ACCESS DENIED!

Ottawa's new end run around access to information? Don't keep records *By Bob Carty*

THIS MAY BE THE YEAR when Canadians crossed a threshold in a key area of our free expression rights—the right to information. On one hand, the health of our access to information (ATI) system, weak and sickly for many years, has now become chronically fragile, with questionable likelihood of recovery. On the other hand, new threats to our right to information are emerging.

The stakes are high. Information—authentic information, and not just spin—is indispensable for a functioning democracy. Public information, and the means of creating and preserving it, must be seen as vital national assets. If they are lost, we will also be losing part of our history, and surely some of our capacity to shape the future.

This year's assessment of the state of our right to information begins with our usual review of the performance of the ATI system, and it continues with a look at the emerging threats and the new remedies that must be considered.

> "I am not the first information commissioner that's been saying the system is failing. What I'm saying now is, failing dangerously. To the point where we're not actually meeting our legal obligations."
>
> *Suzanne Legault, information commissioner of Canada, in an October 2013 interview with the CBC's Evan Solomon*

ACCESS TO INFORMATION

The federal government continued to insist this past year, as in previous ones, that it is one of the most open governments in Canadian history. Tony Clement, the president of the Treasury Board and the minister responsible for the access system, told reporters in October 2013 that he is "very proud of our record. We have an open and transparent record second to none." Such declarations, however, are beginning to wear thin.

A public opinion poll conducted in early 2014 by the Nanos Research Group on behalf of CJFE asked Canadians if they agree or disagree with the claim that the government has given citizens more access to its information. A majority (53.2 per cent) disagreed. It would seem many Canadians have serious doubts about Clement's assertions.

Those assertions are based on selected statistics. Clement boasts, for example, that the number of access requests received by the government last year went up by 27 per cent. That's completely true. But there's a difference between the public's growing demand for government information and proof of transparency. In fact, unless the performance of the ATI system is improved, more requests received only means more ATI responses delayed, extended, censored and/or denied.

Clement's own department, the Treasury Board, tracks the performance of the ATI system in its annual *Infosource* publication. One measure it uses is how many requesters received *all* of the information they asked for—or, conversely, how many responses were refused or contained redactions or blackouts. In 2012-13, government departments and agencies refused or censored almost four out of five access responses—justified by a long list of exemptions or exclusions in the Access to Information Act (ATIA). Conversely, only 21.6 per cent of all Access users received all of the information they requested (see table). In comparison, 13 years ago, twice as many (40 per cent) of users received everything they asked for (some analysts point to 2000 as the time when access performance began to deteriorate significantly).

Clement also asserts that the government has significantly improved its access response times, justifying his claim about government transparency. In 2012-13, *Infosource* reported that government institutions completed almost 65 per cent of access files within the statutory limit of 30 days—a major bump from the 55 per cent of responses returned within the time limit in the previous year. But a closer examination of the data reveals a distortion that has crept into recent statistics due to the very high number of requests made to one department. Citizenship and Immigration Canada (CIC) received 45.3 per cent of all ATI requests in the federal access system in 2012-13. And because ATI inquiries made to CIC, compared with other departments, are generally less complicated—the great majority ask for personal immigration files—CIC is able to complete 75 per cent of these files in 30 days or less, while it accounted for only 6.8 per cent of all complaints to the information commissioner.

Citizenship and Immigration, in other words, makes a large footprint in the ATI data although it carries a light load. If the government's performance is looked at with CIC files removed, the performance calculations change quite dramatically in one category: judged by timeliness of response, non-CIC requests exceeded the time limit 44.3 per cent of the time—a figure comparable to previous years (see table).

Overall, the access system remains in crisis—there has not been any significant improvement.

ACCESS TO INFORMATION PERFORMANCE, VARIOUS YEARS

YEAR	1999-2000	2005-2006	2009-2010	2011-2012	2012-2013
TOTAL NUMBER OF REQUESTS	18,489	27,269	35,154	43,194	55,145
RESPONSES EXCEEDING THE 30-DAY TIME LIMIT	36.8%	40.4%	43.9%	44.7%	35.2%
WITHOUT CITIZENSHIP AND IMMIGRATION		45.8%	46.4%	42.6%	44.3%
RESPONSES WHERE ALL INFORMATION IS RELEASED	40.6%	28.4%	15.8%	21.2%	21.6%
WITHOUT CITIZENSHIP AND IMMIGRATION		30.3%	17.1%	18.1%	18.9%

Sources: Infosource (Treasury Board), "Access to Information and Privacy Statistical Reporting," various years; Citizenship and Immigration Canada, "Access to Information—Annual Reports," various years.

A PATTERN OF COMPLAINTS

Another barometer of access performance can be found in the complaints that users submit to the information commissioner for her investigation. From 2011-12 to 2012-13, there was a whopping 42 per cent increase in the number of new administrative complaints—the kind of complaints that usually concern delays and time extensions, and which in turn reflect the basic capacity of a government institution. In her most recent annual report, Information Commissioner Suzanne Legault noted signs of significant deterioration in the federal access system, such as the failure of institutions "to meet their most basic obligations under the Access to Information Act."

There are a number of possible reasons for declining performance: budget cuts have led to understaffing in some institutions; in others there seems to be a simple unwillingness to release information. Parks Canada officials took no action for 11 months on a request related to an announcement that Sable Island, off the coast of Nova Scotia, would become a national park. Transport Canada took roughly a year to release records because of staff shortages. Health Canada cited lack of resources for its poor performance.

But an especially egregious case was found at the Royal Canadian Mounted Police. The number of complaints about how the RCMP managed access requests tripled between 2011 and 2013. In that period the institution understaffed its ATI office so badly, it could not even acknowledge the receipt of requests within the 30 days it should take to answer them. That made it impossible for the information commissioner to even begin an investigation into a complaint, because there was no file number to identify the request. (This is why we gave the RCMP an "Incomplete" grade on our Report Card, on page 4.)

Government bodies can get away with such poor access performance because the access Act does not give the commissioner effective enforcement powers. And now, a Federal Court decision may have given underperforming institutions a new excuse for thumbing their noses at the Act.

In May 2013, the information commissioner took the Department of National Defence to court after the department gave itself 1,110 days (just over three years) to respond to an access request. That is allowed by the Act, but the commissioner said it was unreasonable. A Federal Court judge ruled that while the commissioner was raising important issues that were in the public interest, the court could not censure the Defence Department because of the way the Act is worded—one more reason why the it must be reformed.

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The commissioner is appealing the decision, but it could take more than a year. In such a lengthy time span, other departments and agencies could use the judgment as justification for long extensions—up to three years—because the courts will not likely challenge them.

MISSING RECORDS

There was also a worrisome new trend in 2012-13: 428 complaints concerning "missing records" were filed, an increase of 51 per cent from the previous year. This high volume of com-

plaints about missing records has continued into 2013-14, with a projected increase of another 10 per cent.

This appears to be one of the reasons the commissioner prepared a special report to Parliament, released in November 2013, concerning the risk to the access system from instant messaging technology.

The federal government has issued approximately 98,000 BlackBerrys, the primary wireless device used throughout its departments and institutions. Unlike emails, which are usually stored on central servers, instant messages (texts) sent on BlackBerrys can be transmitted in PIN-to-PIN mode, or from device to device, with no central record storage. Messages stored on the devices themselves are usually erased after 30 days. So, with so many BlackBerry devices in use by government employees, there could easily be millions of messages—concerning deliberations and decisions about policies and programming of government—that are erased every month.

It is possible to store these PIN-to-PIN messages. But in the commissioner's investigation, only two out of 11 institutions studied actually save BlackBerry messages. As a result, Legault concluded: "There is a real risk that information that should be accessible by requesters is being irremediably deleted or lost." And that infringes on the right of citizens "to know what their government is doing and to hold it accountable for its decisions." Noting that the government currently uses an "honour system," with individual officials deciding what is preserved and what is purged, the commissioner suggested that federal institutions disable instant messaging on government-issued wireless devices.

Treasury Board president Tony Clement called that recommendation "nonsensical." Public servants use the technology, Clement insisted, for things like "a quick message that their child has come home safely from school," suggesting there is no need to capture such messages. But given that Legault's study had shown how BlackBerry messages are widely used for government business, not just private missives, she told CJFE that she found Clement's response "extremely disappointing."

The missing-records problem does not end with smartphones. The Correctional Service of Canada destroyed records that were only two years old and that were the subject of the information commissioner's investigation into an ATI complaint. In another case, Transport Canada said that "no records were found" in response to an access user's request for documents concerning the transport minister's meeting with representatives of Canada's largest railway, Canadian National, less than a week after one of the worst rail accidents in Canadian history. It is hard to believe, but the department appears to be saying it created no records about such an important meeting.

Legault also found evidence of an emerging problem that could cause information to go missing. There are no clear procedures, Legault pointed out, to secure information when departments or agencies cease to exist or are amalgamated into other organizations (examples include the demise of the International Centre for Human Rights and Democratic Development, the abolishment of the Hazardous Materials Information Review Commission, and the amalgamation of CIDA with Foreign Affairs and International Trade).

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And then the recent "Senate scandal"—involving a secret $90,000 deal between the prime minister's then-chief of staff Nigel Wright and Senator Mike Duffy—was the source of several revelations concerning missing records and the right to information. Firstly, it drew attention to the fact that MPs and senators, along with the cabinet, are excluded from the reach of the access law. Secondly, it became clear that Wright on occasion used a Gmail account instead of a government one, and the information in those Gmail messages could not be obtained through access to information. And thirdly, as the scandal unfolded, the Privy Council Office reported that emails from former PMO lawyer Benjamin Perrin—who allegedly knew about the deal with Duffy—had been deleted, and that this was standard practice for departing employees. That is a clear violation of government regulations. (Later the Privy Council Office reported that Perrin's email account had not been erased, but merely frozen due to unrelated litigation.)

Meanwhile, the CBC had filed more than two dozen requests for information about the scandal to the Privy Council Office and the Justice Department. Both the Privy Council Office and Justice Department responded that their search yielded "zero" pages because the information "does not exist." CBC reporter Greg Weston found it hard to believe that there was no information trail concerning the government's worst political crisis since taking power.

MISSING HISTORY

Weston says that not generating records is as much a threat to government transparency as shredding them. "There is much evidence that the bureaucracy and political staff are increasingly conducting their business verbally without retaining notes, often exchanging correspondence through private email addresses and digital systems that are largely untraceable."

Ian Wilson agrees. Wilson is the former chief librarian and archivist of Canada, with more than three decades of experience in the creation, storage and retrieval of government information. He insists that "one of the defining functions of a public service is the creation and maintenance of records." This "duty to document," Wilson asserts, is undermined by the growth, throughout the public service, of an oral culture. "I have seen it," Wilson says. "Interactions between senior officials and the political level is now, from what I can determine, largely an oral culture."

It is difficult, however, to show proof of an oral culture or evidence of transgressions against the duty to document, because the intent is to leave no trail or evidence behind. But Canadians clearly want to reverse the growth of an oral culture and to encourage the duty to document. In the Nanos Research Group–CJFE poll, a strong majority of Canadians said they want federal employees to be required to create permanent records of deliberation and decision-making, and they also want to see those bureaucrats disciplined if they destroy those records or emails. (See "Do Canadians care about free expression?" on page 8.)

Ian Wilson says that the stakes will be very high should public servants continue to rely on an oral culture without a retrievable record: "Without record keeping and accountability, you have a very ill-informed democratic process—what are people voting on if they don't know the authentic record, not just the spin? This is a crisis for democratic society."

AN AGENDA FOR 2015

The coming year will see Canada's political parties revving up for the 2015 federal elections. Promises will be made, platforms will be pitched. CJFE believes that it is essential and urgent that our national political parties adopt and campaign on a platform for comprehensive reform of the ATIA. The Act is more than 30 years old—and showing its age. In a study of 89 countries with right to information laws, the Centre for Law and Democracy ranked Canada's ATIA at number 56—a drop of one position from the previous year.*

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Elsewhere, CJFE has outlined detailed recommendations for ATIA reform (see "A Hollow Right" at cjfe.org/a-hollow-right), but in concluding our analysis of the right to information in this year's *Review*, we believe two key measures have pressing importance:

- **Duty to document:** The evidence that more and more records are reported missing suggests that it is urgent that Parliament pass new legislation to firmly establish the duty to document, stressing the obligation of public servants to create records and setting and enforcing penalties for failing to do so or for destroying information. New amendments to the Access to Information Act should include strong sanctions for non-compliance (current penalties for destroying or altering documents have had no deterrent effect). The duty to document could also be added to the Values and Ethics Code for the Public Service.
- **Expanding the scope of the Act:** In the wake of the Senate scandal, it is all the more apparent that the House of Commons, the Senate and the cabinet should be made subject to the Access to Information Act so that the cleansing effect of sunlight might reduce corruption and deceit in those corridors.

Bob Carty is a radio documentary producer and has worked with CJFE since 1992.

**More evidence of the weakness of the Access Act and the information commissioner's powers appeared in a mid-April 2014 report from Legault's office. She has found evidence of "systemic interference" in the access process by three Conservative staff members. The commissioner recommended that such a serious incident be turned over to the police, but the Public Works*

ON THE PLUS SIDE

While many criticisms can be made of the access system, there are a few positive developments to celebrate.

- **Some departments and agencies are performing well.** The Office of the Information Commissioner resolves complaints efficiently—despite budget limitations—and continues to issue principled and forceful warnings about right to information issues. In the coming months, the commissioner is expected to release the results of two important studies: one concerning the alleged "muzzling" of government scientists, and the other proposing reforms that should be made to the Access Act.
- **Access users appear to appreciate the government's initiative to allow access requests to be made, and responses returned, online.** Launched in April 2013, the online tool processed almost 21,000 requests in the first 10 months.
- **On another digital front, the federal government was severely criticized for its 2008 decision to kill CAIRS (the Coordination of Access to Information Requests System), a database of summaries of all ATI responses government-wide.** The database let users obtain copies of responses already released to other users without having to make a new request. The government has re-established a central access portal with the Completed Access to Information Requests (data.gc.ca/eng/search/ati). Users appreciate this initiative, although some say its search parameters are limited and response times are irregular—sometimes fast, sometimes slow. Canadian Press reporter Dean Beeby, a veteran access user, says it's important to not forget the heart of the problem, namely "the rampant delays in responses to requests and the excessive use of exemptions once requests are processed. The new tools, in some ways, merely streamline the process of delivering blank pages to requesters."