



Cartoon by: Mayes

FORCE FOR CHANGE OR AGENT OF MALEVOLENCE? THE EFFECT OF THE ACCESS TO INFORMATION ACT IN DND

Delay in responding to access to information requests is now at crisis proportions. Given the clear and mandatory obligations placed on government to provide timely 30-day responses, the flouting of Parliament's will in some institutions is a festering, silent scandal ... [in DND, it is] a defiance of the law of breathtaking proportions for which no one has been held to account.

*John Grace,
former Information Commissioner, 1997¹*

Proof that the Access to Information Act has "more potential than any statute to harass, embarrass, distract and annoy the government of the day," is regularly available in Canadian media.² However, this impact assessment, by the former head of the office charged with investigating complaints that the federal government has denied rights under the Act, seems incongruent with the lofty expectations expressed during the Bill's second and third reading in the House of Commons almost 20 years ago. Then, it was hailed as one of the cornerstones of Canadian democracy; an important tool of accountability to Parliament and the electorate; a seminal legislation; a significant development in

making our institutions more open and more democratic; a fundamental right to the future of our country; and one of the most important pieces of legislation ever introduced in the Parliament of Canada.³ Legislating a qualified right of access to information held by government is a profound administrative reform that shifts the onus from the citizen to justify why information should be released, to the government to justify why information should be denied. This change in the federal government-governed dynamic has been a qualified success at best, including at the Department of National Defence (DND).

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National Defence and Murphy's Law

When it comes to administering the Access to Information Act, ND last year offered a unique case study of Murphy's Law in action. If it could go wrong, it did go wrong. Between the Information Commissioner and the Somalia Commission of Inquiry, Canadians were given a sad lesson in what public officials are capable of doing to undermine the public's right to know:

- destroying some original records so that the allegations would not be found out;
- grossly inflating the number of hours spent on searching for and reviewing records requested under the access law;
- giving access requests the narrowest possible interpretation so that, by slavish adherence to the letter of law, the spirit of the law was violated;
- dispersing records ordinarily held in one location to many locations throughout the department, thus making it more expensive for access requesters;
- taking pains not to write things down or doing so on stick-on notes which can be easily

if there is an access from taking minutes of because of concerns visible access requests; ing inadequate searches do requested under the law;

self involvement in g the access requests selected requests; a widely within the and, on occasion, of the identities of requesters;

response deadlines to suit the convenience of senior officials, to facilitate lengthy sign-off processes and to enable media response lines to be developed;

- employees treating their own computer files as private property and, hence, not covered by the access law;
- following a philosophy in answering responses to access requests which states: when in doubt about the likely consequences from disclosure, keep it secret a philosophy specifically rejected by the Federal Court;
- publicly attacking the motives of an access requester who used the access law to find skeletons in the ND closet;

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Excerpt from Information Commissioner's Report 1996-97

For several years, DND's record with respect to Access to Information (ATI) has been the subject of scrutiny and considerable public criticism from the Office of the Information Commissioner (OIC), the media and the public. Defence accounts for approximately one-fifth of all Access complaints lodged against federal departments since 1994, and is one of the two most complained about departments to the OIC in each of those years.⁴ The situation seemed to reach a nadir in 1997, with the Information Commissioner writing that "the generally positive story about the gradual withering away of the old culture of [government] secrecy is stained by the corporate behaviour of the Department of National Defence ... [which] offered a unique case study of Murphy's Law in action. If it could go wrong, it did go wrong."⁵ On the surface, the explanation for DND's apparently egregious performance seems self-evident; after all, the potential consequences of security breaches conceivably range to the very survival of the nation itself. This breeds an institutional culture which indoctrinates a need-to-know mentality as a means to safeguard secrets and deny information to those individuals or organizations that pose or could pose a threat to the state. The public perceives a department that is intransigent to change, and one that rewards duty and loyalty to the narrow interests of the organization at the expense

of accountability and public service values in their truest sense.

OUTLINE

Proponents hail ATI as an important vehicle for more informed decision making and better public policies, thereby increasing public confidence in government and its institutions by making them more open and accountable. In the case of DND, about six years ago the media and their proxies frequently began using ATI to shed light on a litany of unseemly episodes and behaviours that spawned significant negative publicity. These revelations so seriously diminished the confidence of the general public, serving members and political leaders in the institution that the latter were forced to impose fundamental reforms on a department which to that point had mounted a formidable campaign against changing with the times. This positive record of serving as a catalyst for change needs to be recognized. The ATI Act, however, in ways unrecognized by the general public, creates incentives for perverse behaviours with serious repercussions for the formulation and implementation of public policy. In DND, it is suggested that the direct effects have been greater and growing secrecy, less accountability, and a decline in respect and confidence in the institution. The evidence suggests that these effects are replicated throughout the federal government.

Although ATI has resulted in wider access to a greater scope and volume of government documents, most applicants are businesses and media, both of which are motivated principally by commercial concerns rather than the public interest. When the media's insatiable appetite for the curiously trivial as against the dull important⁶ is coupled with the nature of opposition parties and politics in an adversarial system of government such as ours, an overwhelming impetus for negative stories about public servants and public institutions is created and sustained. Complex issues of public policy are reduced to context-less 'scandal-bites' or are ignored altogether in favour of news items that are fast and inexpensive to produce and cater mainly to political expediency, public titillation and 'infotainment'. Consequently, the public receives a distorted picture of government and its policies, its institutions and the value of public servants. Battered by daily doses of petty stupidities, accusations and allegations, taxpayers respect for and confidence in the federal public service is diminished.

Raised on the twin conventions of ministerial responsibility and anonymity as keys to providing impartial advice, public servants now find their recom-

mendations and analyses, draft form or otherwise, subject to the glare of public scrutiny and often attributed to them by name in the media. Taken out of context more often than not, the public servant appears to be critical of the Minister or of government policy. A climate of fear is created. Without the means to defend themselves in public forums, without departmental support to correct the record or to provide context to the issue in question, and faced even with public castigation by their own Minister responding off the cuff to initial media reports, public servants react in an entirely predictable manner — they adapt by taking actions to circumvent the Act in order to restore their anonymity.

In an effort to level the playing field, public servants protest silently by giving direction and briefings orally rather than in writing, and not committing to paper minutes of meetings, ideas, analyses, recommendations, advice or orders on potentially controversial topics. If ethicist Sissela Boks definition of secrecy is accepted — “deliberately withholding information”⁷ — then the result of ATI has been greater secrecy.

Paradoxically, an Act whose intent is to promote freedom of information and thereby foster public interest and involvement in the affairs of state is instead alienating the public service and public alike. Under present conditions, Canada is in danger of exchanging the pre-ATI situation of limited public access to a broad storehouse of information for one that yields relatively broad access to a diminishing storehouse of information.

The intent of this article is to evaluate the effect of ATI in National Defence, from which general conclusions about the effect on the federal government will be evident. DND appears to be a particularly useful case study in this respect, as it provides seemingly irrefutable evidence of the extreme range of non-compliance with the Act. This article is constituted in four parts. To situate the discussion, the political impetus that led to the ATI Act is followed by a description of the Office of the Information Commissioner and the process used to respond to requests. Second, an analysis of the quantitative data (who is asking for how much information) and qualitative data (what kind of information is being asked for) is presented. Third, the motivations of public policy actors will be examined in brief, to argue that the secretive culture attributed to National Defence is not unique, but rather is a microcosm of the federal public service at large. Finally, the broader effects on DND and the government will be explored and conclusions drawn.

AN ABRIDGED HISTORY OF THE ACT

Of nearly 200 independent countries in the world, Canada is one of about 15 to recognize the concept that citizens have a legal right to government information.⁸ Sweden is the forerunner, enacting a freedom of information for the press law in 1766 and enshrining it in their constitution in 1949. The United States, often believed to be a leader in this field, passed the Freedom of Information Act only in 1966, though long-standing constitutional provisions such as the First Amendment of 1791 (Congress shall make no law . . . abridging the freedom of speech, or of the press) and greater oversight of a more politicized public service have resulted in a more open and progressive culture of public administration than the mere age of their Act might suggest.⁹

In the post-Vietnam era, western democracies in particular have come under increased scrutiny and pressure to make government at all levels more open and accountable for the range of decisions and actions made on the public’s behalf. As policy issues became increasingly more intransigent and unsolvable, what Rittel and Weber refer to as ‘wicked problems’ — the demands to

<p>nature of their advice will come under critical scrutiny?</p>	<p>Annual Report, the remedial initiatives taken by these departments were reported.</p>
<p>The Access of Information Act has been successful in forcing public servants to disclose more information but it has not changed the closed culture. And the clear evidence of the durability of the old ways is the system-wide crisis of delay in answering access requests. These delays illustrate the capacity of the public service (through design, incompetence or both) to thwart the clearly expressed will of Parliament.</p>	<p>or, after over a year to correct them, the statistics are in and partners get their grades. 5 to 85 per cent of requests by those departments were not in within statutory deadlines.</p> <p>adling approach</p> <p>ent made it clear in the accessibility of responses was as at in the responses themselves. ion 10(3) of the Act deems a ponic to be a refusal to give. Consequently, the Information otoner has adopted, as the measure of performance, the</p>
<p>problem of delay has been dealt with because delay complaints have been growing as a percentage of overall complaints. Now, delay complaints account for almost 30 per cent of all complaints. Yet, to a large extent, the problem has been hidden below radar detection because the Treasury Board does not collect and report the damning statistics to Parliament, though the Access Act says it should.</p>	<p>percentage of access requests which have become deemed refusals under subsection 10(5). This standard is both objective and generous to departments. It is generous because it does not insist, as it could, that the measure of performance be the percentage of requests which are not answered within the 30-day statutory deadline. Rather, it only counts cases which have missed either the 30-day deadline or any extended deadline properly claimed by the department. The extension provisions are generous and limited only by the requirement of reasonableness.</p>
<p>In the face of that paucity of data, the Office of the Information Commissioner conducted studies in 1996 into the performance of six departments: Citizenship and Immigration Canada (CIC), Foreign Affairs and International Trade (FAIT), Health Canada (HC), National Defence (ND), Privy Council Office (PCO), and Revenue Canada (RC).</p>	
<p>In the 1996-97 Annual Report, the bad news was reported. In the 1997-98</p>	

Excerpt from Information Commissioner's Report 1998-99

	generality of the foregoing, any such information	fidèles-provinciales, notamment des renseignements sur :	
	(a) on federal-provincial consultations or deliberations; or	a) des consultations ou délibérations fédéro-provinciales;	
	(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs. R/S 1983, c. A-1, s.14.	b) les orientations ou mesures adoptées ou à adopter par le gouvernement du Canada touchant la conduite des affaires fédéro-provinciales. 1983-L.R. 1983, c. A-1, art.14.	
International affairs and defence	15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information	15. (1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'un état allié ou associé avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment :	Affaires internationales et défense
	(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities, or in connection with the detection, prevention or suppression of subversive or hostile activities;	a) des renseignements d'ordre tactique ou stratégique ou des renseignements relatifs aux manœuvres et opérations destinées à la préparation d'hostilités ou entreprises dans le cadre de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;	
	(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;	b) des renseignements concernant la quantité, les caractéristiques, les capacités ou le déploiement des armes ou des matériels de défense, ou de tout ce qui est conçu, mis au point, produit ou prévu à ces fins;	
	(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any	c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense,	

Excerpt from the Access to Information Act.

know what interests, information or pressures helped shape policy decisions — have also become more acute.¹⁰ As Harlan Cleveland explains, the impetus for greater openness in modern democracies is a natural result of a politically sophisticated electorate:

[F]or the most part, individuals and corporations and governments don't have a choice about this [the capacity to keep information secret]; it is the ineluctable consequence of creating through education societies with millions of knowledgeable people . . . That means more openness, less secrecy not as an ideological preference but as a technological imperative. Secrecy goes out of fashion anyway, because secrets are so hard to keep.¹¹

Canadians have traditionally been tolerant or deferential to authority, and, with no outrageous breaches of faith in the order of Watergate to reveal malfeasance in government, have accorded public institutions and public servants a high degree of trust. As such, the Canadian public and media were generally satisfied to rely on common law and the practical convention of a free press to obtain access to government documents. Canadian political heritage, after all, is derived from the

desire for peace, order and good government rather than life, liberty and the pursuit of happiness. It is not a coincidence that the Access to Information and Privacy Acts followed shortly on the heels of the Canadian Human Rights Act (1977), which provided for citizen rights respecting the privacy of personal information, and after the 1982 Charter of Rights and Freedoms. As Andrew Ronin makes clear:

[T]he Charter must be taken seriously by administrators ... there is no point being irritated about it because it reduces administrative efficiency; that was precisely what it was intended to do. If the administration thinks that something is 'reasonably justified,' it must be prepared not merely to assert it, but to prove it. Gone are the days when one can simply say, "Trust us, we are the public service."¹²

In 1979, Joe Clark's government introduced Bill C-15, the Freedom of Information Act, and though this bill died on the order paper with the defeat of the administration, the new Liberal government felt obliged to introduce an Access bill of its own. After more study and at-times acrimonious debate, the Act passed third reading in 1982. In July 1983, concurrent with the Privacy Act, Canadians and landed immigrants obtained the right to view federal government records, subject to specific and broad exemptions, in 150-plus departments and agencies. This includes minor players like the Freshwater Fish Marketing Board and all major functional departments (Finance, Health, etc.), but excludes certain agencies (Nav Canada) and many Crown Corporations (including the CBC). In 1989, the right of access was extended to all corporations and individuals that are present in Canada but are not citizens or permanent residents.

The rationale for greater public access to government documents centers around four main themes.¹³ First, since taxpayers (owners) pay for the collection of information by government (custodians), the public is entitled to that information with as few restrictions as possible. Second, public confidence in government is enhanced when it is open to scrutiny. Knowledge of what is going on 'behind closed doors' can be a bulwark against arbitrary decision making by the state. In an extreme denunciation of government secrecy, the British philosopher Jeremy Bentham claimed that "without publicity, no good is permanent; under the auspices of publicity, no evil can continue."¹⁴ Third, the ability of citizens to inform themselves, effectively judge choices made by government and hold elected representatives accountable requires knowledge of the information and options available to decision makers. As Sissela Bok observes, "the exercise of power depends on knowledge

and the means to employ it, and without the former, there is no opportunity to exercise the latter.”¹⁵ Finally, when deliberations over public policy issues are restricted to a small number of like-minded elites, the results may be biased or based on faulty premises, and run the risk of reflecting only a narrow range of values and interests.¹⁶

The purpose of the Act is therefore five-fold: to provide a right of access to information in records under the control of a government institution; to make government information available to the public; to provide for limited and specific exemptions to the right of access; to see that decisions on the disclosure of information are reviewed independently of government; and, lastly, to complement, rather than restrict, existing procedures for access to information.

OFFICE OF THE INFORMATION COMMISSIONER (OIC)

Canada is one of the few countries to establish an OIC, whose role is to investigate complaints that the federal government has denied rights under the Act. This office has been an effective mechanism to mediate disputes, with a success rate consistently above 95 per cent.

An ombudsman in the classic sense, the OIC has special investigative powers, but no judicial authority to order disclosure.¹⁷ However, if an applicant is dissatisfied with any aspect of a department’s response to a request even after an OIC investigation, he/she can ask for a review by the Federal Court, which can order disclosure if it finds the institution was not authorized to refuse access. To date, the OIC has preferred to rely on the position’s influence and moral suasion to effect compromise rather than having to resort to costly and time-consuming litigation.¹⁸ But moral suasion appears to be of limited use if the OIC characterizes the delay situation as being a ‘system-wide crisis’ this far into the act’s existence.¹⁹ One factor inhibiting the office from achieving better results is that until recently there have been no effective sanctions to punish non-compliance or obstruction. The coming into force in March 1999 of Bill C-208 may rectify this shortcoming. This bill makes it an offence to destroy, alter or conceal a record, or to counsel anyone to do these things with the intent to deny a right under the Act. On conviction, the guilty party is subject to up to two years imprisonment, a \$10,000 fine, or both.

PROCESSING A REQUEST

Before documents can be released, an applicant must first request records from a specific department; staff must determine which areas are most likely to hold pertinent records; offices and all files, electronic and

print, must be thoroughly searched and the relevant documents extracted; the records must be read page-by-page to ensure compliance with Access and Privacy Acts (there is a mandatory requirement to exempt certain information, meaning frequent consultations with other offices, departments or businesses to ensure that sensitive, proprietary or personal information is not unwittingly divulged); and, the file reviewed by the department head or the designated official with the delegated authority to release the documentation.²⁰

Section 6 of the Act obliges applicants to “provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.” Records are documentary materials that are under the control of a government institution and have been “used to initiate, continue or complete a departmental activity, function or business transaction.”²¹ The history of OIC investigations and Federal Court cases makes clear that any form of communication that can be manipulated and was created or received at work, or at home if departmental activities were conducted there, is subject to the ATI Act. That is, all papers, videotapes, tape recordings, appointment-schedulers, electronic mail, Post-It® notes and all other such records must be provided if these are relevant to the request.²² Departments have 30 calendar days to produce the information requested or to give reasons for the denial or the delay. The head of the institution may extend the time limit for ‘a reasonable period’ if the request is for a large number of records or if the preparation time would unreasonably interfere with the institution’s operations. As such, it is one of the very few acts that obliges the public servant to act within a set period of time.

UNDERSTANDING THE SCOPE OF THE PROBLEM AT NATIONAL DEFENCE

The focus of criticism in the OIC’s annual reports has increasingly been directed at DND, and the tone used more strident. In 1994-95, Defence was merely one of three ‘possible candidates’ for an OIC audit, and the following year was singled out as a habitual problem. In 1997, revelations of document tampering and delays of ‘epidemic proportions’ led to a savaging of the department’s performance. In March 1999, John Reid, the current Information Commissioner, issued report cards on compliance with response deadlines for DND and five other departments. Defence rated an “F,” but was in good company, since all the others failed as well.²³

The Numbers Game

There is no single measure to determine how effective a department is with respect to ATI. The statutory 30-day response time only compels a department to

YEAR	83-84	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
REQUESTS RECEIVED	67	171	236	337	309	425	440	468	388	421	495	759	869	942	861	1031

TABLE 1: ACCESS TO INFORMATION REQUESTS RECEIVED IN DND, 1983-99²⁵

provide an initial reply, which often is acknowledging receipt of the request and advising that more time is required. No two departments are structured the same and no two files are created alike. A five-page record filed in Ottawa that does not require cuts or deletions (termed ‘severances’) is obviously less onerous to process than 1,500 pages from many offices in several bases across the country on a complex issue that, by law, requires significant review or substantial consultative time before the file can be released to the applicant.

Many factors affect the ability of an organization to fulfil its obligations under the Act in a timely fashion, including the number of requests received, the complexity of the requests, how many severances and third-party consultations are required, where and how information is stored, and the pace of activity at the department. However, the number of requests received and whether that is increasing or decreasing is a good start for quantitative analysis. The situation in DND since 1983 — the year the Act came into force — is summarized in Table 1.

The figures are striking. Since 1993-94, the start of sustained interest in DND following the Somalia incident, the number of ATI requests has more than doubled. The number of pages released per request has also substantially increased, requiring more time to process each file. In 1994-95, the ATI section in DND released about 60,000 pages to applicants. This rose to 141,000 pages in 1996-97, 134,800 in 1997-98, and ballooned to more than 282,000 pages in 1998-99, an increase of 110 per cent over the previous year.²⁶ Efforts to provide information from the ATI office on an informal basis (no formal request required) are also proceeding apace, rising from just 57 such requests four years ago, to 80, 130 and 422 in the years since.²⁷ If formal and informal requests are combined, access requests in DND have increased almost 50 per cent in the last year and about 200 per cent in the last five years.

Who Is Using the Act?

Government-wide, businesses use the Act most frequently (about 40 per cent), mainly to see why they have not been successful in their bid for contracts or to determine the needs and wants of government. The second largest group of applicants is the general public (just less than 40 per cent), and these information interests vary widely. Requests from these two groups are the easiest to process, as the information required is generally about a report or activity which is “self-contained.” In Revenue Canada, for example, the majority of requests are from businesses who want to see their own files after an audit or after having had goods seized at the border.²⁸

About 20 per cent of ATI requests government-wide come from journalists, organizations, academics and Parliamentarians. Requests from media and academics tend to be the most time-consuming to process, because they generally reflect broader, more complex issues requiring extensive preparation of documents from several, often dispersed locations. “Canadian Forces Activities during the Gulf War” or “Operations in Support of the Red River Flood,” are two real-life examples. In an extreme case, an access request for “all Somalia-related reports” would net the applicant some 150,000 documents totaling more than 650,000 pages.²⁹ Hypothetical as that may be, since the documents are now in the public record and therefore not subject to the Act, one file, “Leadership Failings at a Psychiatric Hospital in Bosnia,” is 35,000-plus pages and took more than six months just to sever the documentation.³⁰

Table 2 details the source of ATI requests government-wide compared to DND, averaged over the latest four years that statistics are available.

Again, the figures are striking. Defence clearly is subject to a significantly higher percentage of ATIs that

SOURCE	All fed depts (12,667 requests)	All fed depts (%)	All fed depts less DND (%)	DND (%) (858 requests)
BUSINESS	5,262	41.5	42.2	31.6
PUBLIC	4,710	37.2	37.6	31.5
ORGANIZATIONS	1,256	9.9	10.5	2.3
MEDIA	1,189	9.4	8.4	22.5
ACADEMICS	250	2.0	1.2	12.1

TABLE 2: SOURCE OF ATI REQUESTS AVERAGED OVER 1994-98³¹

YEAR	83-84	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
REQUESTS (% of total)	N/A	N/A	54 (23)	128 (38)	88 (28)	74 (17)	100 (23)	137 (29)	91 (23)	107 (25)	241 (49)	310 (41)	264 (30)	409 (43)	206 (24)	397 (39)

TABLE 3: NUMBER AND PERCENTAGE OF ATI REQUESTS RECEIVED BY DND FROM MEDIA AND ACADEMICS³²

are more complex and time-consuming than those received in the rest of the federal government: DND must process 10 times more requests from academics and almost three times as many media requests. Of particular note, this figure does not take into account those agents acting as proxies for media, since they are categorized as ‘businesses’ (the source of specific requests is protected under the Act) and exacerbates DND’s problem further. Whereas ‘media and academics’ historically account for about 10 per cent of all ATI requests government-wide, they account for more than a third of the requests in DND, or more than three times the government average, as indicated in Table 3.

Other Factors of Note

Provisions to exempt or exclude information from release are an important indicator of a government’s commitment to the right of access. As a recent OIC annual report noted, “releasing information which is convenient to release is no test at all. Releasing information with no potential embarrassment is no test. Releasing information which reveals mistakes or misjudgments or has a potential for misunderstanding is a test.”³³ There are 12 categories in the ATI Act by which information can be exempted and two categories of information that are excluded from disclosure.³⁴ The propensity to release information in whole (no severances) or in part is another measure of compliance with the Act. Table 4 indicates DND’s record:

Over the course of the Act’s history, ‘all government’ has disclosed all or some of the requested records 68.5 per cent of the time,³⁶ and in Defence the figure is consistently about 70 per cent. Of course, a department could disclose a significant percentage of the requested documents but sever them so heavily as to render them meaningless; however, even the OIC acknowledges that DND is neither more nor less likely to sever records than other departments.

To action a request, someone must do something to retrieve a record from somewhere. One scribe has written that the act of collating files should be simple, “in

	All fed depts	DND
Some / All records disclosed	68.7%	70.9%
No records disclosed	3.8	6.0

TABLE 4: DISPOSITION OF ATI REQUESTS, 1994-1998³⁵

an age where information is instantly available with a few pokes at a computer keyboard.”³⁷ Alas, records retrieval is slightly more complicated than that. Clerical staff bore the brunt of the deep public service cuts, and everyone with a computer is now his/her own file manager; much ‘hard copy’ work has been replaced by e-mail, for which government information directives are woefully inadequate; computers crash and discs are misplaced. Offices are moved, stood up, stood down or downsized, and personnel transferred — often in a hurry. Many files are discarded simply to make room in cramped offices or erased to clean hard drives, without malicious disregard for archivists.

Thus, the storage and retrieval of information in a highly decentralized department of 100,000-plus employees with a high turnover rate is an increasingly haphazard affair.³⁸ DND is not alone — the OIC believes “there is no more egregious failing in the entire access system than this. The abysmal state of records management in the federal government puts at risk not only our right to know, but our national interest in a full historical record of public functions.”³⁹

As early as 1994, the then-Information Commissioner acknowledged the effect of Program Review and sought to pre-empt the argument that fewer hands in the shop would slow the processing of requests. “As the public service experiences more and deeper budget cuts,” he wrote, “the danger is that officials, already cool to the access law, can cloak themselves in self-righteousness. Resource constraints will be seized upon as a respectable justification for ignoring the law’s response deadlines. Canadians should be sceptical of such excuses.”⁴⁰ This incredible statement belies a fundamental ignorance or willful blindness of the scale of government downsizing/restructuring and the ATI’s effect on departments. To put this in a DND context, it is akin to the OIC being subject to the Act itself (thereby conducting ‘first-line’ reviews of their own records), tripling their caseload, cutting their budget by 35 per cent, halving their headquarters staff, and holding the office to account for not meeting a three-month complaint turnaround time, as is the government expectation and OIC goal. Even without these added pressures, OIC investigations on average take at least one month longer than the expected standard. In spite of the deep personnel cuts to DND, its Access and Privacy

office continues to grow. In 1995, the personnel complement was increased by 30 per cent, in 1996 by 8 per cent, in 1997 by 12 per cent, and in 1998 by 24 per cent, for a staff of 52 full-time employees.⁴¹ It appears that DND is not sloughing off its ATI responsibilities by starving the section of resources.

In sum, the quantitative data do not validate the OIC's belief that the situation in Defence is "a festering, silent scandal." Delays are a serious problem for reasons other than "malicious non-compliance."⁴² Requests have increased significantly and many of them are more time-consuming to process. Staggering numbers of records are exiting the department. In addition, DND is the largest and arguably the most decentralized federal department, has sharply reduced personnel, concurrently increased the operational tempo, and put more resources into the access section. This is a strong record by any standard.

DOES INTENT MATTER? SHOULD IT?

Three years ago, several senior officers in DND were required to respond to the following ATI request:

. . . provide a copy of all of the 01 January 1997 to 01 July 1997 records, electronic or written, as well as any copies of such correspondence together with any attached minutes or enclosures, memoranda, letters, briefing notes, aide-memoires, reports, minutes of meetings or discussions, notes to file, analyses . . . prepared by [the individual, including] . . . a copy of the contents of the hard disk contained in his desktop PC; a copy of the contents of his hard disk on his laptop; a copy of any and all of his PC diskettes; a copy of the information recorded in his electronic organizer; a copy of his personal diary or notebook or facsimile thereof; a copy of his personal schedules/agenda; a copy of his travel and general allowance claims; [and] a copy of the contents of his personal filing cabinet.

Since that time there have been more than a dozen requests of that same sort. In the face of such bold uses of the Act as this, DND has timorously caved in each time and forced the recipients to respond to the demands in full rather than to have the courts decide if these requests meet the 'spirit and intent of the Act' test as envisioned by the drafters of the legislation. Still, the OIC maintains that there is no such thing as a frivolous or vexatious requester. "No case is known to the Office of the Information Commissioner of an access requester whose purpose in making use of the Act is to attack,

punish or interfere with the administration of any government institution," reads their latest annual report.⁴³ Resolving systemic problems with ATI has taken on a greater urgency with the passage of Bill C-208, given the frightening ease with which someone so inclined can now 'set up' public servants for stiff fines or even jail time. These and related ATI issues are the root cause of greater secrecy in Defence and the federal public service.

The conceptual shift from "all information is secret unless proven otherwise" to "all information is open unless proven otherwise" removes a requirement to convince a bureaucrat of the reason or purpose for the records. All access requests are created equal and the law does not differentiate between a Hell's Angel, a public interest researcher, an aggrieved employee, an academic, a terrorist, a competitive businessperson, a curious citizen or a muckraker. Quantitative measures such as the number of ATI requests submitted, the length of delay or the number of complaints lodged — pretty much the extent of the monitoring done by the OIC — provide too superficial an analysis to draw conclusions on whether the information provided under the ATI Act substantively contributes to better governance. Surely, after almost 20 years without substantive amendments, this seminal piece of legislation deserves a qualitative review by the responsible government offices.

There is wide acceptance that most decisions or actions by public servants should be subject to public scrutiny, and the Privacy Act makes clear that the privilege of working for government means public servants enjoy fewer privacy rights than other Canadians. Essentially, all information which "relates to the position or functions of the individual" is considered public, not personal, and this includes "the personal opinions or views of the individual given in the course of employment."⁴⁴ However, if the intent of the ATI Act is to inform and engage taxpayers in the discussion and debate of substantive public policy issues, then critics of government need to better distinguish between *what is in the public interest* and *what is merely interesting to the public*. Collectively, we must also somehow better distinguish the limits of government's "duty to reveal that which the public has a right to know" and the "indiscriminate disclosure of all possible information." The example of Ken Rubin, a dogged public interest researcher and long-time Access gadfly, offers insight into the constructive role that ATI can play in public administration. Some of what he describes as his 'top ten access hits' include bringing to light the food industry's influence to increase the recommended daily serving of eggs and meat in the Canada Food Guide, the dangers of breast implants, inadequate safety systems in nuclear reactors, and a pattern of maintenance and inadequate safety practices which led to the 1989 Dryden air

disaster.⁴⁶ Several years ago, Finance was deluged with ATI requests from a Montreal tax lawyer who used the information to publish a monthly tax newsletter. The requests were so voluminous that the office was forced to hire several people to attend to this one applicant. Finally, it became obvious that the information had merit and should be made available as a matter of course; it was, and the newsletter disappeared.⁴⁷

In contrast, numerous examples of minor public servant and departmental failings are trumpeted in the news and sprinkled throughout the OIC's annual reports as examples of the Act's effectiveness. "The small potatoes count," says John Grace. "In government here, the tea services on good china are practically extinct."⁴⁸ But these are pyrrhic victories. Media, principally concerned with maximizing profit, are engaged in an intensely competitive industry where being first is always better than being second and getting more of the story. Spurred on by opposition politicians eager to ridicule public servants and their Ministerial masters, profiling individual peccadilloes at the expense of matters in the broader public interest serves to trivialize the public service, thereby diminishing public confidence and support. We will surely never see a story to the effect that "General Smith's" (or bureaucrat Jones') decisions are evidence of moral character, of doing the right thing with the best available information at the time in the face of diminished resources and conflicting priorities, according to documents obtained under ATI." Blanket requests for all written and electronic mail correspondence are not made with the intent to profile leadership ability, management skill and marked competence in public policy or military affairs. Neither are travel claims and expenses of military officers or bureaucrats requested to demonstrate their frugal dispositions. It is also evident from media reports or from points raised in the House of Commons that after-action reports are not requested so as to highlight for the public those aspects of training, preparation and conduct which led to mission success.

In an effort to address this aspect of the discussion, 375 requests from the latter half of 1997 were examined from a qualitative perspective, and examples of each type are included in Appendix 1. There are several observations of note. The number of requests that could be labelled 'frivolous' is about one per cent. There are also relatively few requests for information concerning policy issues of obvious national import (like Reserve Restructure) or the operational capability of the CF, from which one may conclude there is little public or media interest in the most fundamental aspects of Canada's defence policy. Requests for DND personnel policies and property holdings top the list, the single most popular concern being the call-up lists of tempo-

rary help (companies providing part-time personnel services scan the list for names of potential employees). Requests whose aim seems to be to attack individuals, specific groups or the institution accounted for more than half those received, and those which simply 'cast the net' constituted 102/370 (28 per cent) of the total. The analysis (at least during the period in question) informs us that a significant percentage of access requests in DND were designed more to expose public servants to public embarrassment than to facilitate discussions and debate of issues of substantive defence policy issues and programs *per se*.

MOTIVATIONS OF PUBLIC POLICY ACTORS

Many authors have explained how countries that inherited the British parliamentary system have a strong tradition of administrative secrecy,⁴⁹ with MacGregor Dawson writing that "the character of a government, like that of an individual, is shaped by the two primary forces of heredity and environment; and the study of a government, again like that of an individual, must perforce devote some attention to the parentage and the special associations which have direct contact with each particular institution." If it is the case that our political heritage inculcates a propensity for secrecy among federal public servants, then the challenge of implementing the ATI Act is shared by all of government, with impediments not unique to DND.

Ministers and their staff do not share the same enthusiasm for ATI as the Opposition, media or the public, as requests are not submitted to find cause to praise government. The 'embarrassment factor' of an unprepared Minister facing off in the House against an MP armed with the results of an access request accords ATI files considerable priority with Ministers and political staff. Ultimately, it is the Minister who is accountable to the Canadian public for what goes on in the department, so it is not unreasonable that he/she be briefed on an ATI file before documents are released. The process can be tedious, however. One ATI staff member in DND recalls 16 levels of approval for a 'nil reply' (no comment) on Somalia media response lines.⁵⁰ A file on the closure of bases in Chilliwack and Calgary and the move of units to Edmonton was only approved after 11 sign-offs (of note, this process was streamlined late last year).

In lieu of a profit motive or getting elected, Anthony Downs suggests bureaucrats are motivated by "power, income, prestige, security, convenience, loyalty (to an idea, an institution, or the nation), pride in excellent work, and a desire to serve the public interest."⁵¹ To that list should be added "to be kept out of the media spotlight." Senior civil servants, like politicians, have a vested interest in minimizing the release of information

that is potentially embarrassing to the department and may threaten their projects, resources and power base. Bok notes the benefits of concealment include insulating “administrators from criticism and interference; it allows them to correct mistakes and to reverse direction without costly, often embarrassing explanations, and it permits them to cut corners with no questions being asked.”⁵² As Sir Arthur Robinson from the British comedy *Yes Minister* wryly advised, “if no one knows what you’re doing, then no one knows what you’re doing wrong.”

The former Information Commissioner attributes the ‘obviously failing grade’ of the department with respect to ATI mainly to a “. . . traditional culture with [in] National Defence of secrecy and suspicion of those seeking information . . .”⁵³ And, there is widespread acceptance within DND that the access predicament is at least partially self-inflicted. Comments one officer who describes DND as the Department of Naturally Defensive:

You can’t minimize the extent to which we’ve exacerbated the situation. There are deep cultural, systemic and organizational issues that militate against efficient administration of the Act ... [and] we’ve made a conscious decision to oblige everyone to use the Act. It’s a double-edged sword. If we start requiring them [potential applicants] to invoke the Act, we simply give them a lever of complaint.”⁵⁴

It is too easy and convenient, though, to explain DND’s troubles as a natural outcome of a unique, secretive culture borne of values that are incompatible with liberal, democratic society. The behaviours that inform DND personnel are the same ones that inform federal government employees as a group. In fact, some argue the root of the Access problem is that the military culture has been subsumed by a civilian bureaucratic culture: the ‘Army’ killed Shidane Arone (and paid for it), the argument goes, but it was not the Canadian Forces that truncated the Somalia Inquiry.

As early as two decades ago, in a major review on the effects of the structural changes wrought by unification in 1968 and the amalgamation of the military and civilian headquarters in 1972, Major-General Jack Vance wrote that “civilian standards and values are displacing their proven military counterparts and, in the process, are eroding the basic fiber of Canadian military society.”⁵⁵ As Douglas Bland makes clear, a more politically correct military is inevitable as First World democratic societies look to save money at the expense of operational effectiveness and shift from leading soldiers in combat to managing resources in peacetime. Over

time, military organizations acquire characteristics more in keeping with civilian firms and government.⁵⁶ “In all these trends the model of the professional soldier is being changed by ‘civilianizing’ the military elite to a greater extent than the ‘militarizing’ of the civilian elite,” is the assessment of the Somalia Inquiry.⁵⁷ Therefore, if civilians in DND are assumed to be representative of the federal public service, it seems the Access situation in Defence is not a consequence of a unique military culture but one found throughout the federal government.

EFFECTS ON PUBLIC POLICY FORMULATION AND IMPLEMENTATION

Without a doubt, the ATI Act has been successful in making more information available on many substantive policy issues that otherwise likely would not have come to light. Other positive benefits include more professional correspondence, particularly e-mails, and serving to collate well-dispersed documents on some issues of import. However, a variety of unintended effects with serious consequences for Canadian public administration are now taking form.

First, the ATI as presently constituted is creating a more secretive public service by eroding the long-standing principles of public service neutrality and anonymity. The development of public policy is an evolutionary process and government a study in compromise, so discrepancies in advice given and advice taken inevitably arise. Having the written work of even the lowest-classified public servant open to public scrutiny destroys those principles. The dilemma is summed up by this officer:

If I’m pretty sure my document is going to be the subject of a request, why would I risk my career to put pen to paper and recommend against something the Minister wants to happen? Because it’s going to happen if it’s good for him politically, regardless of the effect on the soldier or the CF. The last thing I need is for my name to be in the paper or to be used in the House [of Commons] because it makes for a good story or suits somebody’s political purpose to do so.”⁵⁸

Without the means to protect their identity and without a capacity to defend themselves in public against media allegations and charges or innuendo levelled against them by Opposition or even government politicians, public servants adapt to what they perceive as a hostile environment by taking actions to restore their anonymity. This takes the form of fewer minutes (supplementary notes) on documents, which is ‘raising

eyebrows' in the OIC;⁵⁹ an increasing number of requests coming back to the DND Access office annotated "no records available;"⁶⁰ minutes of some important meetings no longer being kept;⁶¹ more briefings being conducted orally or by telephone than before;⁶² and most importantly, many significant recommendations, observations, analyses and direction are simply not being committed to paper.⁶³ As one senior CF officer who worked in Montreal during the 1998 Ice Storm comments:

I was very conscious of this [ATI]. At one point there was discussion about the 'bad blood' developing in Hydro-Quebec unions about the work we were doing, and how we were taking away overtime from their workers. I deliberately didn't write that and some other criticisms down, because I don't want to be perceived as the guy drawing attention to this fact, by virtue of my notes and not someone else's getting accessed.⁶⁴

This situation is not restricted to DND, and many public servants from several departments interviewed by this author admit to the trend, though it would be difficult to quantify its extent. Given that the issue of delay is "at the very top of the Information Commissioner's priority list," and that the performance of the federal government is characterized by his office as "dismal"⁶⁵, it seems certain that these behaviours to circumvent ATI are being repeated throughout the federal government.

Second, the conscious decision to avoid note-taking for fear of public attribution, retribution and possible ridicule means the "corporate memory" is fast disappearing. Without written records, tracking the evolution of programs, policies and the rationale that informed decision-makers is more problematic. Finding solutions to unintended policy effects will be more difficult and more time-consuming. And, in an ironic twist, accountability suffers, since it is more difficult to identify those individuals critical to the decision-making process in the first place.

Third, if records are cryptic or not taken at all, discussion and debate on issues is limited to those who attend key meetings, which in turn leads to ill-informed subordinates and poor decision making. As Alan Leadbeater, a senior OIC official explains, "say a PCO [Privy Council Office] committee doesn't keep minutes of the meeting. Each organization takes back with them exactly what they want. CSIS [Canadian Security Intelligence Service] may think they have certain approvals to do something which they don't have, and this leads to a breakdown of control."⁶⁶ The problem for the formulation of policy is even more fundamental than that, as Larry Gordon, a former DND Chief of Public Affairs explains: "It leads to a politically correct public service - grey suit, tie, one size fits all, afraid to

say something wrong ... Government is about balancing competing realities, be they economic or political. You need to be allowed to discuss forces at play to find the best solution to the problem."⁶⁷

Fourth, the task of tending to a burgeoning number of increasingly complex requests in light of deep personnel cuts and an increased operational tempo consumes phenomenal resources, diverting staff from their primary function and pressing personnel and departmental issues. Delay becomes a serious issue not because of a deliberate attempt to thwart the Act or a penchant for secrecy, but as a function of work priorities. As one staff member explains:

Put it this way. I can fill sandbags for homes in danger of being flooded. I can train soldiers to go to Bosnia. I can do tests on equipment we are thinking of buying. I can try and catch up on the paperwork my secretary used to do before she was laid off. Or, I can forget all about that and spend 20 hours photocopying documents for [a frequent requester] so he can publish libelous crap about us in the paper and make money off us doing it. That's an easy decision for me to make.⁶⁸

Only cursory efforts have been made by Treasury Board to estimate costs associated with ATI. This is unfortunate, since incremental ATI costs to DND alone would easily be tens of millions of dollars a year.⁶⁹ A calculation of the overall cost to government would shock Canadians, and we have not seen, nor are we likely to in the near future, a call by the OIC to see this issue seriously studied. But not everyone is blind to the expense and effects of ATI on an organization that receives numerous requests, as this recent report makes clear:

Requiring a detailed review of relevant files every time an access to information request is received will also be extremely time consuming and costly. Valuable staff resources will be required to review large amounts of material and analyze whether each line qualifies for an exemption under the Act.⁷⁰

This excerpt is not a DND report lamenting its ATI lot in life. Rather, it comes from the Ombudsman's action plan (1999) submitted to the Minister of National Defence, and further argues for an exemption from the ATI Act on the grounds of assuring confidentiality. "... [T]he need for the elimination of injustice, inequality and unfair treatment," reads the report, "should be given precedence over specific individual rights to access to information contained in the Ombudsman's files."⁷¹ This approach presumes guilt on the part of the accused

and limits their right to full disclosure. It is also not the only recommendation in the action plan that looks to make short shrift of the Access and Privacy Acts.⁷² If ATI is fundamental to informed policy making, and if the exemption provisions according to the Information Commissioner are “about right,” then why do publicly funded organizations like the Ombudsman, the OIC and the CBC need exclusions from the Act? If the CBC’s Terry Milewski can spark such a response over a single e-mail (the APEC summit), just imagine the brouhaha if all of the public broadcaster’s correspondence was accessible!

Fifth, it is obvious from the OIC’s annual reports and recent ‘report cards’ that systemic problems with the Act are contributing to visceral anger and low morale throughout the public service. On balance, public servants work hard for a reasonable salary and wonder at the government’s priorities when they have to set aside their primary job in order to do a student’s research work, essentially for free, or provide grist for a media story that is predestined to be negative, particularly when the investment is five company dollars and the users are neither accountable nor responsible for the finished product.⁷³

Finally, there is a concern that records are exiting the department that are not adequately nor consistently severed, leading to the prospect that personal information and, potentially, material detrimental to national security as defined by the Act is being released. This is a result of the sheer volume of requests and pages released in DND, and the general unfamiliarity with ATI rules of those offices charged with preparing records for release (legal interpretations of what is severable are constantly evolving), combined with departmental pressures to expedite records processing and avoid negative criticism or subpoena by the OIC. This issue warrants further exploration by either the OIC or the federal gov-

ernment. Determining ‘detrimental effect’ as defined by the ATI Act is usually a discretionary, subjective exercise. To qualify for exclusion, the information, “must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption The fact that the disclosure could result in administrative change in a government institution is not sufficient to satisfy an injury test. Under the law, it must be possible to identify an actual detrimental effect.”⁷⁴ For example, DND could not demonstrate “injury to the defence of the nation” in the case of a request for documents relating to an accident or incident involving an armoured personnel carrier or a rifle. However, release of information about several or all such accidents or incidents could provide a pattern describing capabilities and operational weaknesses, the release of which could pass the injury test. “The injury is not always obvious in any one case viewed in isolation,” notes one Defence report. “Furthermore, the Department has no way of determining whether separate requests in a particular area of interest are in fact being generated by a single agency through proxies in order to develop a mosaic of information . . . that could be quite damaging from a national security point of view.”⁷⁵

CONCLUSION

Conceived with high expectations, the ATI Act is experiencing serious growing pains. If information has become “society’s transforming resource,” then the “public’s ability to receive, absorb and understand information no longer can be left to happenstance.”⁷⁶ The situation is that an Act whose intent is to make for more open and accountable government, more informed public policy and greater confidence in public institutions is exhibiting signs of the opposite effect.

There is little to suggest that a culture unique to DND is the cause for its poor performance: National Defence exhibits norms and values with respect to secrecy in about the same measure as those found in other federal departments. Better filing systems, education and training in access issues, increased resources, and further streamlining the ATI process would all help the situation. However, long delays are a virtual certainty due to systemic problems distinct from any deliberate attempts to thwart or delay access. The calculus is simple: there are more requests for documents of greater size and complexity with fewer public servants to attend to the total volume of the Department’s work. Tightening the provisions by legislating shorter response times, making it even cheaper to request information, increasing the powers of the Information



Commissioner, jailing public servants, or continuing to put off the implementation of a comprehensive national information strategy will simply exacerbate present problems.

If the intent of the ATI Act is truly to inform Canadians and improve public policy, then the profit incentive for applicants must be eliminated or minimized, and the political mileage for politicians lessened. One way to realize these aims would be to make requested information available to all Canadians *at the same time* through a central government information centre or at centres across Canada. This is in contrast to the present practice of sending records directly to the applicant and placing the documents in the respective departmental reading rooms after several days or even weeks have elapsed. Media would be apoplectic with this, since it would rob them of “scoops” and directly attack their profit motivation for using ATI. Opposition politicians would also strongly object, since their ability to dole out documents piecemeal to sustain a media story would be muted. This simple reform, at no increased cost to applicants, would send a powerful

message that the intent of the ATI is to truly serve public, rather than private or political interests, and to provide easier access to the full documentary record for all interested parties.

Access to information is fundamental to democracy because the inherent power of government can lead to abuses that secrecy can conceal. A qualified right of access to government documents counterbalances injustice and helps hold elected members and public servants to account for their actions. Much has changed on the public administration front in Canada in the past 20 years, however, and serious review of the Act is now merited, an observation often and loudly proclaimed by the Information Commissioner. If the public interest is to be better served by the Act as a force for change, the public needs to know the full range of issues at stake, not merely a few quantitative statistics. As well, debate on reform needs to acknowledge the practical challenges of implementing ATI at ‘the coal-face,’ lest the Act’s legacy be an agent of malevolence.



NOTES

1. Information Commissioner of Canada, *Annual Reports Information Commissioner 1996-1997*, (Ottawa: Public Works and Government Services Canada, 1997), pp. 5, 16. While the Information Commissioner is correct to assert that no individual has publicly been held to account for the problem of access delays in DND, it is believed to be the only department to have had senior officials charged and disciplined for actions which contravened the Act. The senior naval officer who headed the Director General Public Affairs section where documents were tampered with during “The Somalia Affair,” was court-martialled, pled guilty to a charge of negligent performance of duty, fined \$2,000 and reprimanded. A second senior officer was court-martialled and found not guilty of charges relating to the destruction of documents, but was forced to leave the military years before his scheduled retirement. As well, the *coup de grace* for General John Boyle came as a result of his remarks over why and how his staff deliberately thwarted the ATI Act, not about who should be held accountable for the serious breakdowns in military discipline in Somalia and the subsequent activities in Ottawa. “If this is how the staff behaved,” he said in August 1996 during testimony to the Inquiry, “they lacked integrity, they lacked moral fiber, they lacked what I contend is the very fabric ... of what makes the Canadian

Forces the institution that it is today.” From Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy, The Lessons of the Somalia Affair* (Ottawa: Public Works and Government Services Canada, 1997), Transcripts Vol. 89, pp. 17, 375.
 2. Information Commissioner of Canada, *The Access to Information Act: 10 Years On* (Ottawa: Public Works and Government Services Canada, 1994), p. 23.
 3. House of Commons Debates. Respectively, Jan. 29, 1981, p. 6689; *ibid*; p. 6692; *ibid*; p. 6716; Jan. 28, 1982, p. 18850.
 4. Results for that period were as follows:

YEAR	Total Access Complaints to OIC	Institutions most-complained against (by complaints completed by OIC)
1998-99	1670	DND (245); Indian and Northern Affairs (143); Citizenship and Immigration (130); Revenue Canada (124)
1997-98	1405	DND (260); Citizenship and Immigration (207); Revenue Canada (83); Finance (69)
1996-97	1382	DND (256); Revenue Canada (223); Citizenship and Immigration (160); Immigration Refugee Board (83)
1995-96	1712	DND (421); Finance (205); Citizenship and Immigration (159); Revenue Canada (58)
1994-95	1016	Citizenship and Immigration (149); DND (114); Revenue Canada (89); Immigration Refugee Board (54)
1993-94	768	Immigration Refugee Board (103); Privy Council Office (63); DND (52); Transport Canada (45)

Immigration Refugee Board (103); Privy Council Office (63); DND (52); Transport Canada (45). Data from Information Commissioner of Canada, *Annual Report Information Commissioner, 1993-99*.
 5. *Annual Report Information Commissioner 1996-1997*, particularly pp. 14-18.
 6. Walter Lippmann, *Public Opinion* (New York: Free Press Paperbacks, 1922, reprinted 1977), p. 230.
 7. Sissela Bok, *Secrets: On the Ethics of*

Concealment and Revelation. Pantheon Books: New York, 1983, p. 10.
 8. *Annual Report Information Commissioner 1997-98*, p. 3.
 9. Many American public servants are appointed to positions by the President rather than entering the public sector on merit, and are expected to be visible and to actively participate in making political decisions. One scholar also argues that the competitive drive to win wealth or power in the U.S. is more pronounced than in Canada, with the result being the former are more inclined to illegal and unethical behaviour. There, governmental controls are “... too often non-existent, or weak, or if strong, rarely enforced,” with heavy reliance on the market as a self-correcting mechanism, whereas Canadians expect governments to play that role. From H.L. Laframboise, “Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government,” *Canadian Public Administration*, Vol. 34, No. 1 (Spring), p. 75.
 10. Horst Rittel and Melvin Webber, “Dilemmas in a General Theory of Planning,” *Policy Sciences* 4 (1973), pp. 155-169.
 11. Harlan Cleveland, “The Twilight of Hierarchy: Speculations on the Global Information Society,” *Public Administration Review* 45 (January/February 1985), p. 188.

12. Quoted in Kenneth Kernaghan and David Siegel, *Public Administration in Canada*, (Scarborough: Nelson Canada), p. 411.
13. See Kernaghan, *Freedom of Information and Ministerial Responsibility*; see also Donald Rowat, *Public Access to Government Documents: A Comparative Perspective* (Toronto: Commission on Freedom of Information and Individual Privacy, 1978); and, Donald Smiley, *The Freedom of Information Issue: A Political Analysis* (Toronto: Commission on Freedom of Information and Individual Privacy, 1978).
14. Quoted in Bok, *Secrets*, p. 174.
15. *ibid.*, p. 19.
16. David Curzon in Kenneth Kernaghan and John Langford, *The Responsible Public Servant*. (Halifax: The Institute for Research on Public Policy, 1991), p. 91.
17. Each of the OIC investigators has the power to summon public servants and to compel them to give oral or written evidence on oath, to enter any premises occupied by any government institution, and to examine any record under the control of a government institution, with the exception of Cabinet Confidences. From Information Commissioner of Canada, *The Access to Information Act and Cabinet Confidences, A Discussion of New Approaches* (Ottawa: Public Works and Government Services Canada, 1996), p. 7. Of note, the OIC's investigative records are not subject to the Act, the rationale being that their disclosure could prejudice complaints and destroy the confidentiality of investigations. This is very much at odds with the premise that, with as few exceptions as possible, government information should be accessible on the grounds that the exclusion and exemption provisions are sufficiently broad to limit the risk of injury.
18. John Grace, "Accountability and Independent Review," *Optimum*, Vol. 24-2 (Autumn 1993), p. 80.
19. *Annual Report Information Commissioner, 1998-99*, p. 6.
20. For instance, personal information, by far the most frequently applied severance in DND, may be released only if 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 [where the public interest in disclosure outweighs the invasion of privacy that could result from disclosure]." From *The Access to Information Act*, s. 19.
21. Department of National Defence, "Record Keeping Information and Guidance," file number 1875-1 (A/DCA) dated July 18, 1996.
22. Treasury Board of Canada, Information and Administrative Management: Access to Information, December 1, 1993, Chapters 2-4, p. 7.
23. *Annual Report Information Commissioner, 1994-95*, p. 14.
24. The other departments were Foreign Affairs and International Trade, Revenue Canada, Privy Council Office, Citizenship and Immigration and Health Canada. From Information Commissioner of Canada, *National Defence: Report Card on Compliance with Response Deadlines Under the Access to Information Act*, March 1999, p. 49.
25. *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1983-99*.
26. Letter from Louise Frechette to John Grace, June 24, 1997, p.3, and *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1997-98 and 1998-99*.
27. *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1998-99*.
28. *The Access to Information Act: 10 Years On*, p. 14.
29. *Dishonoured Legacy, The Lessons of the Somalia Affair*, p. 1226.
30. Interview with staff member from DND's ATIP section, March 1998.
31. Compiled from Treasury Board Secretariat, *Info Source Bulletin, 1994-98* and *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1994-98*. A four-year average was used to avoid criticism that using any one year would skew results in favour of the thesis. The 1997-98 Info Source Bulletin was the most recent publication available at the time of this writing.
32. *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1983-99*.
33. *Annual Report Information Commissioner 1995-96*, p. 12.
34. The exemptions are: information obtained in confidence from foreign/provincial governments; federal-provincial affairs; international affairs and defence; law enforcement and investigations; safety of individuals; economic interests of Canada; personal information; third party information (corporate); advice; testing and procedures; solicitor-client privilege; and publication in the near future. The exclusions provisions are materials published in the Archives and Cabinet Confidences (dubbed the "Mack Truck" clause by critics). One might expect DND to frequently resort to section 15 ("injurious to the conduct of international affairs, the defence of Canada or suppression of subversive or hostile activities") as a means to deny access. In fact, in the last two years, DND resorted to section 15 in only one of eight severances (13.1 per cent), it being the third most-used exemption. The others are section 19 (personal information) at 27.5%, section 20 (third party information) at 14.6%, and section 21 (operations of government) at 11.2%. Data from *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1997-99*.
35. *Info Source Bulletin, 1994-98*. The figures do not add to 100 per cent because some files are transferred to other departments, are treated informally, could not be processed due to insufficient information, no records were found, or because the applicant abandoned the request.
36. *Info Source Bulletin, 1997-98*.
37. *London Free Press*, May 9, 1994, in a story by Wendy Cox on MP John Bryden's effort to strengthen provisions of the ATI Act in the face of delays.
38. Dan Dupuis from the OIC tells of the time he was investigating a complaint from an applicant who maintained the files s/he asked for did exist, though the department (not DND) maintained they did not. Dupuis tracked down the secretary who used to work in the section and when asked about the files, was pleased to hand over about 40 discs containing a good portion of that year's records from her old section. She had been keeping them, she said, since there was no one to give her files to after being declared surplus, and no one had asked her about them since. Interview with Dan Dupuis, April 1998.
39. *Annual Report Information Commissioner, 1998-99*, p. 13.
40. *Annual Report Information Commissioner, 1994-95*, p. 12.
41. *DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1997-98*, p. 14.
42. Phrase coined by Alasdair Roberts in *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Queen's University: School of Policy Studies, April 1998.
43. *Annual Report Information Commissioner, 1998-99*, p. 12. This statement is as stark as any that the OIC has no idea how the Act is being manipulated for exactly those purposes. Some of DND's frequent requesters, for example, file several dozen requests at Christmas or other times when the department is at minimum manning. By doing so at those times, the applicants virtually guarantee there will be delays, which provides an opportunity to lodge complaints with the Information Commissioner.
44. *Annual Report Information Commissioner, 1994-95*, p. 18.
45. Bok, *Secrets*, p. 257.
46. *The Globe and Mail*, July 3, 1993.
47. The lawyer made more than 4,500 requests and 2,679 complaints to the OIC. The department had to commit 10 support staff and disclosed 230,000 pages of information. *The Access to Information Act: 10 Years On*, p. 19.
48. Interview with John Grace, April 1998. In rare cases where information obtained under the Act portrays the public service in a positive light, it is generally only to further dramatize the negative condition initially raised. For example, subsequent to the detailed revelations of Ted Weatherhill's propensity for lavish lunches at public expense, Canadians learned the detail of only one other of the approximately 100 public servants entitled to the Treasury Board exemption from meal expense guidelines. Evidently, bureaucrat Ivan Fellegi's "total bill for meals in all of 1996 came to barely double the cost of Weatherhill's infamous lunch in Paris." In addition, Southam newspaper readers were treated to a front-page photo of Fellegi eating a homemade cheese sandwich at his desk to boot, in the event the juxtaposition was already not clear. From *Ottawa Citizen*, December 7, 1997.
49. See Donald Rowat, "The Problem of Administrative Secrecy," *International Review of Administrative Science*, 1966, pp. 99-100; see also Kernaghan, *Freedom of Information and Ministerial Responsibility*. Dawson quoted in Government of Canada, *To Know and Be Known* (Ottawa: The Report of The Task Force on Government Information, 1969), p. 25.
50. Interview with senior DND executive, March 1998. The practise of blaming low-ranking bureaucrats or 'secretive military members' in DND's case, for delays in processing requests, systemic departmental shortcomings and political decisions gone wrong is eroding the long-standing tenet of an apolitical public service. For an excellent case study on the beginnings of the modern-day abdication of political accountability, see Sharon Sutherland, "The Al-Mashat Affair: Administrative Accountability in Parliamentary Institutions," *Canadian Public Administration*, Vol. 34, No. 4 (Winter), pp. 573-603.
51. Anthony Downs, *Inside Bureaucracy* (Boston: Little, Brown, 1967), p. 2.
52. Bok, *Secrets*, p. 177.
53. *Annual Report Information Commissioner, 1996-97*, p. 17.
54. Interview with senior Canadian Forces officer, March 1998.
55. Major-General Jack Vance, *Task Force on Review of Unification of the Canadian Forces*, Final Report (Ottawa: Department of National Defence, 15 March 1980), p.18.
56. Douglas Bland, *National Defence Headquarters: Centre for Decision* Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Public Works and Government Services Canada, 1997), pp. 47-60.
57. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy, The Lessons of the Somalia Affair* (Ottawa: Public Works and Government

Services Canada, 1997), p. 81.

58. Interview with senior Canadian Forces officer, February 1998.

59. Interview with Alan Leadbeater and John Grace, April 1998.

60. Interview with senior DND executive, March 1998.

61. This is an observation confirmed by all individuals in DND and other federal government departments who were interviewed for this article.

62. Interview with Alan Leadbeater and John Grace, April 1998.

63. *Annual Report Information Commissioner, 1996-97*, p. 5.

64. Interview with senior Canadian Forces officer, February, 1998.

65. *Annual Report Information Commissioner, 1996-97*, p. 77.

66. Interview with Alan Leadbeater, April 1998.

67. Interview with Larry Gordon, March 1998.

68. Interview with senior Canadian Forces officer, March 1998.

69. Treasury Board calculates that each access request in the federal government last year cost \$1,003 to process and led to \$15.85 in fees per request, for a total expense of less than \$12 million, which actually represents a very small fraction of the real cost. This is because each request (which costs five dollars) entitles the applicant to five hours of free search time and 125 pages of documents. Each subsequent hour of search time costs \$10, and each additional page 20 cents. A request for all documents in a person's filing cabinet, for example, requires no search time, and time spent photocopying, reviewing, consulting and severing the records ('preparing' records vice 'searching' for them) is all done at no cost to the applicant. Applicants can also view the complete set of documents in departmental reading rooms, and select up to 125 pages for free, rather than

having to take (and pay for) the full file. And, most or all of the search and photocopy costs are waived if the request takes long to process, a compensatory gesture to the applicant for having to wait beyond the 30-day statutory limit. Last year, Defence recovered \$32,800 in application fees, reproduction and search time (for 280,000+ pages), or an average of about \$36 a request, and 'spent' about \$2,050 to process each one. (*DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1998-99*, p. 24). If Treasury Board was to calculate incremental costs, that is, actual time spent retrieving, photocopying and reviewing the records, valuing those efforts by multiplying the time spent by the salary of those doing that work, and calculating the opportunity cost of tending to ATI requests instead of other departmental work or having to hire contractors to pick up that slack, ATI easily costs the federal government several hundreds of millions of dollars per year to administer. The most extensive study to date (but hardly comprehensive) is Treasury Board of Canada Secretariat, *Managing Better: Review of the Costs Associated with the Administration of the ATIP Legislation*.

70. National Defence and Canadian Forces Ombudsman, *The Way Forward: Action Plan for the Office of the Ombudsman*, January 1999, p. 114.

71. *ibid.*, p. 113.

72. *ibid.* Recommendation 30 proposes that the Ombudsman be distinct from the National Archives Act and the Privacy Act with respect to the storage, retention and destruction of files. Recommendations 34 and 35 would see the Ombudsman and his staff "exempt from being compelled to testify or to produce documents in any judicial or quasi-judicial or administrative proceeding." Recommendation 54 would grant the Ombudsman "immediate and direct access to all personnel records held by the DND/CF," thereby

stripping persons of their own rights as provided by the Privacy Act. This range of powers would be an astonishing *carte blanche*, emasculating the rights of those falsely accused of wrongdoing.

73. These observations are exacerbated by a lack of informed public debate on the Act and its effects. After all, the position of the Information Commissioner is virtually unassailable, the critics few. Parliamentarians and bureaucrats who dared raise a critical voice about ATI would be publicly condemned as being "for secrecy" and "against openness." For media, since nothing less than 100 per cent access to information 100 per cent of the time is their desired standard, we would expect their coverage to be deferential to the OIC, strident in its support for greater access to documents irrespective of the effects, highly critical of bureaucracy for delay regardless of the circumstances at play, and bereft of any assessment on ATI's effect on public policy. And, assuming the OIC is subject to the same bureaucratic imperatives as any other element of government, it would be in their interest to overstate the depth and scope of Access problems, to publicly remark on these problems with fervour and colour, and to capitalize on public sentiment by assigning blame on a public service under siege from an already cynical public, thereby perpetuating their office, budget and influence/power.

74. *Information and Administrative Management: Access to Information*, December 1, 1993, Chapters 2-7, p. 9.

75. Department of National Defence, untitled, undated document.

76. Lawrence Grossman, *The Electronic Republic* (New York: Penguin Books, 1995), p. 31.

APPENDIX 1: ATI REQUESTS AT DND BY CATEGORY (LATTER HALF OF 1997)*

CATEGORY OF REQUEST	EXAMPLES OF REQUESTS WHICH ARE DOCUMENT-, EVENT-, OR ACTIVITY-SPECIFIC	EXAMPLES OF REQUESTS WHICH “CASE THE NET”
Personnel and DND policy; general information on property holdings.	<p>Preliminary analysis on recruitment into the Regular Force, examining historical trends over the last ten years.</p> <p>Number of foreign military personnel who have attended courses in Canada since 1984.</p> <p style="text-align: center;">62</p>	<p>All drafted, proposed and approved organizational and re-org charts from 1 Jan 89 to the present including all supporting administrative and financial documentation.</p> <p style="text-align: center;">7</p>
Specific investigations or information pertaining to potentials investigations.	<p>Copies of all or any lists of aircrew involved in the airlift and tactical airlift operations in Sarajevo together with all/or any lists of grounding support personnel.</p> <p style="text-align: center;">43</p>	<p>All military investigations completed or underway between 1994 to present period that involve HQ staff or UN/NATO assigned troops.</p> <p>Copies of reports or other documents related to drunkenness, alcoholism or the use of drugs or alcohol by military officers within the past five years.</p> <p style="text-align: center;">17</p>
Audits, contracts, and general reports for costs of events or activities.	<p>Copy of all documents that would allow me to know the total maintenance cost for the entire fleet of Labrador, Sea King and Griffon helicopters for each year of 1994, 1995, 1996 and to date in 1997.</p> <p style="text-align: center;">42</p>	<p>List of all sole-source contracts issued from the department since October 1993, who got the contract, for how much was the contract, what was the contract for, and the reason for the contract not going to tender.</p> <p style="text-align: center;">13</p>
Targeting a specific individual or a group (interest generated by virtue of position or status in organization).	<p>Copy of all records detailing visitors hosted at La Citadelle during calendar years 1996 and 1997 and provided accommodation in the VIP suites at the R22R Officer’s Mess.</p> <p>Details of MGen MacKenzie’s retirement, an effective date of release, number of months furniture and effects stored at public expense after release.</p> <p style="text-align: center;">25</p>	<p>Copy of all documents that would allow me to know all of the expenses incurred by LGen Maurice Baril while he was commander of the army, including expense accounts, receipts, credit card slips, etc.</p> <p>All of the electronic or written records signed by MGen Forand between 1 Jan 97 and 24 Dec 97.</p> <p style="text-align: center;">26</p>
Minutes of meetings; general correspondence; studies and reports.	<p>All documents pertaining to the evaluation of the progress of changing the ratio of general officers and senior civilian officials to overall strength, and reducing the ratio of officers to non-commissioned members.</p> <p style="text-align: center;">31</p>	<p>Any correspondence dated after 1 Jul 97 concerning the establishment of the independent grievance review board and efforts to improve the personnel complaint resolution system.</p> <p style="text-align: center;">13</p>

Post-operational or after-action (lessons learned) reports.	Analysis of exercise Brave Lion [deployment of brigade from Canada to Norway in 1986] to include requests for such analysis: post-exercise reports and analysis, and policy recommendations 17	Concept of operations, any discussions at the Ministerial level, and the staffing for the decision to deploy CF on operations related to Haiti. 11
Primarily historical interest, though possible implications for present-day.	Information regarding CF operational planning and policy analysis for a planned non-combat evacuation operation in 1974 on the island of Grenada involving HMCS <i>Assiniboine</i> . 17	All records at Defence Research Establishment Suffield and elsewhere in the CF relating to chemical weapons trials at the base between 1940 and 1949 (mustard gas trials). 1
Equipment related.	All summary records created since 1 Jan 96 assessing, examining or reviewing the problem of airframe cracks in the fleet of Sea King helicopters, including any ministerial briefing materials. 14	Information pertaining to the new Search and Rescue helicopter. 2
Policy issues of obvious national import.	All reports, created since 1 July 97, from CF Recruiting, Education and Training System pertaining to the effectiveness of meeting gender-mix targets in military occupations. 7	All documents pertaining to the 1995 referendum, the Jean Marc Jacob affair, and any plans regarding the possibility of Quebec to create its own fighting or military force. 8
Operational characteristics or effectiveness of military forces	Three specific documents by file number with respect to funding, capabilities and resource adjustments of Joint Task Force 2 [CF counter-terrorism force]. 6	Information pertaining to the Pathfinders, to the infantry reconnaissance platoon snipers, to the counter-terrorism unit JTF 2. 4
The bizarre.	Info regarding the possibility that Canada might contribute to a peacekeeping force to the Malvinas/Falklands Islands. 1	All info if any pertaining to telepathy and telekinesis that might be used in DND. 3
TOTAL: 370 (5 were transferred to other departments)	268	102

The methodology employed for this analysis was to review 375 files taken from the latter part of 1997; the rationale for the selection is that it represents about one-third to one-half-year's worth of records during a period beyond the height of the interest in Somalia. The left-hand column is my attempt to categorize requests, an admittedly imperfect exercise, but sufficient to illustrate the salient points. The descriptions are taken word-for-word from the actual ATI requests. Under the auspices of the ATI Act, departments must make space available for the public to view policy manuals and information materials that can include ATI requests and documents released under the Act. The name of the applicant is confidential.

APPENDIX 2: COMPOSITE ATI DATA FOR THE DEPARTMENT OF NATIONAL DEFENCE, 1983-99
 (compiled from DND/CF Access to Information and Privacy Report, Annual Reports to Parliament, 1983-99)

YEAR	ATI REQUESTS RECEIVED				TOTAL REQ'S REC'D (INFORMAL)	COMPLETED REQUESTS	COMPLETION TIME				FINANCIAL (Per Request)		PAGES RELEASED	COMPLAINT FINDINGS AGAINST DND BY OIC
	Business	Public	Academic	Media			Orgs	30 Days Or Less	31-60	61-120	121+	Cost		
1998-99	141	410	120	277	83	885	245	156	220	264	\$2051	\$37.07	282,500	245
1997-98	363	250	8	198	42	846	317	193	106	230	1812	32.05	134,800	260
1996-97	189	326	182	227	18	882	322	213	182	165	1693	9.70	141,000	256
1995-96	380	216	139	125	9	870	198	210	236	226	1347	18.00	-	421
1994-95	151	287	89	221	11	667	291	175	131	70	1211	15.97	60,000	114
1993-94	73	167	126	115	14	465	217	127	77	44	1596	22.48	-	52
1992-93	132	178	41	66	4	419	198	128	67	26	1282	5.80	-	31
1991-92	154	137	30	61	6	451	168	126	87	70	1262	0.87	-	60
1990-91	165	157	53	84	9	434	140	131	96	67	1270	8.05	-	79
1989-90	186	141	38	62	13	442	189	137	57	59	1060	5.29	-	49
1988-89	174	160	26	48	17	426	201	105	69	51	842	4.99	-	26
1987-88	95	117	27	61	9	283	97	82	62	42	1097	9.05	-	44
1986-87	74	109	49	79	26	286	184	57	32	13	1078	11.86	-	12
1985-86	63	93	8	46	26	254	178	38	20	18	1191	13.08	-	-
1984-85	N/A	N/A	N/A	N/A	N/A	147	127	15	4	1	1895	8.03	-	9
1983-84	N/A	N/A	N/A	N/A	N/A	55	49	5	1	0	3067	10.47	-	2