

How Access to Information Fails Journalists

By Dana Lacey

I T STARTED WITH A ROUTINE ACCESS TO information (ATI) request in a B.C. courthouse. A government employee had been found with the personal information of 1,400 income assistance clients in his Victoria condo, and had subsequently been fired. *Victoria Times Colonist* reporters Rob Shaw and Lindsay Kines wanted a copy of the RCMP search warrant, a document that the Supreme Court of Canada had ruled nearly 30 years earlier should be easily accessible to the public. Their request was met with numerous roadblocks bordering on the bizarre: “Sorry, the courthouse staff say you can look at the warrant, but only the suspect or his lawyer get a copy,” one court clerk told Kines. “By the way, are you the suspect? No?” It was enough to launch the two reporters—along with their colleague, courts reporter Louise Dickson—into an investigation in which they discovered that B.C.’s courts routinely and wrongly deny access to information that should be available to the public.

Unfortunately, the problem isn’t isolated to the court system, or even to the province. Despite the promises laid out by the *Access to Information Act*, getting information out of any number of government bodies—whether they be municipal, provincial or federal—is neither straightforward nor timely. Here are some sobering stats:

44 Percentage of federal ATI requests not met within the required 30-day limit.

21.3 Percentage of requests that took more than 60 days to fulfill.

315 Average number of days to resolve an ATI complaint.

A recent report published by the journal *Government Information Quarterly* compared the effectiveness of freedom-of-information laws in five democracies. Canada ranked dead last thanks to its long delays and “outdated”

policies: citizens cannot file requests online, and must mail in cheques to cover fees.

None of this is news to anyone who has ever filed an ATI request in Canada. What’s alarming is that, faced with so many obstacles, fewer journalists are making requests. For the fiscal year 2009–10, only 10.5 per cent of ATI requests came from journalists—a 23 per cent drop from the previous year. Meanwhile, ATI requests from business rose 14 per cent during the same period. So, what gives? Why aren’t journalists taking advantage of this tool?

“Going through the process is not for the faint of heart,” writes David McKie, the CBC investigative journalist who crunched the Treasury Board numbers to find those facts. “But neither is being a journalist facing a federal government bent on spin and obfuscation and a bureaucracy that is justifiably scared, and many times forbidden from talking to journalists. So let’s all get cracking. There’s too much at stake for journalists to be on the wrong side of a downward trend.”

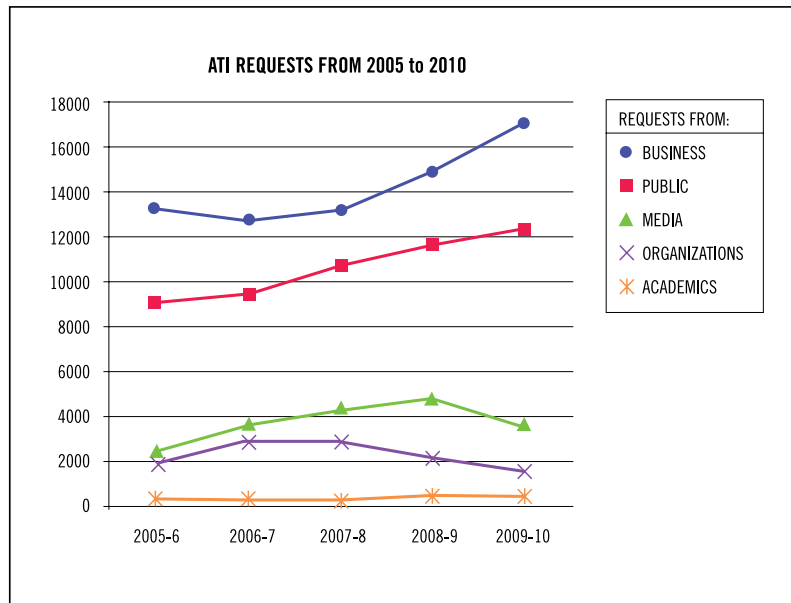
ATI plays an important role in public service journalism. The *Toronto Star* uses the *Act* often to break stories, although investigations editor Kevin Donovan notes that it can be difficult to convince journalists to take advantage of it. For one, it can be expensive, and the delays are beyond frustrating (while some documents are retrieved fairly quickly, the *Star* has waited more than two years for others to be released).

Journalist Stephen Spencer Davis filed an ATI request for documents about previous incidents at a Toronto apartment building that had been gutted by fire. The OpenFile.ca reporter was drawn to the story after he found this quote from a resident who had ignored the blaze: “They always have fires. Everyone just ignores them.” After sifting through the reports, Davis realized that “the difference between reading a press release and reading internal documents was like the difference between someone’s schoolwork and their diary. They were the opposite of polished: there were reports of slip-ups and unheeded warnings, things no one would ever tell a reporter wielding a notebook and a tape recorder.”



The *Access to Information Act* was enacted under Pierre Trudeau’s leadership in 1983, in part as a result of an RCMP scandal. Overseen by the Office of the Information Commissioner (OIC)—launched the same year—the *Act* stipulates what information can be requested and how long it should take to receive it. Its most obvious flaw is what critics have dubbed the “Mack Truck clause,” named for the transport-truck-sized holes in the legislation that exempt cabinet documents including, among other things, discussion papers containing background explanations, analyses of problems and policy options, communications between ministers, and draft legislation. That loophole has not been corrected over the 30 years of the *Act*’s life.

Soon after launching the ATI process, the government also created a searchable database, the Coordination of Access to Information Requests System (CAIRS). It was an extremely useful tool for journalists. If an ATI request had been returned to any individual requester, the government was obliged to provide a copy of all the response documents to any other citizen. By 2008, millions of documents were available through CAIRS, with 35,000 more available each year. Then, on April 1, 2008, the government stopped updating CAIRS because, Prime Minister Stephen Harper explained, it was “deemed expensive.” Ironically, departments could now be wasting money duplicating searches already done at taxpayers’ expense. (For historical searches,



Reprinted with permission from David McKie, CBC.

McKie maintains the CAIRS system up to its 2008 shutdown. See <http://server.carleton.ca/~dmckie/CAIRS/CAIRS.htm>.)

Any progress Canada has made toward transparency—such as extending the *At* to cover more institutions, including the CBC and Canada Post—has been overshadowed by Harper's ongoing efforts to keep information behind closed doors. Journalists have long complained about his parental and tight-lipped treatment of the press. Blocking ATI requests has become a matter of course. When Stephen Maher of Halifax's *Chronicle-Herald* sent repeated requests for information to the PMO, he was told to "stop bothering them."

In a February 2010 feature for *The Walrus*, Gil Shochat writes, "One tactic in particular—delay, delay, and delay—has created such a massive logjam of requests that it threatens to crash the entire access system." Say, for instance, an office receives a request it deems sensitive. The request is slapped with an "amber light" tag and is sent on down the rabbit hole, where it may take months to resurface—long past any reasonable journalistic deadline. Shochat notes that amber lights are given to nearly half of an office's requests. The Public Policy Forum blames the government's general rule: "When in doubt, cross out." The Canadian Newspaper Association reports, "Media requests are about twice as likely to get the tougher treatment as requests overall."

Some federal departments have even started converting data into images before releasing it; a photo of data is a lot more complicated to import into a spreadsheet or database.

Complaints about the request process are also backed up; the OIC can take as long as two years to resolve a grievance. Furthermore, it is largely a dog without bite, and while more than one commissioner has recommended policy changes, the requests have been largely ignored.

So what about that 23 per cent decline in journalists making requests? "What makes matters worse," McKie writes, "is we don't seem to be cultivating a new generation of journalists who use the [At]. Few schools of journalism in Canada teach their students how to file requests, which means that the new recruits filling newsrooms across the country lack the reflex of demanding records that help challenge claims that politicians make on matters such as job creation or the need to be tough on crime."

Recently, five government departments, half a dozen agencies and one Crown corporation (the CBC), have begun posting lists of completed requests online. Citizens can request a copy of the documentation, though the lists are incomplete and sometimes quite dated. But McKie advises Canadians to hold their applause—the technology to post this information has been around for a decade, but only a small fraction of the 250 institutions under the

At have opted to take advantage of it. And a handful of institution-specific lists (not a single, centralized, searchable database) doesn't come close to replacing CAIRS.

There is a simple way journalists can champion a better system: use it. Those *Times Colonist* reporters turned their frustrating experiences into an award-winning series, published in February 2010, which has since had a direct impact on provincial policy. As a result, B.C. Attorney General Mike de Jong scrapped a \$6 online court registry search fee and promised to revise aging court access policies so that they have a "presumption in favour of releasing information." Let's not sit around hoping that presumption spreads—get cracking.

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~~NOT~~ Access to Information THE DECLINE OF ACCESS IN 2010-11

By Bob Carty

UNDER THE HARPER GOVERNMENT, IT'S NEVER been harder to pry information essential to a functioning democracy out of the federal bureaucracy. And time and again, the main reasons for the debasement of Canadians' right to freedom of information are considerations of political damage or embarrassment that information can do to those in power. CJFE observed several alarming trends in access to information over the past year.

A CULTURE OF CONCEALMENT

The year under review began with a case that may be just the tip of an iceberg of political interference.

The Canadian Press's Dean Beeby reported on Feb. 7, 2010, that a federal cabinet minister's aide had killed the release of sensitive material—an action for which he had no legal authority. Under the *Access to Information Act*, Beeby asked for information on the extensive real estate portfolio of Public Works and Government Services Canada. His request was tagged as

sensitive and handed to Sebastien Togneri, a political aide to then-minister of Public Works, Christian Paradis. The department's officers decided it had no legal basis to withhold the information and ordered 137 pages to be released to Beeby. At the last minute, Togneri sent an urgent email to a senior Access official to "unrelease it"—and there was a rush to the mailroom to stop the file from being delivered to media hands. Four months later, Beeby received only a fraction of the information, and it was heavily redacted.

The case came under investigation by Suzanne Legault, head of the Office of the Information Commissioner (OIC). She found that there was evidence of a political vetting machine at Public Works and recommended that the case be referred to the RCMP. The *Act* forbids anyone to "direct, propose, counsel or cause any person" to conceal a record, with a maximum penalty of \$10,000 and two years in jail (Legault says that to the best of her knowledge, no criminal charges have ever been laid for violations of the *Act*). Togneri resigned in October.

The commissioner is also looking into similar allegations of political interference in the access process at Foreign Affairs, National Defence and Public Works. While there is some evidence that the previous Liberal government also operated a system to politically "vet" ATI requests, it appears the Harper government created a system-wide culture of violating freedom of information rights.

ACCESS WAIT TIMES GETTING WORSE

Legault monitors the ATI performance of federal institutions in her annual and special reports to Parliament. In an April 2010 document called *Out of Time*, Legault reported a "constant decline" year over year in government obligations to meet the 30-day limit for response required by law. Delays in response are the "Achilles' heel" of ATI, Legault warned, and the public's right to government information is "at risk of being totally obliterated...."

Of the 24 government departments and institutions surveyed for the OIC report card, more than half were operating below average in terms of refusals, delays and poor information management. The Privy Council Office, directly under Prime Minister Stephen Harper's leadership, got a

"D" for having the second-worst timelines; it was taking, on average, 157 days to complete a request. Five institutions scored a failing grade, among them the departments of Natural Resources, Heritage, and Environment, along with Correctional Service Canada and the Canadian International Development Agency (CIDA). Foreign Affairs and International Trade Canada (DFAIT) performed so badly it earned a "red alert"—a grade below failure.

The commissioner also warned about new trends behind the increases in ATI delays. The time taken for extensions is getting longer each year, and there is a pre-occupying practice of consulting other government departments. When the Harper government was elected (2006), there were 1,330 requests that each required more than 30 days of consultation with one or more departments. That number doubled over the next four years—and that's just one way to delay the release of information. "There are literally 500 ways of saying no," according to ATI activist Ken Rubin. He asserts that when it comes to sensitive issues like Afghanistan or climate change, Ottawa has perfected the ability to generate black holes—nothing escapes.

It's important to note, however, that the OIC does see improvement in government departments, and some—like Justice, and Citizenship and Immigration—do an outstanding job at access largely due to leadership and a culture of disclosure.

In March 2010, the OIC also produced a report card on eight institutions and Crown corporations just recently brought under the requirements of the *Act*. Several, like the National Arts Centre and Atomic Energy of Canada, are performing very well. But, for a second year in a row, Legault lambasted the CBC for long delays and a high rate of refusal. The CBC responded that it has been bombarded by hundreds of ATI requests submitted by a media competitor, Quebecor Media, owner of QMI Agency and Sun Media. The requester wants information such as audits from the last three Olympics and a copy of all records on the costs of running the contest to find the new *Hockey Night in Canada* song. The CBC contends it does not have to release such information because it has an exemption for journalistic and programming material. The

requestor argues the information is about general administration, not about journalism. It is a complex discussion, deciding where this line should be drawn. For its part, the OIC wants the right to review the relevant documents to assess whether the exemption is being applied properly; currently, that assessment is made by the CBC. The issue is making its way through the courts.

THE SHRINKING OF INFORMATION

Declining government performance can also be found in the annual statistics for ATI requests compiled by the Treasury Board's *Infosource* bulletin. One of the indicators is how often all the information requested is released—or, conversely, how much is redacted or refused. In 1999–2000, the federal ATI system disclosed all requested information 40.6 per cent of the time. By the time the Liberals went down to defeat to Harper's Conservatives in 2006, that rate had already dropped to 28.4 per cent. But then it plummeted by almost half—in 2009–10, requesters got everything they asked for in only 15 per cent of cases.

Elsewhere in the world, others are doing better: in 2008, 60 per cent of all freedom of information requests made in the U.K. and 43 per cent of all FOIA requests filed in the U.S. yielded full disclosure.

REFUSING TO RELEASE INFORMATION

This *Review* is being published at the end of an election campaign required after the Harper government was held in contempt of Parliament in part for refusing to provide information about the costs of programs such as its law-and-order legislation and corporate tax cuts. This, too, is a freedom of information issue. The government does not deny it has this information—just that it is a "cabinet confidence." The Parliamentary Budget Office confirms that this information exists, it is part of the expenditure management system that costs out new programs. So, the government is again refusing to release important information to Parliament and the public—which appears to be a case of contempt not only for Canada's democracy but also the Conservatives' own promises to make government more open, transparent and accountable.

Bob Carty is a CJFE Board member.