective of the external environment in which the Act is implemented. Many respondents provided observations regarding areas where the Act may need to be adjusted to reflect these new realities:

Alternative Service Delivery:

As government moves toward Alternative Service Delivery, particularly in the form of new agencies, new programs for exporters and importers are created. In determining whether they are eligible to benefit from these programs, private firms must know what information the government currently holds regarding their firm. This information can at times be difficult to access.

New Access Points:

- ⌚ The emergence of new media, such as the Internet, has resulted in demands for improved service from government.
- ⌚ Concern was expressed about the long-term availability of electronic data, which has the potential of being manipulated or erased.
- ⌚ Respondents also felt that new mechanisms were needed to accommodate online information and its users.

Confidentiality vs. Access:

- ⌚ Balance needs to be struck between rights to confidentiality and access to information.
- ⌚ Proprietary information such as that provided in confidence to government by industry, including confidential information and trade secrets, needs to be protected.
- ⌚ Participants questioned whether the “borderless” world of the Internet is accommodated by the existing ATI framework, and noted that models for international privacy and security policies will need to be considered in the review, given that electronic arenas often transcend borders.

SECTION II – GENERAL DESIGN

Most participants’ inputs included notes on contextual issues facing ATI.

ATI perceived as a Restrictive Tool:

- ⌚ The tone and implementation of the ATI process tends to restrict rather than facilitate access to government information.
- ⌚ Information made public needs to be shared through an accessible and understandable medium, such as in electronic format.
- ⌚ A more proactive approach is needed for government to make its information available to the public without resorting to the ATI process.
- ⌚ A “triage” process within departments to determine which documents do not require intensive review before access is granted would help relieve the burden on ATI officers and enable greater access.
- ⌚ The Act itself has given rise to an industry of access consultants, and this demonstrates that it is “out of touch” with the average user or citizen.



SECTION III – SCOPE

The scope of information and types of information covered by ATI were cited in a number of inputs. The rise of new media over the last decade has helped to highlight some tension areas. A number of examples related to the scope of the existing Act were noted, including:

Interpretation of Exemptions:

- ⌚ Some sections of the Act are open to broad interpretation, and consequently are not applied consistently across departments. Cited examples include:
- ⌚ sections 13(1) (information obtained in confidence from other governments), 15(1) (information related to defence, international affairs and security), 19(1) (individual or personal information), 69(1) (confidences of the Queen's Privy Council), 18 (particularly as it pertains to economic, financial and technical information);
- ⌚ requests related to the rights of victims of crime, including access to information on the behaviour and rehabilitation of offenders in the correctional system, information on police investigations, among others;
- ⌚ section 20, which pertains to third-party information and information provided to government in confidence by private industry, should be enforced; and,
- ⌚ government is too reticent to resort to Section 16, as the head of government is often under great pressure to improve access and transparency to outweigh the pros and cons of access in special cases.

Too Broad a Scope:

- ⌚ It was suggested that a considerable amount of information should be available to the public without being subject to ATI requests for release, such as in cases where there are no individual privacy concerns.
- ⌚ The current scope of ATI causes too broad a range of information to fall under its clauses, potentially overwhelming the system and restricting access to documentation that is not sensitive.

New Media Grey Zones:

- ⌚ The emergence of new forms of communication, particularly over the last ten years, has resulted in the creation of two key “grey areas” in the ATI Act:

Medium: Greater clarity is required in the Act to accommodate tools such as electronic mail, so-called “e-business,” and other forms of computer or Internet-based communication, as well as the use of “cookies” (Internet related tracking files).

Content: Wording is required to deal with new types of information, such as e-commerce transactions and electronic data sources of personal and organizational information. There is an increased need for protection and disclosure measures specific to the management of online information and its users.

Crown Corporations and Special Operating Agencies:

- ⌚ Information possessed by Crown corporations and some agencies is not covered under ATI, and this was identified as a weakness by a number of respondents.

First Nations Records:

- ⌚ Guidelines for information and records relating to First Nations communities need clarification and / or review.

SECTION IV – IMPLEMENTATION

Many participants' inputs identified implementation issues as key areas for attention. Significant issues include:

Costs

- ⌚ Setting costs based on search time or document copying can discourage applicants from pursuing requests.
- ⌚ High costs may be indicative of a lack of appreciation within departments for the importance of openness and transparency.
- ⌚ While most respondents thought that fees should either remain the same or be reduced, a small number of inputs suggested that they should be increased in order to ensure greater cost recovery.



Delays:

- ⌚ Specified timelines for response to applicants are frequently overlooked.
- ⌚ Departments often fail to provide the information within the 30-day deadline and use the deadline to indicate to applicants that more time is needed to process their request.

Co-ordination / Consistency

- ⌚ Delays and costs are symptomatic of the lack of consistency and co-ordination across departments.
- ⌚ Departments are often inconsistent in their decisions to release certain types of information, as well as in the time and costs they estimate they require to do so.
- ⌚ Increased co-ordination between departments would lead to increased consistency, which would likely increase trust and improve the public's perception of the access to information process.
- ⌚ There is general inconsistency across departments in the level and influence of the staff responsible for dealing with ATI requests.

Collections Information:

- ⌚ Government-held information is stored/collected in a way that makes it time-consuming to compile and expensive to obtain.
- ⌚ Information on government holdings is not readily accessible, and this challenges the ability of a citizen or organization to submit an ATI request.
- ⌚ Proactive steps to inform the public of information products and a central directory or repository of government-held information were cited as positive means of facilitating the access to information process, as well as integrated information management mechanisms for co-ordination between departments.

SECTION V – REDRESS

With respect to the redress process, inputs pointed to a number of concerns and opportunities for improving the existing system, including:

Delays:

- ⌚ The process and time required to lodge a complaint and then follow it through to “final judgement” were noted as onerous, given the multiple steps required, and particularly the amount of time required once the redress process enters the court.

Role of Information Commissioner:

- ⌚ A number of inputs recommended that the Information Commissioner be responsible for enforcing the Treasury Board Secretariat's guidelines for “open information”.
- ⌚ The model of an independent Information Commissioner as an officer of Parliament with order-making powers was cited as a possible solution.
- ⌚ There is debate as to which of two overlapping issues, privacy and access, is given priority in the federal mandate. Most stakeholders felt that privacy was often given more weight than access, while a few respondents argued that there was a bias in favour of access.
- ⌚ Many stakeholders stated that the Information Commissioner should put the onus of justifying decisions to release or not to release information on departments.

MERGING OF INFORMATION AND PRIVACY COMMISSIONERS

- ⌚ A number of stakeholders argued that the ATI legislation needs to be merged with the *Privacy Act* to help restore the balance between privacy and access rights.
- ⌚ Provincial jurisdictions in which the two have been merged were cited as potential models, namely Ontario and British Columbia.



Appendix D – Roundtable Participant List

Mr. Claude Archambault Association of Public Service Financial Administrators	(representing the Canadian Media Guild)
Ms. Denise Barton CGI Group Inc	Mr. George Hunter Borden Ladner Gervais
Mr. John Bescec Canadian Association of Importers and Exporters	Mr. John Klenavic Canadian Gas Association
Mr. Malcolm Brown The Professional Institute of the Public Service of Canada (PIPSC)	Mrs. Anne Kothawala Canadian Newspaper Association
Mr. Peter Calamai Toronto Star (representing Open Government Canada)	Dr. Daniel E. Lane University of Ottawa
Dr. Graham Carr Concordia University Department of History	Ms. Lise Lareau Canadian Media Guild
Mr. Bob Carty Canadian Journalists for Free Expression	Mr. James T. Lyon The Air Passenger Safety Group
Dr. John A. Chenier ARC Publishing	Ms. Arva Macham Food and Consumer Products Manufacturers of Canada (FCPMC)
Mr. Duff Conacher Democracy Watch	M. Robert Maltais Conseil de presse du Québec
Ms. Nancy J. Coulas Canadian Manufacturers & Exporters (CME)	Mr. Levon Markaroglu Association of International Customs and Border Agencies
Mr. Guy Dionne Bombardier Inc	Mr. Phillip Marks Bombardier Aerospace
M. Vincent Emmell Progesta Publishing	Ms. Penny Marrett The Coalition of National Voluntary Organizations (NVO)
Ms. Catherine Gilbert Canadian Auto-Workers Canada (CAW)	Mr. Lawrence Martin Southam News
Mr. Mike Gordon CBC Marketplace	Mr. Michael C. McCracken Informetrica Limited (representing Open Government Canada)
Ms. Beth Gorham The Canadian Press	Mr. Russell A. Mills The Ottawa Citizen
Mr. John Grace Former Federal Information Commissioner and Former Federal Privacy Commissioner	Ms. Suzanne Morin Bell Canada
Mr. Daniel Henry Ad IDEM	Mr. Robert R. Parker Canadian Tobacco Manufacturers' Council
Mr. Declan Hill The Fifth Estate	



Ms. Josefina Moruz
United Food and Commercial Workers Union
(UFCW)

Ms. Linda J. Nagel
Advertising Standards Canada

Ms. H  l  ne Paris
Social Science Employees Association (SSEA)

Mr. David E. Paterson
Canadian Advanced Technology Association (CATA)

Mr. Sergio Poggione
Canadian Access and Privacy Association (CAPA)

Ms. Kathleen Priestman
Public Interest Advocacy Centre (PIAC)

Mr. David Rideout
Canadian Aquaculture Industry Alliance

Ms. Penny Ross
EDS Systemhouse Inc

Mr. Jeff Sallot
The Globe and Mail

M. Marc Sauv  
Service de recherche et de l  gislation
Barreau du Qu  bec

Mr. John M. Scott
GPC International

Mr. Craig Spencer
Public Service Alliance of Canada (PSAC)

Commander (R'  td) David Statham, CD
Novatip Consulting Inc

Mr. Mel Sufrin
Ontario Press Council

Mr. Steve Sullivan
Canadian Resource Centre for Victims of Crime

Dr. Sharon Sutherland
The Institute of Public Administration of Canada
(IPAC)

Mr. Scott Taylor
Esprit de Corps

Mr. William G Tholl
Canadian Medical Association (CMA)

Ms. Doris Townsend
Author / Researcher

Mr. Eric Vernon
Canadian Jewish Congress

Mr. Chris Waddell
CBC Television

Mr. Bob Whitelaw
Canadian Council of Better Business Bureaus

Dr. Margaret Ann Wilkinson
University of Western Ontario
Faculty of Information and Media Studies

Ms. Barbara D. Wise
KPMG LLP

Mr. Tony Wong
Blake, Cassels & Graydon
(representing The Toronto Star)



Appendix E – Roundtable Outcomes Report – May 23, 2001

Facilitator:

Paul Lepsoe

Opening Remarks

Dr. David Zussman welcomed participants to the Consultation on the Access to Information Act and its Administration. With the Access to Information Act (ATIA) now 17 years old, and the advent of the information age in which information is available with speed and simplicity, there may be a changed public perception of what information should be available, he stated. The Public Policy Forum is leading the roundtable consultation process on behalf of the Access to Information Task Force. The Forum is an independent, non-profit organization whose aim is to improve the quality of public policy and public sector management through multi-stakeholder dialogue.

Paul Lepsoe, who facilitated the meeting, clarified that he is not a member of the Task Force, the federal government or the PPF; he is an independent facilitator. Mr. Lepsoe explained that the discussion would follow the four-part structure presented in the *Access to Information Review Task Force Consultation Paper: Context, Scope, Implementation and Redress*. The first topic addresses the general context in which the Act is administered, including the evolution of the environment of government, citizens' expectations and the management of government-held information. Scope pertains to details such as what issues are covered, exemptions and the sub-issue of right of access. Implementation or process deals with the practical ways in which the Information Act works. The issue of redress includes the powers of the Information Commissioner (IC), recourse to the federal court, how the redress process works, and how valid it is.

Mr. Lepsoe told participants that a non-attributed outcomes report would be prepared on each session and posted on both the PPF and the Task Force web sites. A draft would be circulated to roundtable participants for their comments.

Participants then introduced themselves and stated their reasons for attending the roundtable discussion.

Issues Identification

Nancy Averill presented a summary of the comments and inputs that had been received from access to information stakeholders.

Context

- ① the key question is whether the Act still serves its intended purpose
- ① with the growth of electronic information and media, is government information more accessible?
- ① are there new methods for accessing government-held information?
- ① how does the Act accommodate globalization?
- ① how does the Act complement the redefinition of the citizen/government relationship, and strike an appropriate balance?

Scope

- ① what institutions are / should be covered under the *Act*?
- ① the main issue with regard to exemptions is whether the release system should be proactive
- ① does the *Act* apply to the new public / private partnership?
- ① clarification is required as to what is covered by the *Privacy Act* and *Access to Information Act*

Implementation

- ① inconsistency is a key issue
- ① how are fees calculated? should fees be charged at all? The question here is deciding whether fees should be charged with the objective of cost recovery, or if this service should be available at no cost to the public.
- ① high fees were seen as a barrier, however, the fee was also described as an incentive for good information management systems [how is the fee an incentive for good information management systems?]
- ① since delays are a deterrent, increased efficiency is an important consideration.

Redress

- ① delays in rendering a decision are an issue
- ① the role and powers of the Information Commissioner should be discussed
- ① merging the roles of the Information and Privacy Commissioners should be considered



Special Issues

- ① there is no government-wide standard for interpretation of the *Act*
- ① the practice of the *Act* is in the hands of consultants
- ① how could the *Act* foster trust between citizens and government?

General Discussion

Context

A participant suggested that it would be a good idea for the review of the *ATI Act* to include a review of the antiquated *Official Secrets Act*. In principle, the people who pay for government—the taxpayers—have a right to see what government generates. This should be accessible without formal filing of a request.

The *ATI Act* should be turned to by information seekers only as a last resort, a participant said. One is commonly told, at the outset of seeking a piece of information, to file a request under the Act. This slows research. One of the biggest reforms could be accomplished without amendment to the legislation. The guidelines regarding the classification of information could be revised to reflect a spirit of openness. For example, the number of people allowed to classify could be limited. Some people simply classify documents routinely. They should be made to justify their classification decision at the time of classification, for example, by reference to the disclosure exemptions of the Act, or by stale date, rather than wait until someone makes a request. That change would be revolutionary.

The problem is not with the purpose clause, a participant stated. Rather it is the collision between the specific things indicated; for example, exemptions and non-exemptions.

A participant illustrated the need to make changes to the classification process with a personal account of finding published documents in classified storage. They had been classified because it was deemed sensitive to know what a minister was looking at.

Another participant stated that people joining the public service should be advised of their oath of office and asked to sign a document. That would make them recognize that they are bound by the *Act*. This is a simple administrative step that could be taken immediately.

It was noted that the *Act* seems to frighten public servants. It makes them think that only certain documents can be released. There must be something fundamentally wrong with the way the *Act* was drafted, to frighten intelligent and well-meaning public servants into presuming that information that has been accessed might be taken out of context, a participant said.

A participant remarked that people who give advice to a minister sometimes draw up “out-of-the-box” thinking. However, many do not put it down on paper because of the *ATI Act*, lest it be reported in the press. It was called an insult to Canadians that it would be assumed that each bit of advice would be regarded suspiciously by the public. If there is such a perception problem with a particular journalist or with the Opposition, then it is better to open the whole file and deal with it openly. Besides, the information is often no longer relevant by the time journalists obtain it.

An observer noted that expectations have risen in the last 17 years as a result of technology and real-time news. As a result, people expect the use of a search engine to answer all their questions with regard to something they have just heard on the news. These expectations will continue to rise.

The statistics in the Annex of the *Access to Information Review Task Force Consultation Paper* seem to show that Canadians are not aware of or motivated by the kinds of concerns that lead to use of the *Act*, a participant stated. The number of requests in one year, 19,000, represents a small percentage of the Canadian population, especially when “serial requesters” are factored in. It would be interesting to know how many individuals that figure actually represents. Most members of the public are under the impression that they can get the information they need, commented another.

Participants agreed that there should be a description of the range of what qualifies as secret. The word “access” assumes an authority to release. The lack of variety of requests begs the question: How can so few people create so much anxiety in so many? The assumption is that one has to knock on a door, and 18% of people give up. Perhaps “access” is the wrong word, a participant said. A participant stated that when one uses ATI one assumes that the information is protected, prior to request. That is why the issue of exemptions is important. The IC has spoken about the reality of how there are some categories that should be made available, but others that are sensitive. A special



process is required for these. The challenge is to define what categories different kinds of information fall under, the participant said.

Another participant expressed that ATI has established an anomalous situation in which civil servants regard themselves as owners rather than stewards of public information.

Buried in the 18.7% abandonment rate is the “simply can’t find it” factor, a participant said. Perhaps a cohort of librarians could categorize information and make it machine-readable. Sometimes documents are not in Central Records. The best records are the Privy Council records because they are records of decision.

Another participant stated that a simple phone call from the access officer to the requester to clarify exactly what it is that is requested could save a lot of bureaucracy. Access officers seem to be working in a vacuum, the participant added.

A participant noted that drafts are often not dated, so the sequence cannot be discerned. The electronic world could eliminate this.

Scope

A participant commented that although the CBC uses the *Access to Information Act* to obtain information on a daily basis, they themselves are exempt from the *Act*. The participant found this to be a “flagrant conflict,” but acknowledged this was their only experience in dealing with exempted institutions.

Participants discussed Atomic Energy Canada Limited (AECL), which, as a Crown corporation, is exempt from the *Act*. The participant allowed that AECL must be competitive both in business and technology, but stated that he had been told by the AECL that since the organization is responsible to a Minister, and the Minister to Parliament, the fact that the AECL is audited by the Auditor General is “all you need to know.” Participants discussed the AECL’s need for a means to protect business secrets and yet be transparent and open to the public regarding their public function.

Another participant clarified that the request of CBC for information was in relation to a documentary film, not their business practices, and said that the CBC had used its exemption to deny the release of information.

Organizations using public money are included under other Public Policy Acts. A participant noted that provisions for arrangements regarding what the obligations of said organizations should be should be made available. The participant noted that when some Members of Parliament were serving on a standing committee, they had requested documents and information relating to the Al-Mashat family’s entry into Canada. There were ‘huge blanks’ in the documents received by MPs as a result, but the exclusions were so haphazard that a persistent analyst could ‘piece together the whole picture’. The roundtable participant, interested in the event, was able to look at an MP’s copy of the documents, and then worked with a professional access researcher to obtain the information which had been excised for MPs.

A participant emphasized that it is supremely important that the *Act*, if revised, be more intelligent in making a more precise exemption of release for Cabinet papers. The current *Act* is worded in such a way as to create argument about whether ‘privilege’ extends to certain documents belonging to Cabinet. The Auditor General, for instance, has gone to the Supreme Court to obtain political papers. The Cabinet, the participant continued, is *not* a Board of Directors running the country, but is both a coordinating device for government and a partisan group that operates as “a steering committee guiding the House of Commons.” Political parties are institutions of civil society, argued the participant, and therefore partisan deliberation and party business should not be thought of as public information unless criminal. While an agenda is not a Cabinet paper, the participant noted, people forget that Cabinet is a partisan formation. Participants discussed the exemptions from the *Act*. It was noted that the single largest text portion of the *Act* is the list of exemptions. A participant said that in reading through the list he realized how “sweeping” many of these exemptions are, citing sections 13 and 15 as examples. He added that the complaints procedure does not allow one to “get at the nature of the exemptions.” These exemptions, the participant concluded, may protect actions which are inconsistent with the rights and principles intended for Canadians.

A participant then commented that the injury exemption should be approached as a cost / benefit analysis of the release of information. Disclosure should be granted if the public benefit of disclosure outweighs the potential injury to the individual or organization, and such benefit can be proved. Solicitor / client privilege, for example, may preclude the release of information regarding nearly any actions of the Justice Department. A participant expressed that there should be a more practical excision: perhaps looking toward a more practical, not legislative, solution. A participant reported



that documents received days earlier had many blank pages; the participant knew only that those pages *had* existed, not their content.

Under Westminster government, a participant noted, it is generally supposed that the governing party, representing the majority of voters, is responsible in a pragmatic way for working out what would further the 'public interest'. For this reason, 'public interest' rationales do not have the same weight as they do in the United States when people seek information.

The facilitator asked participants if they were suggesting that the list be scrapped in favour of another distinction. A participant responded with two possible solutions: a complete re-draft of the legislation or the imposition of time limits on the duration of exemption for information; for example, information regarding the RCMP handling of the Winnipeg public strike of 1919. The same argument holds for more recent material from the 1940s and 1950s. The participant noted that these, and other documents several decades old are still "routinely kept from view" through the application of section 13.1, "Information Shared with Other Governments" or section 15.1, "National Affairs and Security." The participant asserted that these documents are now too old to have any relevant impact on present-day security, and would not meet any test of "public reasonableness."

A participant stated that the protection of police sources should end with the source's death. Also noted was a "perversion" contained in the *Act*, which protects the privacy of an informant after they have compromised the privacy of a source.

The facilitator noted that the present scope restricts the submission of ATI requests to Canadians or those present in Canada. A participant attempted to recall the original reason for the clause, and expressed that it was likely to restrict Canadian taxpayers from paying the cost of information requests by non-Canadian taxpayers. If this was the case, the participant added, then the issue might be addressed with a dual fee schedule, just as out-of-province students pay higher tuition fees. However, a fellow participant expressed dissatisfaction with a dual-fee schedule, feeling that there should not be two costs for the same piece of information. The facilitator noted that those who are ineligible to request information could easily hire an eligible individual in order to obtain the desired information. A participant said that the original aim of this clause of the *Act* was largely cost-related, and that in anticipation of a "landslide" of requests for information, it was intended to slow that "flood." Another participant stated that there should be no obvious objection or reason to prevent the removal of the clause.

Implementation

The facilitator then invited discussion on making the information request and response processes easier. The first suggestion was to have more "user friendly" Access Coordinators. The participant added that through e-business and e-government, the submission of ATI requests could be made easier, with the fee automatically debited to a credit card. While some departments have online registration, access is "not there yet," the participant added, and this may be a matter of time and administration.

Finally, it is important to clarify requests and the actual need for the information requested, which could be achieved through phone calls ☺ instead of spending thousands of dollars collecting pages to fulfill the request, but which are not relevant to the actual information sought. These phone calls could also redirect requests to more relevant source departments or individuals, the participant concluded.

The question was raised as to whether there is enough information available to guide those who are seeking information, yet are unsure as to their specific needs. One participant, a competent and experienced researcher using both library and Net resources, reported being unable to acquire much of use through the ATI process. "It is not worth my time, as an amateur, to go through the *Act*," the participant said, adding that one would be better served by working to earn money to hire someone else to perform the ATI request for them. Another participant recounted frustration in requesting information held at the National Archives regarding the RCMP, for which CSIS now has ATIP responsibility. The system seems designed to frustrate researchers with confusing file names, no indication of file sizes, and no database, the participant said. Another stated that using an "ask somebody" approach seems reasonable when faced with pages of minimal text with no context and no explanations.

The facilitator asked if there are ways to make the process more efficient. Participants responded that the ability to search databases by word or name would quicken the process. A participant proposed that once it is technologically possible, the public should be able to request and receive information directly from institutions via online access. It was again expressed that this would require revisions in order to train departments and staff in correctly classifying documents upon creation. A participant felt that this would result in more bureaucracy, as more advanced work in



training^② in regards to records management^② would be required. The participant felt that partisan information should be protected, but also that good search engines should be standardized and implemented. The cost of implementing such search engines is unknown. Some universities, in the interest of saving costs, encourage students to obtain information online and print it out themselves. A participant noted that society is currently training a computer-literate generation who will not automatically depend on a coordinator, but who will want to do research themselves, and are well versed in search engines.

It was stated that online access to British governmental information is both faster and easier to navigate than the Canadian equivalent. A participant noted that they are currently in the seventeenth month of a request that was initially estimated to be completed in nine months. The participant expressed a preference for working “historical rather than geological time,” adding that the complaints process has taken five months thus far.

In relation to Section 5.4 of the Consultation Document, the facilitator asked whether a “serial requester” should be limited in the number or frequency of requests. A participant noted that ATI officers are best able to address this issue, to determine if this is a problem and would also have statistics on repetitive requesters. The facilitator reminded participants that the Consultation Document was not a proposal, rather a document designed to stimulate discussion. He then asked if those who trade information for business purposes, and journalists, should be subject to cost-recovery fees or limits, in contrast to members of the general public. A participant suggested that the costs related to ATI functions, compared to the total cost of government communications, is most likely “a drop in the bucket.” Another participant opposed the creating of a hierarchy of users based on their ability to pay fees, stating that such a hierarchy goes contrary to the nature of such an *Act*. A participant then noted that those “in the game” know to use a Member of Parliament as a means of acquiring information, asking for help rather than submitting an ATI request per se.

Redress

A participant stated that the Information Commissioner should have powers akin to those of a court judge in regards to adjudicating, with the requester having the option to follow up at the Federal Court of Appeal. “Is there anything to prevent the Information Commission from holding public hearings now?” the participant asked. The facilitator responded that the release of documents during an investigation is currently prohibited, since it is stipulated that investigations must be held in private. The facilitator asked participants if the Privacy Commissioner also needs a role in these investigations. It was argued that if personal information is a defense against a request for information, then the Privacy Commissioner may need to be called in with the Information Commissioner. This process can always be followed to the Court of Appeals, the participant noted.

A participant discussed the need to address what must be private, citing as an example Conrad Black’s lawsuit against the Prime Minister for access to information on the basis of the Prime Minister’s decision. (The courts have since ruled that the Prime Minister can make decisions on any grounds he or she likes.) The participant expressed a desire that the *Act* not allow the release of the minutes of Cabinet, nor specific advice to Ministers where it could show a conflict with the Cabinet decision. If this information were made available, observers could infer that Cabinet had made an uninformed decision, said the participant. The participant noted that the *Act* is rather “long in the tooth” for the way people are now doing business.

The facilitator noted that a judge in a recent Federal Court decision about access to Cabinet documents had remarked an apparent correlation between the revamping of the Cabinet paper system in 1982 – 84 and the coming into force of the *Act* in 1983. The judge appeared to leave it to readers to draw their own conclusions.

A participant stated that “a democracy is not governed by a bureaucracy.” The Cabinet, the participant added, may not follow the “practical” advice of the public service, indeed that advice may be ill founded.

A participant noted that the discussion seemed to be anticipating how information may be used, but that that should not impact whether a document is made public.

A participant defined the Westminster system as one in which Ministers are, under the Departmental Acts, responsible for administration and policy. The public service implements this administration and policy. Because the public service does not have a constitutional personality of its own, it is conceived as being part of the Minister’s personality. This is another angle on why ‘advice’ that is directly in support of Cabinet decisions should remain confidential. The facilitator noted that apparently not even the courts can legally review a decision about what is designated a Cabinet confidence.



A participant noted a statistic in Annex A of the Consultation Document which shows 71% of complaints resolved. “Define ‘resolved,’” the participant challenged.

A participant expressed that many complainants likely assume the Information Commission will be more liberal in the interpretation of the Act, presuming agencies and departments will be more restrictive. Another added that the Ombudsman should not be able to make binding decisions on Access to Information without the participation of a board of advisors and specialists, since the Commissioner is a political appointee. It was proposed that the Commissioner should be an actual judge instead of a Parliamentary appointee.

A participant expressed the need to know the specific outcome of information requests, instead of merely knowing the percentage “resolved.” Specifically, the participant asked if there have been instances that were successful in improving access to information. Complainants are usually given “discouraging” statistics on the results of “resolved” cases and the success rate, the participant said, with officers indicating that the outcome is not likely to be in favour of the requester without actually offering specifics. The commissioner should publish these outcomes and decisions.

The facilitator invited final comments from the participants. A participant expressed three points. First, regarding best practices, the participant cited the example of the Department of National Defence and its practice of posting captions and précis of all access requests on its web site, in contrast to the “Cold War” mentality of the past. Secondly, in regards to e-business and e-government, the participant expressed frustration at past attempts to obtain e-mail addresses of Foreign Affairs diplomats. The participant was initially told that that was considered personal information. The participant then asked only for those whose e-mail addresses were printed on their business cards. This request took months, but the participant did eventually receive them. Finally, regarding document classification processes, the participant felt that the initial decision should require justification up front, and that documents should not be classified as “Protected” simply as a “routine typing procedure.”

Another participant recounted some very good experiences using ATI. Referring to the previous comment about the “Cold War mentality,” the participant said their perception was that this mentality persists in relation to historical documents relating to the Cold War itself. These papers which are decades old are still defined as relating to current safety issues. In conclusion, the participant stated that privacy rights clash with access rights, noting that there has been little discussion on this issue, but that this conflict affects “historical memory.”

Finally, a participant expressed distaste for the concept of categorizing and classifying users, stating that while it may be useful to have specialized groups of adjudicators to expedite the process, the public should not be classified. The participant also noted that legislation should be “illuminated by very clear guiding principles, and perhaps more modestly tilted, so that it can be adhered to without hypocrisy. In conclusion, the participant stated that while it is *all* public information, if a minority is exposed to harm, they must have their interests protected “for a period of time.”

The facilitator thanked the participants for a great discussion on some complex areas.



Appendix F – Roundtable Outcomes Report – May 24, 2001

Facilitator: **Dr. David Zussman**

Opening Remarks

David Zussman, President of the Public Policy Forum, opened the session with a brief overview of the *Access to Information Act*, created 17 years ago. The World Wide Web is less than 10 years old, he noted, but it has propelled radical changes in communications and the parameters of “government information.” He anticipated a constructive meeting and welcomed the participants’ recommendations for changes to the *Act*.

A round of introductions followed, in which participants stated which organizations they represented, and their standpoints. One participant asked about bringing diverse stakeholders together to assess whether and where there is any consensus in their interests. Dr. Zussman replied that this approach had been taken and was valuable, but a different approach has been chosen for this series of consultations. He added that reports are being prepared on each consultation, however, statements will not be attributed to specific persons.

Issues of concern raised by participants during their introductions included the scope of the *Act*, exemptions to the *Act*, the fees associated with receiving information through an ATI request, and compliance with the *Act*. Also noted was the potential—and possibly actual—misuse of the legislation by government employees, to keep information from being released for purely political reasons. There is no penalty to a civil servant who misuses the *Act*, according to one participant. Participants were also concerned that the growth of privacy legislation is not being counterbalanced with access legislation.

Time delays, deletions in the documents received and an overall feeling of “interference” were other issues cited. Long delays caused one participant to stop using the *Act* to gain information. The participant called the *Privacy Act* a “smokescreen” that is used to prevent the release of information, and was curious about the role the Privacy Commissioner wants to have in access to information. Another commented on being “not able to pierce the governmental secret culture” and stated that there must be a political will to effect any changes.

One participant expressed some concern about the term “transparency.” Glass is transparent but it is also a barrier, the participant said, while stressing that transparency is not the same as accountability. Another noted that the issue of information access is going to feature prominently in discussions at an upcoming international meeting. Fees, exemptions and time delays were mentioned repeatedly. A participant proposed a public interest override, wherein information would be held back only in cases of harm.

Nancy Averill, Director of Research and Methodology with the Public Policy Forum, then presented an overview of the access to information issues identified by participants. These included:

- ⌚ privacy
- ⌚ the scope of the *Act*, and inconsistency in interpretation
- ⌚ delays ⌚ a particular issue for practicing journalists
- ⌚ fees
- ⌚ the role and powers of the Commissioner, and whether the offices of the Privacy and Access Commissioners should be somehow merged
- ⌚ how to provide stakeholders and citizens with the tools needed to use the *Act*

General Discussion

Context

A participant noted that the Access to Information Review Task Force’s role had not been discussed as a group, and proposed that the group address the issue of delays and whether recommendations are binding. The Director of the ATI Review Task Force stated that they are conducting a comparative study, looking at the access legislation of the United Kingdom, Australia, Ireland and even Sweden. The director noted that as the number of requests has increased, the staff has also increased; however, there is no data concerning the size and complexity of requests, merely the overall number of requests. All requests, she emphasized, are not equal.



A participant questioned whether Access to Information has become “a place for people with no other place,” where it is not seen as a problem if employees are not good at their jobs. Another participant added that ATI work is often perceived by those within a department as a career-limiting move, if done well.

There was some discussion on the need to alter the culture of government, which tends toward secrecy, so that those responsible for ATI are encouraged to believe that ‘access’ should dominate their thinking.

Scope

Regarding the *Act* itself, a participant argued that the nature of the information, and not the interests of the government body, should determine whether information is released. As an example, the participant saw no reason why NAVCan should be excluded. The participant argued that information should not be excluded if a private or quasi-private institution performs a public function. A participant stated that exempting private bodies if they are performing a public function could be the “recipe for another Walkerton.” It was also stated that contractors who are commercial, and seen as no longer public, should be included under the *Act* if they are working in a public role.

Other participants echoed the call for the non-exemption of private organizations performing public functions. Even when contracted out, they stated, the work is still a public function and the *Act* should still apply.

A participant noted that one can no longer find printed copies as in the past; the participant also confessed to not knowing the definition of ‘document’ under the *Act*. The facilitator mentioned that e-mail is included under the definition.

It was noted that all documents produced by institutions and bodies which are financed by public funds are public documents, and that access to them should be available, be they federal, provincial or municipal. It was also proposed that the information time limit of 20 years should be reduced to 10 years. All exemptions should be viewed with the philosophy of the *Act* in mind – that of *providing access*. A participant commented that the *Act*, in its current structure, supports a culture of secrecy. The participant contended that documents should be exempt only in the case of harm, and that consideration should be given allowing for a “public interest override.”

It was also emphasized that more specific detail of the reasons for exemptions is needed, thus allowing easier determination of whether a complaint is warranted. Another participant suggested that giving the Commissioner binding override capabilities could be useful for this purpose.

A participant stated that Foreign Affairs is “one of the worst,” using agreements with foreign governments as the reason for exemptions. The participant contended that it is better to go through U.S. access to information to get such information than to go through Canada. Third-party interests and confidentiality were portrayed as a threat to ATI. A participant noted that the *Act* is being, or may be, used to prevent disclosure, with memos being contrived to use the *Act* to force exemption[Ⓢ] for example the rule requiring the removal of entire paragraphs with any specific mention of private organizations, as is currently the case under ATI regulations.

A participant noted that, rather than more discretion, they would prefer to see more categories of release without discretion needed. A participant also proposed that[Ⓢ] because the government consults the involved company before releasing information, and since no company is likely to ‘OK’ the release of information[Ⓢ] a mandatory release of information should be written into these contracts. If companies do not want to release information, these companies should not bid on government contracts. A participant noted that there are many standard mandatory provisions of government contracts, and that this should be another one.

A participant described the current culture as one of paranoia, trying to “keep everything quiet.” Another stated their perception that law enforcement is an area with a great deal of overuse of the exemption, and that some attention should be paid to limiting the exemptions in that field. A participant offered the example of a case in Vernon, B.C., in which an individual shot nine people, committed suicide. The participant gained no information from the police regarding the individual’s firearms acquisition license, background check, etc. This was declared a matter of privacy, presumably of the deceased. A comparable example from the United States was offered, in which an individual was on trial for possession of bomb-making equipment. The participant received no information from Canadian authorities, but received from U.S. authorities information they had received from Canada. The participant did not trust the motivation of the U.S. government in providing the information, but the information was received nonetheless. It was noted that it is considered a rule in journalism, that the American executives, government officials and the population in general “talk more” than Canadians.



The question was raised as to whether Canadian legislation should take account of the information available elsewhere, such as in the U.S. A participant argued that there should be greater motivation than simply “Americans do it, so should we.” Another participant contended that the American information act should be examined, as it “does not appear to have harmed them.” The participant mentioned that there is no shielding for Canadian civil servants who provide information, and felt that perhaps there should be, and that there is a need for a real change in statutory incentives.

A participant asked about the role of the Ministers’ offices in relation to the *Act*. Do they have the right of veto power, to delay release, the discretion to decide on exemption or release? If the Minister is routinely told when the information is to be released, is this tantamount to the right of veto? The ATI Review Task Force Director confirmed that, under the *Act*, the Minister is required to release the information or administer a request.

A participant argued that “whistle blower” legislation is needed in Canada. It was also noted that Britain has protective legislation for anyone whose career is “adversely affected.” The facilitator said this was an interesting issue and, noting that many individuals in government find themselves in this position, inquired as to where the training and government culture comes in. He also noted that the construction of documents has changed, including the transition from preliminary analysis to Cabinet Document. A participant commented that an Ombudsman dealing with harassment cases may destroy records after resolution of the conflict, not being required to keep such documents. A participant noted that we are experiencing a difficult transition rewording legislation to harmonize with a so-called paperless world.

Regarding the scope of the *Act*, a participant stated that there should be a list of exceptions, and all other documents should be public. That is not currently the case. A Minister should only intervene in a case of national security; anything else would constitute interference.

Another participant suggested that a list of the types of document that should be public would enable a civil servant to make an instant decision about whether to release a specific document. In this regard, a participant quoted Alisdair Roberts, who wrote, “Disputes about the right to information should be resolved by the reference to its role in protecting the fundamental interests of citizens and not by reference to the provenance or structural characteristics of the institution holding the contested information.”

Implementation

A participant noted that, in the United States, copyright is not held by the government, so that an organization whose business it is to gather information can copy and redistribute government documents without a problem. This kind of practice would facilitate public access to information in Canada. People are not using ATI because of delays and barriers, the participant said. If there were an economic incentive for an organization to produce government documents for profit, they would be routinely available commercially. The cost of \$20 million for 18,000 requests is not a good ratio, but if the information that was retrieved was extended to more people it would represent better value.

An observer commented that several publishers are repackaging government information and adding value. However, she clarified that an organization could not reprint and sell a government book. A participant remarked that currently there is discussion of charging for the use of web sites. If that goes ahead, government documents could be included. As an example, Statistics Canada sells information and then charges again if the material is put on a web site. A participant stated that if Crown information is not copyrighted, then another organization would be able to sell it. Then it would be a matter of whoever can provide it to the public at the least cost—it could be that it is the government who can.

A participant noted that 18,000 requests for information were handled at a cost of \$20 million and a cost recovery of \$217,000. Cost recovery is not necessary if the object of the *Act* is to provide information. It should be perceived as the cost of government; it should not be a disincentive. It is silly to generate \$217,000 in a multimillion-dollar environment, the participant argued. The government would not be inundated with requests if they were free; most citizens do not care. If that did happen, the government would become more efficient and cost effective. It would be interesting to know the costs involved in collecting the \$217,000.

The statistic on fees waived (in the Annex to the discussion paper) probably represents cases when the information coordinator decided that it was more trouble than it was worth to charge the fee, an observer noted. Another explained that the fee is waived for personal information. An observer clarified that there were about 50,000 personal applications.



A participant said that from the media perspective, the cost is not a big deal. However, another countered that the cost is a deterrent, because the process extends the turn-around time. Cost is an issue, the participant asserted. Even though large media organizations can afford the expense, it is often not within the budget of a particular program within that organization. Further, a participant said, estimates tend to be high-balled, which is a deterrent. In a case where \$3000 was quoted for 3000 pages, one journalist went into the reading room where the documents were displayed and selected about 100 pertinent pages, knowing the estimate was overloaded as a disincentive.

Many media organizations are not well financed, particularly the small, local ones, a participant said. Whether or not media organizations are deterred by the cost, there should be equal access—it should not be determined by ability to pay.

In their discussion of fees, participants agreed that the basic principle is that access to information should not be blocked. Information is a basic right in its facilitation of public debate. Any changes to fees will have an impact on the use of ATI. A participant noted that if charges are to be eliminated for the news media, it is essential to eliminate them for the public as well. In New York, there were many more press passes issued than there were journalists, because people decided they were journalists, if it meant there were no charges. Many people would qualify in the age of the Internet. Access should be free to everyone, especially as \$217,000 makes a mockery of ATI.

It was noted that when the *Act* was introduced, one of the concerns was that there would be too many requests to handle. The government can learn from the knowledge of how much cost was actually recovered. Should the handling of a request be open? The Department of National Defence has an open process, noted one participant.

It would be valuable to be able to use a database to see if a request had ever been made before. The result would not have to tell who obtained the document. A participant remarked that the Patent Office has a great database. A participant stated that currently the list of databases is not accessible online, only in a \$49.95 book. The law should be amended so that these are available electronically. An observer clarified that the request form may be available online, depending on the institution. The issue is that it has to be ascertained whether the requester is in Canada.

The system is designed to deter the applicant for fear of inundation with requests, a participant said. It was suggested that there be a period of time in which requests are free, to determine whether fees are necessary. It would have to be a sufficiently long period of time to handle a potential initial flood. An implementation target date would give time to prepare for an increase in requests, the participant suggested. Another remarked that the cost of collecting the \$5 fee probably exceeds \$5. A participant added, the limits to access are a “double whammy” —fee plus delay.

Delays are often not due to the information coordinator, a participant said. The request has to go to many departments and then someone has to vet the document when it comes back. It is a cumbersome process that involves many people. However, another participant said that some delays are clearly imposed to give the government time to make policy decisions. They are not due to a staffing shortage. The information always comes through the day after a decision is made, the participant claimed. Certainly journalists make some broad “fishing” requests—it is faster if they can be very specific as to author and date of material requested, but there are still delays. Polls on which budget decisions are made always come after the budget. This is not a matter of exemptions; it is just delaying. The advice of an assistant deputy minister should be held up, but not the data it is based on, the participant concluded. Another participant stated that by definition, public polling data should be released.

When the *Act* was written, it was assumed that the 30-day requirement meant that the information would be provided in 30 days, a participant said, however, the interpretation is that an acknowledgment is to be made within 30 days. Requests take longer today than they did five years ago, said another. There is a culture in the government to use the *Act* as it chooses.

Taxes on people who do not provide information are not much disincentive—it is public money anyway, a participant stated. Another participant said that if the fine or penalty on the department for being uncooperative were publicized, it might have an impact on other departments. Perhaps the fine could be given to the requester, suggested another.

The Information Commissioner’s annual report is often made available at 5 p.m. on a busy day, so it does not attract much attention, a participant remarked. However, another participant said that Statistics Canada has a free media hotline, on which journalists can speak to a media officer. It works well. This raises the issue of consistency, the participant added. There are cooperative ATI and media relations officers in some departments. The Department of Transport is an example. This also raises the issue of the kind of training these people receive, a participant noted.



The fundamental issue is that everyone should be working on the same set of values. The preamble to the legislation should speak of basic rights and ATI's responsibility to help citizens with access. Currently, there is no accountability, a participant stated. Another commented that there is no consistency. Some coordinators are very good, especially to people who make a lot of requests. However, there seem to be no rules and no standards.

This discussion should ignore the fact that there is a lot of deliberate withholding of information, a participant said. A change in the legislation will not eliminate the misuse of the *Act*.

Redress

Since results of redress are after the fact[Ⓞ]after "useless" information has been received[Ⓞ]most people give up and do not bother with the redress process. The really dangerous and disturbing trend is that by not providing information, the government has achieved what it intended, a participant stated. How is the public to find out about fundamental issues such as Somalia and the blood supply? Are there any statistics on complaints, another asked.

The Commissioner's office has power, but it may be trying to handle too many cases. The Commissioner has been very helpful, but slow, a participant said. Participants identified some abilities missing from the Commissioner's mandate. For example, someone other than the Prime Minister has to make the decision regarding access to his agendas. It is wrong that the Commissioner is not allowed to look at Cabinet documents. The Information Commissioner's office should have the resources to monitor statistics. It would also be a good idea to show departmental records in responding to ATI requests and identify problematic departments. Participants said the Information Commissioner should have the authority to issue binding orders to departments, while stating that it is wrong that the Information Commissioner reports to the Minister of Justice. The current Information Commissioner is testing the *Act* by asking questions.

Information and Privacy should not be merged, a participant said. Someone should be focused solely on information. The focus on privacy is already overdone. Another participant said that if the two offices were merged, privacy would always be the trump card. There should be two people. One person would always lean in one direction. A participant noted that there is one person in Quebec, and that Quebec leans about 90% towards increasing the protection of information. There are severe privacy concerns, a participant said, but this discussion is about using privacy as a barrier, rather than a sincere attempt to protect the privacy of individuals.

The debate around ATI may be dealing with yesterday's problem, when it should be looking five to ten years ahead, a participant said. An example is the Royal Society's report on genetic engineering. Because it dealt with the approval of foods, there was a commercial privacy issue. However, since the science of health and safety were involved, it should be available. That kind of science area will become more frequent in the future. The process of regulation is very secret.

With regard to Cabinet secrecy, a participant noted that certain things are secret for practical reasons. Why not make these things secret for as long as the government lasts, and release them immediately after an election, even if the government is re-elected? The 30-year limit may have been established to protect people until they died, another remarked. The time limit should be based on a lesser number of years or on the utility of maintaining secrecy; for example, when the government changes or when the decision is made. It would be useful to have access to the underlying information during the decision-making period. Another participant countered that Cabinet does need to be protected. Barriers are appropriate, but that should not be used as an excuse to limit the free circulation of information.

The 30-year period is too long, a participant concurred. There have already been exceptions made for serious researchers. The 30-year limit on the declaration of the War Measures Act in 1970 has just expired and nothing earth-shattering was learned. A more reasonable period would be the life of the government, or one year.

A participant stated that the government should separate the concept of ATI from its natural desire to spin information to its benefit. Denial should not be part of a media plan. After a decision would be a good time for release of information[Ⓞ]within 30, 60 or 90 days. Participants agreed that it is important to know what went into a decision; what decision-makers were weighing; what data they did not have; what they chose to ignore. The issue is really accountability, which is different from transparency, said one participant. This process should push toward accountability, particularly since there is great public cynicism about politics.

A participant stated that the first people to have information should be the MPs, not the media. Another noted that the Alliance Party is feeding the media information. There should be disincentives for politicizing, the participant said.



It was noted that lobby groups are very powerful. The government may be reluctant to give them more power by sharing information.

Any information that would put national security at risk should be dealt with on a different level, a participant said. That might be a case for withholding information longer than it takes for government to make a decision. The onus has to be on the government to prove that release of information would be harmful to national security. With national unity, for example, it is absurd for citizens not to know the government's plans. Most information will be released eventually; it is an issue of when. Citizens have a right to know about the decision-making process of the government; it is the business of the nation.

There is a disturbing lack of recognition that there is a cost to living in a society, a participant said. Individuals have to give up some of their privacy. That notion should find its way into the principles of legislation. Privacy should not be put on a pedestal. When people live in a group, they allow others to have some personal information about them. The review should make it clear that that is fundamental, and keep that balance in the debate, the participant said. There is a thrust towards keeping more categories private. When the Ontario legislation came into effect, some information became private that used to be public. With regard to Cabinet confidences, the culture has to be changed by addressing all exemptions.

A participant noted that often the media are criticized for not respecting privacy rights. However, the need to inform has been recognized in the Privacy legislation. Canadians may not realize the role played by the media in getting stories out to them. While a blanket journalistic exemption is not being suggested, there should be some recognition of the role of the media.

Access issues are not privacy issues, a participant stressed. Privacy exemptions are used too much. There are real privacy issues but with access laws, privacy is used as an excuse.

Other comments were that the media may not necessarily know what the public wants. There may be a limit to what the media needs to know—it may not be necessary to know all the gory details. The point is that the burden of proof should be on the government to explain why an exemption is made, a participant emphasized. Currently it is generic.

For example, a participant said, it is not helpful to know all the details of the debate in the current issue of scientific peer review. There is too much information, which is divisive and preventing the issue from moving forward. Some reticence is natural; it is human nature. Another participant said, the question is: at what point is it going to be divisive? People are reticent to give information because it might make them look bad. A 20- to 30-year period is appropriate.

At the Cabinet table everyone is elected. They make comments that they know will be public at some point. This debate is only about when they will be public, a participant said.

Regarding an earlier point about giving up some privacy when living in a society, a participant cited the example of the openness of the court system. In a case at the turn of the century, a couple requested a closed-court divorce. It was not allowed because that would not have been good for public confidence in the judicial system, the judge ruled. This attitude should be extended to all public institutions so that the public can have confidence in them, the participant said.

These comments bring the media back to its own duty to distinguish between public and private interest, a participant said. The media needs to demystify its own role, and the media should not forget that the public does not always understand.

With regard to Cabinet secrecy, if MPs are going to be embarrassed, it will be because of the decisions made, not because of the length of time that has elapsed. That is a reason to advocate sooner release, a participant said.

Nancy Averill outlined the process for the report of this roundtable and the larger process for review of the legislation. The meeting was then adjourned.



Appendix G – Roundtable Outcomes Report – May 29, 2001

Facilitator:

Dr. David Zussman

Opening Remarks

Dr. Zussman introduced himself as the chair of the roundtable, and thanked the participants for coming. He said that the *Access to Information Act* (ATIA) was produced 17 years ago and there have been significant changes since that time. The electronic age has made it possible for information to be available with speed and simplicity, and has changed people's expectations about availability. Government has evolved to include partnerships with the volunteer and private sectors. It is therefore time for a review of the *Act* to ascertain whether it is succeeding. This roundtable is an opportunity for stakeholders to voice their concerns and criticisms.

The Public Policy Forum, Dr. Zussman said, is an independent, non-profit organization whose aim is to facilitate development of public policy through open, frank dialogue with stakeholders. The comments made during the roundtable will be recorded on a not-for-attribution basis and made available to participants. Participants are also invited to provide inputs directly to the Task Force. There has been some criticism that the roundtable process has not been open to the press. The decision was made not to invite the media so that the discussion could be more open and participants would not feel constrained in expressing their views and criticisms. The report will be available on the web site.

Dr. Zussman outlined the format of the meeting. People would introduce themselves and briefly present their concerns about the ATIA; Ms. Averill would give an overview of the concerns expressed in the written inputs and telephone interviews with stakeholders; and then discussion would proceed, framed around four areas: Context, Scope, Implementation and Redress.

Participants introduced themselves with the following brief comments regarding the *Act*:

Companies are concerned about the visibility of their own records / profiles under the *Act*.

There is limited information available to the general public on how to use ATI to obtain information.

It will be interesting to see how growth in the amount of information affects access, as well as how government makes its electronic information available.

The government is in a conflict of interest in trying to administer the *Act* at the same time as fighting it in the courts.

Parties whose information is held by government are concerned about what might be released, and want to maintain certain exemptions.

The system should be open and transparent; if people do not have access to information, they often become suspicious.

Disclosure of information regarding private sector firms may have an impact on competitiveness.

It will be interesting to see how the *Act* can accommodate the public's increasing use of new information and communications technology.

The role of privacy regulations and laws in the maintenance of commercial confidentiality is interesting.

It is the job of government to make information readily available; the premise of free dissemination is and should be the government mind set; therefore, there should be concerns regarding fees for data.

Denial of information to companies for commercial purposes will cause them to relocate to other countries where the same information is readily accessible.

Delays in access to information have an impact on the tendering process for government contracts.



The hype and anxiety of the ATI process is out of proportion, especially considering the innocuous type of information that is often being sought; there should be more trust.

There are concerns about both cost and confidentiality when government requests information from private companies.

There is a suspicion that competing companies can use ATI to obtain lists of staff and skill sets.

Sometimes private companies feel they have to hire counsel to prevent disclosure of confidential information under ATI.

There seems to be a resistance on the part of the government to disclose information.

Occasionally the information provided under ATI by the government is wrong.

The power of the Information Commissioner is cause for concern.

With ATI, pre-clearance of advertising for compliance with regulatory regimes risks disclosure of market secrets.

It is difficult to strike a balance between the need for information, concerns about clients, and the rights of the public.

The filling of an ATI request can be a huge burden on a small organization.

The ATI process occasionally errs, based on a bias toward release. That is its mandate, but there should not be any bias built into the mandate.

Nancy Averill gave an overview of the inputs and telephone input from stakeholders:

Context

- ① The growth of electronic formats has meant that more information is available and there are new methods of retrieval.
- ② Globalization has ATI implications.
- ③ How can the revised ATI process complement the alternative service delivery, new public management and citizen-centred services? What is the appropriate balance?

Scope

- ① There is inconsistency with regard to ATI across government departments.
- ② A proactive release system was advocated.
- ③ Exclusion from the *Act* of Crown corporations, First Nations and public / private partnerships is an issue.
- ④ There are gaps in privacy versus access.
- ⑤ Protection of personal information and trade secrets is an issue.
- ⑥ Implementation
- ⑦ There is inconsistency in the application of the *Act* across government departments.
- ⑧ Fees are an issue - should there be any? Should the structure reflect the cost? Are they consistently calculated?
- ⑨ Delays are a deterrent.
- ⑩ Overall concerns
- ⑪ The lack of an overall government standard for interpretation constitutes a barrier.
- ⑫ The complexity and variety of the system results in requests being put in the hands of consultants.
- ⑬ How can the *Act* be used to foster trust?

Dr. Zussman opened the discussion by reading the purpose of the *Act*.

One participant noted that ten to fifteen years ago, the information governed by the *Act* consisted of paper documents, but now also includes electronic data. For that reason, it was deemed important to use the word “records” rather than “documents” in an ATI request.

The test for confidentiality should not be tradition, argued another participant. It should be whether the decision to release information serves the public good. How the *Act* is applied is important. Over the last six to seven years, as a result of court decisions and due to the presence of the Information Commissioner, many departments have improved their handling of ATI matters. All departments must learn to use the *Act*. It was mentioned that the government itself has taken a long time in this regard.



A participant inquired as to what efforts were being made to deal with inconsistencies in the application of the ATIA across departments. Currently, a persistent and well-funded requester can achieve the desired results by making many requests to different departments, all worded slightly differently. Inconsistency can lead to a huge amount of game-playing, a participant stated.

One of the issues that makes the ATIA difficult to use is the lack of knowledge regarding the actual existence of documents. Perhaps a complete list of government documents and their availability could be drawn up. If records had to be identified, it might reduce the gamesmanship. Also, why not make any request for information accessible to everyone, as well as the information gained from it? It would contribute to making a great deal of information available, which would be beneficial, especially for the media. Technology offers a good avenue for this, if openness is what is desired. Confidential documents should be identified as such right from their inception. Otherwise they should be presumed available.

It was clarified that, in the 1993 Report of the Information Commissioner, “recorded information” was expanded to include e-mail, e-conferencing and computer-driven information.

A stakeholder mentioned that, even within government, it is extremely difficult to review ten years’ worth of records because of the variety of formats in which they are kept - microfiche, micom, 5 inch disks, and 3.5 inch disks. Such roadblocks within the government will have to be overcome sooner rather than later, the participant argued. Where will government electronic information reside for reading by the public and corporations?

A participant argued that private information becomes public property as soon as a project is approved and the money allocated. There may be tension as balance is sought in this declassification system. The government has not yet achieved this balance.

A participant suggested that the intended implementation of the *Act* requires a change of mindset on the part of those who apply it. A re-evaluation is needed to establish whether the *Act* is meeting its objective of serving citizens. The public good would be better served if the ATI process were examined from that end.

A participant observed that ‘our democratic system – Parliament, courts, social system, etc. – is based on an adversarial approach wherein advocates argue the issues from informed points of view.’ The participant described access to information as “a keystone to this vital process”, and noted that to deny information is to deny knowledge. “An informed advocate, no matter his or her view point, can only strengthen our democratic process”, continued the participant.

“Perhaps we are looking too high up the tree for answers”, remarked a participant. The root of the problem goes beyond the *Act*. Everyone gives theoretical support to the idea of open information, but in practice, politics plays a large role, and governments do not always wish to acknowledge this fact. Politicians, senior bureaucrats, companies and public servants who create documents do not necessarily want all the information released. A participant argued that the private sector (including media) and government often have competing interests in terms of releasing information, and that the ATIA may not provide resolution. It is a good idea that all requests be posted on the Web, but some information can always be hidden, noted a participant, offering as an example lawyers who are not required to provide the names of their clients.

Another participant expressed concern that the discussion might be losing track of the *Act’s* *raison d’être*, the philosophy behind it. It is not about trade and profit, the participant said, but rather the democratic principle. Taxpayers have a right to know. The *Act* has evolved into something else, a treasure trove of information. This should be reflected upon before any changes are made.

There is a potential infinity of requests and many of them are looking for a lot of information. The role of information coordinator is not easy, acknowledged a participant.

Scope

The facilitator asked the participants whether the present *Act*, as written, captures the issues raised. Some participants felt that organizations such as NAV Can and Canada Post should not be exempted from the legislation. When doing business with the government, one participant stated, you should accept the loss of some confidentiality. No organization accepting public money should be exempt from the coverage of the *Act*, argued some participants.



To a participant's question of the priority of the *Act* relative to other disclosure policies, the facilitator noted that the *Act* takes precedence. Another participant suggested that a "blanket requirement to make all information available as a basis for doing business with the government would be impractical".

A participant commented on the depth of the information subject to access, from business issues to the personal "lives of employees" - which raised the question of a reasonable level of information that could be made available. One participant expressed his concern that by offering too little protection to confidentiality "we could stimulate the brain drain if we are not careful". Confidentiality, another stated, is protected by the *Act*. A comment that the office of the Information Commissioner is exempt prompted complaints that it "should not be".

A potential problem was noted for companies involved in varied activities governed by different acts, such as Telecommunications and Broadcasting, where each approaches the protection of commercial information quite differently, with the result that each *Act* is dealt with differently under the *Access to Information Act*. Some participants noted that legislation seems to be listed in the Schedule as an afterthought. Perhaps legislators should be more proactive and harmonize different pieces of legislation in tis regard so that they are dealt with consistently under the *Act*.

Implementation

A participant representing a small organization, not publicly funded, said that their "not unimportant work" could be side-tracked or killed outright by large ATI fees. If not for their lawyers (working for free), he added, they often would not receive information at all. Regarding the issue of fees, another participant called the group's attention to the fact that many trade and other associations are 'not-for-profit' groups as well. This, he said, underlines the need for careful wording of any clause that might distinguish or waive fees for not-for-profit groups.

It was suggested that groups could share information, thereby dispersing the costs incurred for an ATI request. If delays no longer meant increased fees (i.e. profit), another commented, then departments would need to come up with other reasons for not readily providing information. One participant reported hearing an estimate of \$1 Million for an ATI response, which was subsequently negotiated down, leading them to conclude that there is "some discretion at play here".

Talk then turned to the Treasury Board's (TBS) role in administering the *Act*. Costs could be reduced, one said, if the TBS worked as it should to coordinate responses across departments. Some departments were noted for posting their information responses on message boards or in a "reading room". Why, it was asked, cannot the TBS coordinate this for all departments? The government needs to become serious about coordination.

The "human element" was suggested as an element in ATI delays. One asks a department for information, the participant explained, and is refused. One then submits a request through ATI, which is forwarded to the same department, which must then provide the information they previously refused. This, he stated, brings in the element of human nature and delays. Obtaining documents, he said, need not take so long.

The disclosure of third party submissions in response to public consultations was described as another form of delay, inefficiency, and cost for all parties: for the government department in question, the requester and the third party involved. For instance, in a situation where a private company has made a submission in response to a public consultation, in any if not most instances, such a submission is carefully crafted with the expectation that it will be made public. Furthermore, the company may have already passed it along to its stakeholders. However, if another party requests that same submission from the government through ATI, the government delays release in order to consult with the company in question. This, it was stated, is an unnecessary delay since the company has no issue with the information's release, but the requester must still wade (and wait) through the ATI process, and the company must devote time to responding to the request. Some information deemed as confidential by a private company, cautioned another speaker, might not be recognized as such by every public servant. Delays, stated a third, reflect directly on the credibility of the *Act*. Another participant echoed this "excellent point", saying the problem of delays had not improved much over the years. "Information delayed is information denied."

It was commented that, except for ATI staff, no job descriptions within the public service include ATI work, but that it falls under "other duties". Delays are not so much willful as a matter of priorities, he concluded. The question "Are there any penalties for delays?" was met with a recommendation that fees or even authority be lost if a response was unreasonably delayed. Some delays, another noted, are due to third party involvement, needing files from storage, or the need to consult with people on the issue. A participant countered the attributing of delays to "finding paper", saying



instead that they think it is more often the people involved, obtaining the necessary decisions and reasons to release information, or not.

Bureaucrats, one participant stated, must be careful when divulging information about contentious policy decisions. Politicians do not want to say "I made the decision for political reasons", but not all decisions are business-based.

The facilitator then asked for the participant's views on how the *Act* could be better administered. The first comment reiterated the need for TBS, not the Commissioner, to take on a lead role. The participant said there is a need for certification and training programs for ATI professionals. He noted that one college is looking into providing such a program, adding that his organization fully supports such a move. A participant argued that TBS had not fulfilled its mandate with respect to the *ATI Act*. In response to Dr. Zussman's request for a single-word description of the performance of TBS in this regard, two participants called it 'abysmal'. "Inconsistencies in the application of the *ATI Act* across government departments are the result of poor stewardship", one continued. The participant argued that neither TBS nor the Department of Justice should continue in their role of 'stewardship' of the *ATI Act*. Nor should the Privy Council Office be charged with this responsibility. The Public Service Commission was proposed as a potential candidate for this role.

Redress

Redress, one participant began, should be to Parliament. The repercussion for causing delays or problems with an ATI request would be a "damning report" in Parliament. The Information Commissioner also needs more authority and should be further strengthened. The government changing the *Act* while simultaneously fighting against it in court represents a conflict of interest. The Information Commissioner, they concluded, should be responsible only to Parliament.

A participant asked why the administration of the *ATI Act* was moved to the TBS at all, questioning whether the *Privacy Act* is similarly "split". Another replied that responsibility for implementation of both the *Privacy and Information Acts* lies with TBS. The Information and Privacy Commissioners, they elaborated, are at conflict. It was suggested that one Commissioner be responsible for both acts, as is the case in most provinces. The Commissioners, it was noted, already share administrative staff.

It was commented that the commissioner having order-making powers might be too "adversarial", and the role should be that of an ombudsman, not a judge. It was noted that there is a need to "protect the government from crazy commissioners". Another speaker suggested the group give consideration to the option of a single office. The Information Commissioner, he stated, must always balance the two values of privacy and access, while the Privacy Commissioner is only concerned with "keeping it in". Concern was again noted about giving any increased order powers, or punitive powers, to the Information Commissioner.

A participant said that when he hears redress, he thinks instead of responsiveness. Without responsiveness, penalties, benchmarks, he asked, what have we? We have a roadmap, legislation, but "who is driving the car?" Another speaker raised a new issue, asking about "redress for whom?" The facilitator stated that the term was intended in the broadest sense possible, but, in the past, it was most often those requesters who felt the delays or costs were too much. What about, the participant elaborated, redress for those impacted upon, or damaged by the release of information through ATI? The facilitator thanked the participant for offering this "new wrinkle" for consideration. Another participant suggested that the redress of delays or costs is more of an administrative issue, in contrast to the redress of damages.

The need to preserve the "quasi-judicial independence" of the commissioner's office was stated. The participant then added that about five government departments receive approximately 60% of all ATI requests (with an estimated total of 5,000 requests per year), and concluded that this leaves many other departments without the sheer volume of requests as an "excuse" for delays. Again, the need for training was noted, with the comment that all information should be considered accessible and employees should be trained on how to obtain and provide it upon request.

"Using the *Act* to get the bureaucracy to move", another asserted, "is like herding cats". If information is obtainable and the *Act* is used as a last resort, he elaborated, then its use becomes more legalistic. Right now, he concluded, it is the first resort, not the last. Another participant stated that if attitudes do not change at the top, then the changes at the edges of the *Act* are pointless. He cited the Prime Minister's fight against the Information Commissioner's request to see a 'Cabinet Document' as an example of the need for a change in attitude. The Commissioner asked to see a document, but is being told to take the word of the Prime Minister's Office that it is a Cabinet Document, sight unseen. The signals from the top are "all wrong" when the top echelons are fighting the Information Commissioner. The



participant stated a need for a new openness, noting that the Americans have no ATI Commissioner but are more open with information.

Another participant reinforced the previous two speakers' comments, admonishing the ATI Review Task Force to take them seriously. No changes are effective, he stated, without the power of the *Act*. Another noted that, after months of review, the Commissioner makes a recommendation, not a decision. A third participant added that "people do not do the expected, they do the inspected". If they are watched, governed and their actions made public, their will is made stronger, he concluded.

Final comments included a concern that the Commissioner's role would be changed too much with the granting of increased powers. A suggestion was made that technicalities, such as leaving off a "the" or using imprecise terminology in making a request, are sometimes used to deny access. Finally, one participant noted that sometimes requests are inappropriate, such as a request for information on bids prior to the contract being awarded, or even before the bidding has closed.



Appendix H – Roundtable Outcomes Report – June 6, 2001

Facilitator:

Paul Lepsoe

Opening Remarks

Participants introduced themselves and stated their key areas of concern. Issues raised included:

- ⌚ the spirit of the *Act* and the matter of solicitor/client privilege
- ⌚ whether this privilege exemption is being used according to the spirit intended, or expanded to include any discussions in which "there was a lawyer in the room"
- ⌚ the need for quicker and easier access to information
- ⌚ the perceived lack of a "culture of openness" within government
- ⌚ the perception of a "Lack of *Access to Information Act*"
- ⌚ delays and inconsistencies in what information is ultimately received
- ⌚ information that is "blacked out", exempted or denied
- ⌚ protection of privacy of third-party information, particularly that relating to private companies
- ⌚ the irony of holding closed-door sessions to discuss the *Access to Information Act*. (A participant reported that many others had commented on this to him, prior to the meeting, and that he voiced a strong desire to discuss the format of the consultations themselves.)
- ⌚ the need for accountability, particularly in relation to health care
- ⌚ information is never received within 30 days

Nancy Averill gave an overview of the inputs and telephone input from stakeholders:

Context

- ⌚ The growth of electronic formats has meant that more information is available and there are new methods of retrieval.
- ⌚ Globalization has ATI implications.
- ⌚ How can the revised ATI process complement the alternative service delivery, new public management and citizen-centred services? What is the appropriate balance?
- ⌚ Scope
- ⌚ There is inconsistency with regard to ATI across government departments.
- ⌚ A proactive release system was advocated.
- ⌚ Exclusion from the *Act* of Crown corporations, First Nations and public / private partnerships is an issue.
- ⌚ There are gaps in privacy versus access.
- ⌚ Protection of personal information and trade secrets is an issue.
- ⌚ Implementation
- ⌚ There is inconsistency in the application of the *Act* across government departments.
- ⌚ Fees are an issue - should there be any? Should the structure reflect the cost? Are they consistently calculated?
- ⌚ Delays are a deterrent.

Redress

- ⌚ Delays in rendering a decision are an issue
- ⌚ The role and powers of the Information Commissioner should be discussed
- ⌚ Merging the roles of the Information and Privacy Commissioners should be considered
- ⌚ Overall concerns
- ⌚ The lack of an overall government standard for interpretation constitutes a barrier.
- ⌚ The complexity and variety of the system results in requests being put in the hands of consultants.
- ⌚ How can the *Act* be used to foster trust?

Participants first discussed the context and design of the *Act*, focussing on Section 2, the Purpose Clause.

The "purpose behind the *Act*" will not work unless those behind the bureaucracy believe in free and open information. What was intended as the minimum amount of information to be released has become the maximum amount. The concept of openness must "start at the top" and reward openness on the part of employees, "as opposed to the current system".



The manner in which issues are approached should not be "public versus private". For example, with alternate service delivery, since public money is used, the public has a right to know how the money is spent.

Many past scandals were based on senior level perks. These are now private money perks, giving these same bureaucrats the power 'lost' through the public access to information.

The purpose of the *Act* was to allow public participation and government accountability.

The sensitivity surrounding the decision-making process is largely a logistical, administrative issue. The original context of the *Act* focussed on transparency, while jobs and the economy are now based on information - to have and to use. This has resulted in new pressures, as the government is the single largest holder of information on the economy.

Has the *Act* made any difference at all? Previous attempts to address this concern about the "closed door" meetings had not been met with a response.

The facilitator noted that he had heard concerns about the nature of the consultative process from a number of participants and would be willing to have the topic added to the agenda as a separate item if the group were willing to remain longer into the lunch period. All agreed to delay lunch in order to allow time for this item but still finish the previously -announced agenda for the substantive discussion in the time allotted. .

Civil servants now seem to be watching what is recorded, taking care to code and protect material they do not want released. They are concerned about what could happen to them if the information is released. New information management styles have to be developed to include e-document management.

There is a "siege mentality", based on the underlying assumption that information is requested because "you're out to get us". Noting that most Access requests "want information for information's sake," individuals need worry only if they have done something wrong.

People have learned to protect themselves from the *Act*. For example, a nuclear facility organization changed its minute-taking style once it realised its minutes were accessible through the *Act*. The organization now records only decisions, not the discussions leading up to those decisions. This is undesirable from both a journalistic and administrative point of view. There are now no records detailing why certain decisions were made, a matter of concern for the future safety of the facility.

Unless questions are phrased "exactly right", those requesting information receive no information. Any missed term or title will result in no release of information. Those outside government often know more about programmes than those working inside government do, as government employees may rotate through job assignments every 24 months.

The 1983 wording of the *Act* reflects the mindset of 1983. Conversations on the subject, "even around this table today", now include words such as 'war' and 'state of siege'. The purpose clause of the *Act* should no longer refer to "records under control of the government", but should be amended to read "under control or in partnership". This would give access to some, but not all, private company information-only that relevant to public work.

This section of the *Act* was not meant to refer to records but to information, with the emphasis on public information.

A private sector participant noted that the value and wording of government contracts with the private sector could generally be disclosed.

Accountability must be captured in the *Act*.

While the word "accountability" may not be in the text of the *Act*, the entire *Act* was built on the foundation of parliamentary accountability, and is about accountability.

While accountability is now *implicit* in the *Act*, it should be made *explicit*. Who among the drafters of this legislation would have ever thought that the Information Commissioner would be suing the Prime Minister? For this reason, accountability must be explicit.

Accountability is to the public; Parliament is merely an intermediary.



With privatization of public sector organizations, there ceases to be access to information, a serious issue that demands addressing.

Crown Corporations should not be excluded as a category. Plutonium waste at Chalk River was not removed, and yet information regarding the situation was exempted from the *Act* because the operation is a Crown Corporation. Salaries of television hosts provide another example-those on TV Ontario were disclosed under provincial law, while those with CBC were not as the latter is a federal Crown corporation not subject to the *Act*. The Canadian Medical Review Board-unpaid and providing full information disclosure-was contrasted with the Canadian Foundation for Innovation (CFI), whose board is paid but does not disclose information even though it uses public money and acts 'for the public good'. It is precisely for this reason that information on the CFI should be accessible.

A participant noted the implications of the proliferation of what he called "quangos", which are not subject to the *Act*. The facilitator noted that "quango" was a British acronym which stood for "Quasi-Autonomous Non-Government Organization".

A functional definition of institutions needs to be included, and we should move toward data protection legislation. There is also a need to look at exempting information on the basis of the content itself rather than based on the institutions holding the information.

CBC has suffered by not being included all these years: a "culture of secrecy has strangled the place". This is an example of what happens to institutions that are not open, and the CBC must be included for this reason.

Given the gaps in the design and purpose of the *Act*, should there be a public interest override? As some have changed records in an effort to 'adapt' to the *Act*, the exemptions should be more restricted.

A non-profit organization housed at the Corrections Canada offices is exempt. There is no information available on the organization's spending of the public funds it receives.

There are mandatory and discretionary exemptions, and the public interest override should extend beyond the privacy exemption.

The Commissioner does not have the power to order the release of information. He can only make recommendations. If the Commissioner were to have order-making powers for information disclosure, the public interest override should be applied consistently, as a blanket application is "not good either".

"Cabinet Confidences should not be exempt", stated one participant calling for reason in the use of exemptions.

Information initially denied on grounds of privacy was later included in a CD-ROM that was published and sold at "exorbitant cost". When the participant inquired again about the information, she was instructed to buy the CD. Upon asking for only the background information (as originally requested), the request was again refused on privacy grounds.

Information on an agreement that affected Public Service Union members is protected, but how can any information be provided without harming some private competitive advantage.

A blanket exemption goes against the spirit of the legislation.

The Judge Advocate General (JAG) at DND used 'solicitor-client privilege' to keep documents which the Ombudsman later released. The JAG has still not released the information. The Ombudsman had said there was no client-solicitor relationship-he was not a client and the JAG was not his solicitor.

Health Care is our largest spending area, yet much information is exempted and not much, if any, is shared. Accountability, authority, and sanctions are needed. The Deputy Ministers of Health are meeting but "we can't get the agenda".

A participant wondered "Who decides?" The participant argued that it is those with a vested interest in secrecy who have the authority to decide whether information is released. The participant "wouldn't be against a harm test" as a tool for determining which information can and cannot be released.

The facilitator invited comment, in terms of right of access, regarding the requirement for access requests to be filed in Canada by persons present in Canada.



From outside Canada one simply needs a friend in Canada to obtain information; there is no need for a “high-priced lawyer”.

It is easier to acquire information from the United States and the United Kingdom than it is to obtain information in Canada.

Implementation

After a break, the discussion turned to the implementation of the Act. The facilitator drew the group’s attention to the discussion points on pages 8 and 9 of the consultation paper, and particularly question 5.1. The following comments were made.

When ATI was first introduced, it was hard for departments to respond to a request within the time lines because the information was hard to find. Information management was and still is deplorable and contributes to the cost of ATI. Information management has suffered with cutbacks. There is no accountability regarding the length of time it takes to respond to a request or the condition the information is in when it is delivered. A creative solution would be to make the holdings available unless there is a reason to exclude a particular item. It should be published to an electronic information system that the public could access.

Journalists laughed when asked if the 30-day commitment is ever met. They reported delays of up to two years. The problem is not only the delay: no reason is given, and no indication of when the information may become available. Delays are often the result of staffing and funding problems rather than deliberate withholding of information.

The problem is twofold. The government is stonewalling those requesting information, and caseworkers who are supposed to helping with requests in information offices are not pushing hard enough to get it for them.

The government does not know what information it has. The information should be inventoried and released routinely. Forms make it difficult to sever personal information from general information. The system pays no attention to potential requests; they should be anticipated. The 30-day commitment is not respected and cannot be. Better document management and better proactive procedure is needed.

The onus should be on the government to expand its resources to make sure it can follow its own guidelines-the 30-day promise, for example. This is necessary for transparency.

While more resources would help, they will not change the fact that the information management task has been neglected at the business unit level. (A business unit is an organizational piece, a logical cluster under a program or activity.) Records management protocols have not been followed, even though they are in place, and there is no accountability. There is no inventory of information; often it is only on the C drives of computers. This escalates costs because it cannot be found.

There is no anticipation of requests.

The public will not tolerate the government internal processes now that there is new private sector legislation. High fees will not be tolerated either. The paternalism of waiving of fees should not be relied upon.

The fatal flaw in the *Act* is that enforcement is lacking and there are no incentives for self-enforcement. It is similar to the issue of ethical behaviour.

Perhaps all access to information coordinators should work for the Information Commissioner, just as all government lawyers work for the Attorney General.

With regard to records management and access, a major part of the inertia is that inventory and collection are just not there any more. In the past a file used to contain all the history of an issue. These days, when one takes over a file one starts from scratch and when one leaves there is no one to hand over to. With technology and movements of departments there is a great need for document management. The access law imposes a regime on the government, so it performs a service whether or not people use it. Because of the messy state of information within the government, people are reluctant to open up.

In Quebec it is mandatory to inventory all documents.



The process has become politicized. For example, the establishment of a list of what ATI requests have been made to the Prime Minister's Office has profound implications for democracy.

Resources are applied to keeping information from going out. A request often triggers a search for leaks, because it is thought to be the result of a tip-off.

When a department causes delays, it should not be allowed to charge retrieval fees. The Information Commissioner should have the ability to track requests in a systematic way. The results of a review of all the departments' performance should be published. Requests should be tracked as they go through departments. This could result in changes in the worst offending departments. An ATI request could be made to follow ATI requests.

The facilitator drew the attention of the group to the data on page 15 of the consultation paper, and to question 5.5. The discussion continued as follows.

There is no discussion of the benefits of ATI, just the costs. A more philosophical position should be taken and cost recovery should be "stamped out". The public has already paid for the information. At Statistics Canada, cost recovery is built into its enabling legislation, but in the United States access to this kind of information is free. The notion of charging for information is contradictory. It is not the government's to sell, so cost recovery should not be an ATI principle.

Cost recovery is prohibitive to many people looking for information in the health and safety field. They turn to the Internet, where the information is not always reliable or useful.

The facilitator drew the group's attention to questions 5.3 and 5.4 of the consultation paper. The discussion continued as follows.

There should be no categories; all requesters should be treated equally. Often the walls of secrecy go up when it is learned that a requester is from the media. Only when applying the public interest override does the nature of a requester (e.g. media) become a factor.

Has the Task Force uncovered information about the class of requesters? This seems to be a question without context. The United States seems to like having different categories; maybe it works somehow for them.

Since the cost of filling 14,340 requests came to \$28 million (about 100 requests per department) the system does not appear to be being abused. This does not explain the delays or costs. It is probably not necessary to define numbers or categories.

Serial requesters are disruptive to the system, but if access laws were working properly, the number of requests could diminish.

In the United States the requests from media are expedited, because they are in the public interest and speed is usually an issue. It seems to work. The fee system should be based on cost recovery. The \$5 fee creates more paperwork than it is worth. Retrieval and copying fees should be based on market prices. There should be no profit in disclosing information.

The serial requesters are the people in the business of using the *Act*. If it worked properly, these people would disappear.

Redress

The facilitator drew the attention of the group to the first question on page 10 of the consultation paper. The discussion continued as follows.

The process and powers of the Ontario Information and Privacy Commissioner are superior to those of the federal Information Commissioner (IC), who should have broader powers, including power over the records management system. The figures in the consultation paper do not show whose fault the delays are - it looks like an internal records management problem. The Information Commissioner's power should cover this.



The IC should have the right to collect information about the retrieval process, compliance, and delays. That would make it possible to see where the problems are. It should be possible for the IC to track a request.

The IC should have more authority. Accountability goes with authority, as in the Justice model, where the ATI coordinators would report to the IC. To whom should the IC be accountable - Parliament or Canadians?

Well-trained people with consistent practices would be a money saver. The IC should be accountable to Parliament.

Since Treasury Board established the budget, underfunding looks politically motivated. If the IC's budget were voted on in Parliament separately, rather than as a part of the whole budget process, it would be exposed to more scrutiny.

The IC should have the power to levy penalties. Lack of penalties rewards delays, exemptions and non-compliance. The penalty should be like a library fine, increasing with the delay. There is currently a sheriff in jail in Florida for ATI non-compliance.

There are fines and jail terms for non-cooperation with income tax and census laws. However, it would be difficult to assess who is ultimately responsible for delays and not finding the information.

The manager of a business unit should be as accountable for information handling as for his or her budget. Currently they have no knowledge of what they have and they do not apply the same importance to it as they do to managing their budgets. The incentive for changing the mindset of government should be examined. How much information is available without ATI, already in electronic format? The protection mentality must be reversed.

There does need to be protection for employees reporting others (superiors, for example) who are thwarting the ATI process, like whistle-blower protection. This would help in the Redress process.

Giving the IC order-making power legitimizes the ATI process, results in greater access and develops binding precedents.

Question 6.3 in the consultation paper assumes staying with the same model. That route of staying with the ombudsman and the Federal Court is inappropriate. It would be better to enhance the powers of a specialized tribunal.

Consultation Process

An extra topic, "Consultation Process", was added to the agenda. Participants were informed that the roundtable infrastructure would stay and reconvene after the lunch break if desired. The facilitator and Ms. Averill outlined processes of the establishment of the Task Force and the stakeholder consultation.

Participants made the following comments about the consultation process.

MP John Bryden has announced that 14 MPs will sit through the summer in open sessions on ATI in Room 306 West Block. The sessions will not be reported in Hansard, although there will probably be a transcript.

The Ministerial decision on the structure of the process is of concern. Agencies are reviewing themselves. These agencies are involved in litigation, defending the restrictive interpretation of the *Act*. It brings into question the impartiality, integrity, and fairness of the process. Factors of good consultation are missing: resources are lacking; the external advisory committee was appointed late; the time frame is compressed. This process violates the draft guidelines on how to consult with the public, which are currently before Treasury Board. The process is low on the Ladder of Citizen Participation-it is at the level of manipulation by government. The speaker said he was in attendance to protest; his participation was not an endorsement of the process. He said he hopes that this will not be the only opportunity for consultation, that the public will be consulted in a meaningful way, following best practices in citizen consultation.

To avoid several participants feeling the need to take the time to "go on the record", the facilitator indicated (with the concurrence of Ms. Averill of the Public Policy Forum) that the record of the proceedings would specifically note that participants were assured that participation in this consultative process would not be construed as agreement with the process itself: people did not have to agree with the process in order to participate.



Several groups supported public hearings. Choosing the groups allowed to participate in the roundtable, rather than holding public hearings, is a semi-privatization of the democratic process. There should be an all-party Parliamentary committee. This roundtable should not be a substitute for the democratic process.

Many people declined to participate because the process could be a “whitewash” of their opinions. One of Canada’s top academics on the subject of access to information tried to obtain the Task Force documents and found that some were held back. He is not taking part in the process, as it would seem to be an endorsement. Bureaucrats have had years and resources to prepare for this process. Why has there been no money for a benefits study, if this is the only process?

The three weeks’ notice to participants was not adequate. The Task Force or Public Policy Forum should consider asking the opinions of the 19,000 requesters of information from last year. It would be a more systematic way to review.

Ms. Averill confirmed that the PPF would pass on to the Task Force the comments on the consultation process. A draft copy of the minutes from this roundtable would be circulated within seven days and, after people had had an opportunity to comment, they would be posted on the web sites. The outcomes reports from the roundtables will form the basis of reports to the Task Force.

In response to a question about further input, a member of the Task Force, said that other opportunities would be considered. Also, submissions to the Web site are encouraged.

A representative from the Task Force said that while the deadline is somewhat flexible, submissions cannot be left too long. The clock is dictating deadlines for submissions and roundtables. The Task Force report will be released to the public. Participants were told that the summary of discussions from this roundtable would be distributed to them for comment and were invited to provide PPF with their e-mail addresses.

Wrap-Up

The facilitator invited participants to each make a one-minute concluding comment. He re-iterated that the roundtable would reconvene after lunch if necessary. Participants made the following comments.

The *Act* is generally good, but changes should be made in the application as well as in the tools given to people. More responsibility should be taken for the process. Protection of personal information should be retained.

It is reassuring to find out that others are being thwarted by ATI too. The spirit of the *ATI Act* is not being enforced, as there is no political will to do so.

It was never discussed at this roundtable whether more openness would be good or bad for government.

As a result of ATI, no one keeps notes for fear those notes will be accessed. The result is that no one knows how decisions are made.

Today’s discussion illustrates the need for an in-depth public review of the legislation with regard to exemptions and institutions. The few minutes spent discussing exemptions at this roundtable did not really amount to an analysis or a study.

The goals of the review should be three-fold: making access as great as possible; making it as timely as possible; and ensuring that it is inexpensive or cost-free.

Those present at this roundtable are only a small segment. The discussion should be projected to the whole nation.

ATI is not just a challenge; it is an impediment.

It is shocking that little of the *Act’s* purpose is evidenced in its application. Real work must be done on who and what is covered by the *Act*. It is repugnant that this review is being carried out on such short notice. The IC should be given greater and wider powers. The huge issue of contracting out needs more thought.

Currently the incentives in the *Act* to violate it and deny access are much greater than the incentives to comply and give access. If this imbalance does not change, the current situation will not change. The incentives add up to not protecting the public interest. Enforcement may be needed rather than incentives.

The consideration of electronic information should have been added to today's agenda. With the electronic age, the IC must have more power to respond quickly.

The ATI legislation is sound in intent, but it was prepared as a fallback. The current mindset must be changed and public servants should be protected from being penalized.

Public funds should be devoted to some basic research on the benefits and value of ATI. The short timelines for this consultation are a problem, particularly in the academic world. The inconsistency in implementation and administration of the *ATI Act* must be addressed.

This roundtable did not deal with exemptions, particularly third party exemptions that are subject to immense abuse. The *Act* sets an ominous tone because it is based on exemptions. Hopefully the tone will change with the review. The burden of proof should be with the government, not the requester. Hopefully the issues of privacy will not co-opt ATI.

More discussion must take place on exemptions and enforcement.

The major problem with ATI is that the people who have the power to change it are the people who benefit most from its not working.

The way the *Act* works currently hurts democracy because information on why politicians are taking the decisions they are is not being shared.

This roundtable has barely scratched the surface. It is disappointing that this is a major element of the public consultation process. It is not so much an issue of government information, but rather public information held by other people. Fees should be limited to only covering the cost of copying.

An essential starting point would be with incentives to comply. Further, Parliament's role in developing incentives should be strengthened.

The facilitator suggested a 40-minute session devoted to further discussion of exemptions after the lunch period. A number of participants indicated they would like to stay for it. He thanked those who could not stay and adjourned the meeting for lunch.

Exemptions

The province of Quebec maintains that one's name is not personal information. The federal *Access to Information Act*, however, states that if a person's name is mentioned then it does constitute personal information.

This interpretation expands the exemption greatly. Knowing a name does not equate to giving out personal information.

Guidelines for public consultation are currently at Treasury Board in draft form. Someone else commented that these guidelines are more opinions than they are categorical applications.

Cabinet Confidences should be listed under Mandatory exemptions.

There will be exemptions in the next / revised *Act*. How then, do we get precedents and consistencies in the application of these exemptions? "What is the premise of the exemption?", a name? What constitutes a breach of privacy? We must know the public benefit of an exemption. Those proposing it must justify why an exemption is included.

An indication of the harm "intended to be avoided" by an exemption should be required.

Given that there will be exemptions in the next or revised *Act*, how will these exemptions be consistently applied, and what premise will they be based on. Those proposing an exemption must justify the public benefit of it.

Relating to a personal name as private information, prison guards and RCMP officers have expressed concern about their names being included in information released through the *Act*. In other cases staff have been overworked 'round the clock' through a fear of job loss, but the union was unable to access sign-in sheets. The employer used the *Privacy*



Act to block the release and “hide abuse of the employees” and the system. The case went all the way to the Supreme Court.

With no information on alternate service providers available through the *Act*, there is a need for a harm test instead of blanket exemptions. However, “harm” is a difficult concept to quantify-embarrassment is not enough to constitute harm.

The harm test should be “a reasonable person test”.

There should be a requirement for justification of a harm-based exemption. The burden of proof should be to deny access, not to force access.

There is a need for enforcement. It is difficult not to have concerns over the way requests are handled, dealt with and ruled on fairly, as the individual must take on government and the courts.

The facilitator asked if the offices of the Privacy Commissioner and Information Commissioner should be merged.

"No!" There is a definitive conflict between access to information and privacy. The purpose of the Privacy Commission is to keep a “lock box” around information, while Access is based on openness. They are opposites.

If the Commissioner is given the power to rule on what information is private, the facilitator asked, then what is the role of the Privacy Commissioner?

As the two are competing structures such discrepancies should be solved in public, not in a closed forum, and thus not in one office. "Duke it out in public".

There should be advocates from each side to balance the players. They should always be separate-the tension between the offices provides that balance.

The offices should not be merged, but measures should be in place to ensure that there are no overlapping responsibilities. This process involves revising more than just one *Act*. The example of Atomic Energy was used-how it altered its minute-taking style in direct response to the *Access to Information Act*. The *Act* should be changed to stipulate that discussion and the rationale behind decisions must be included in minutes.

An “Anti-avoidance Clause” is stating that one is breaking the spirit of the *Act*, and therefore the *Act* itself, if one is adopting procedures to avoid the *ATI Act*.

“Who takes the fall?” The Minister or “whoever made the decision to do this”. The facilitator asked whether this throws Ministerial responsibility out the window.

People working on Access requests have an interest in *not* releasing the information.

The system as set up to fail, as it is not committed to Access. Dedicated staff should be rewarded for good work.

While prosecution would be highly unlikely, there should be a clause against avoiding the *Act*.

Reinforcing the idea of Ministerial responsibility, even if a middle manager directs actions to avoid the *Act*, employees are still abiding with the Minister’s wishes in the interests of their careers.

Employees are not stealing or concealing documents, they are simply not creating them.

In one instance, access to information was denied because the information was deemed private; it was later published and sold for \$7500, but the underlying information was still denied as private. This was avoidance.

Solicitor-client privilege is also used to avoid the release of information. It is frustrating to see a lawyer used to defend an access request, only to have the solicitor-client privilege invoked to deny the information. The requirement should be for demonstration of harm if information is released, not the reverse, stating that all information should be available unless the government can prove why releasing it would be harmful.



Solicitor-client privilege does not need to be in the *Act*, as it is already protected outside the *Act*. The protection afforded the privilege in the *Act* provides more blanket cover than it does in common law where it is very carefully reasoned protection.

In summary, the facilitator suggested that this group seemed to want all exemptions to be subject to a harm test.

The *Act* states that all information is available, "let's operationalise this!"

Should some Mandatory Exemptions (from the current table of exemptions) be made discretionary? The *Act* should be revised so that the harm test will be used to justify exclusion from release. This had been suggested 15 years ago, and we're "going over the same ground again, 15 years later."

Prior to attending this consultation a participant was asked how anyone could be sure that e-mails aren't being deleted. In this regard, the *Act* must address consistent record-keeping regulations. The issue of monitoring e-mail and employees' phone calls was discussed, and it was noted that these e-mails are not the employee's property.

In order to post information to federal government Websites, it must be translated, which would prove costly.

A participant noted that in Quebec, the government's Website is a very effective tool for accessing government-held information, but that unfortunately, information is posted only in French. Not all sites are completely bilingual and that there is therefore a wealth of Access expertise unavailable to unilingual Canadians.

Government websites need to be completely redesigned as they load too slowly, and information is difficult to find on these sites. Web designers should be connected with those whose expertise is in providing accessible information on the Web, making sites easier to use. There is a department that provides access to a hard-copy list of all Access requests-by whom, for whom, and for what they were made.

The facilitator thanked the participants and adjourned the meeting.



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