

A World of Lost Opportunities:

Canada's Access to Information Act on the Global Stage

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Thank you for your invitation to speak during this Right to Know Week. I am most honoured and pleased to be here today. Let me just note that I am speaking personally and not behalf of the Canadian Association of Journalists or any other organization.

By now, the value of a good freedom of information law and practice must be self evident to you, and I need hardly repeat polemics that may seem overly familiar.

But allow me to quote one political leader: "Information is the lifeblood of a democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians cannot make informed decisions, and incompetent or corrupt governance can be hidden under a cloak of secrecy." That was our current Prime Minister Mr. Harper writing in a 2005 newspaper opinion piece.

I just propose to talk about where we are today, and what needs to be done.

It is obvious and well known that Canada's 1982 *Access to Information Act* has fallen far behind the rest of the world's FOI laws on enabling the public to obtain government information. This fact cannot be disputed even by the strongest opponents of *ATI Act* reform. Ironically and inexplicably, as the world moves forward on transparency, Canada appears to be marching in the opposite direction. I would like to view this tragic situation in the long term view, as a historical aberration and not a permanent reversal, and to be neither too cynical nor too naïve about it.

The required action in Canada is quite simple: the Prime Minister needs to enact his eight promises on *ATI Act* reform that he published in the 2006 election campaign. If fulfilled, these would mainly raise Canada up to global standards.

These include pledges to implement then-Information Commissioner John Reid's recommendations for reform of the *ATI Act*, to grant the Commissioner the power to order the release of information, to expand the coverage of the *Act* to all foundations and organizations that spend taxpayers' money or perform public functions, and to provide a general public interest override for all exemptions.

I support the passage of either of the two private members' *ATI* reform bills of 2008, both of which were based on Mr. Reid's open government act, but with the crucial addition of full order-making powers for record release. As well, the 12 recommendations proposed by Commissioner Robert Marleau in the spring of 2009 are worthwhile, but we need to go much further.

As global FOI expert Toby Mendel has observed, if Canada does not reform its *ATI Act* up to world standards, then this nation's valued international reputation as a defender of democracy and human rights is at risk.

But regrettably our reputation is already suffering. You need not rely solely on my word. Inevitably, FOI experts in other countries have publicly noted the forlorn status of our *ATI Act* in the world context.

For example, David Banisar of London in his latest Global FOI Survey wrote, "There is wide recognition that the [*ATI*] *Act*, which is largely unchanged since its adoption, is in need of drastic updating."

This year Australian law professor Rick Snell called the FOI law of Canada "fairly abysmal," and Ottawa's approach to providing information as a 19th-century, horse-and-buggy attempt at "managing secrecy."

This year the Commonwealth Human Rights Initiative stated that the right of access in Canada "falls short" of compliance with Article 19 of the 1976 *United Nations' International Covenant on Civil and Political Rights*.

Furthermore, I have heard visiting American journalists deride Canada's FOI laws as "pathetic" in comparison to their own - and I was unable to contradict them. How could I? On such grounds, in fact, Canadian journalists sometimes have to find information through the American FOI law about Canadian affairs that they could not obtain in this country. Under FOI they have received complete records from the United States within a few days that would have taken months to obtain in Canada and would have been heavily censored.

Well, our current Prime Minister seemed aware of this reality, which accounts for his eight electoral reform pledges. I believed in these promises, and so was chastised by others as naïve. Yet just after the Conservatives were elected, many observers were truly shocked to see the new prime minister so sharply reverse his previous position on transparency.

His government soon unveiled *Bill C-2, the Accountability Act*, an omnibus collection of provisions designed to "clean up government." The bill prompted Commissioner Reid to issue a rare "special report," writing in it that no previous government "has put forward a more retrograde and dangerous set of proposals to change the *Access to Information Act*." After the resulting protests, the Prime Minister then pulled amendments to the *ATI Act* out of the *Accountability Act* and instead sent the issue of *ATI Act* reform to be exiled, yet

again, to the graveyard of endless and needless study. Yet when the wheel works well elsewhere in the world, there is no need to reinvent the wheel here.

This reminds one of an episode of the British television series *Yes Minister*, in which the subject of the ‘Open Government’ policy comes up, and the droll senior bureaucrat Sir Humphrey Appelby remarks that they will have to steer the minister away from it, using more studies. He says: “It is the Law of Inverse Relevance: The less you intend to do about something, the more you keep talking about it.” (This, by the way, is the same Sir Humphrey who famously declared, “Minister, you can have good government or open government, but you can’t have both.”)

Yet the Prime Minister did fulfill a portion of just one of his promised reforms. In the *Accountability Act*, the government extended *ATI Act* coverage to several foundations, officers of parliament, the Canadian Wheat Board, and all crown corporations and their subsidiaries. Yet more than 100 quasi-governmental entities remain uncovered, most disturbingly the nuclear Waste Management Organization and Canadian Blood Services. (These entities are all listed in Appendix 4 of my report *Fallen Behind*.)

The government is immensely proud of *Bill C2*, and the Prime Minister erroneously stated that it delivered on the government’s promise on accountability. Indeed it was better than nothing, and more progress than seen from the previous administration. It was a fair start, but only a start, not the end point. It was only the first half of chapter one, that is, the other seven-and-a-half chapters remain to be written.

To be fair, every party has at one time or another pledged to implement open government, yet none has fully delivered. It was also disappointing that, unlike the Conservatives, the Liberals made no mention at all of *ATI Act* reform in their 2006 election platform. We still keenly await a detailed policy statement on the *ATI Act* from the current Liberal Party leader.

Why was this report, *Fallen Behind*, written?

After the *Accountability Act* was passed, it was wrongly perceived by some that the issue of government transparency had been successfully completed for the foreseeable future. With this report, I wished to re-energize the *ATI* reform movement, and I could conceive of no other way to do so.

Most of the discussion on reform of the *ATI Act* had become too narrowly focused and circuitous, so I wished to consider another viewpoint on the matter. We need, instead, to continuously reconsider and reform the Act in the light of changing international and historical contexts. This approach could profoundly and positively alter what Canadians come to expect, and perhaps even demand, of their own rights to information.

As Commissioner Marleau said last spring, work is needed on the *ATI Act* “to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.”

So I compiled and cross-referenced every relevant document I could find; that is, the text of 68 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, and the commentaries of 14 global and 17 Canadian non-governmental organizations. I compared all of these with the current *ATI Act* and the Prime Minister's eight unfulfilled *ATI Act* reform promises of 2006. The key topics I entered into a comparative FOI Excel spreadsheet to create the “World FOI Chart”, which is this report's foundation. While the report was written for Canada, the Chart was written for the world.

Although compiling the chart took a year full-time, it was the most valuable usage of time I have yet invested on any subject, and I found the exercise not dry or tedious but unexpectedly compelling and sometimes inspiring.

(You can read the chart on my website, <http://www3.telus.net/index100/foi>). I have also posted there a global index of FOI rulings from commissioners and courts, which FOI applicants can cite in their legal appeals.)

Ten years ago, arguing for *ATI Act* reforms was more onerous because there were no accepted global FOI standards then. But now there are. Any call by our government to reconsider the *ATI Act* anew, from the ground up, is simply another stalling tactic.

I discovered that most Commonwealth nations have moved far ahead of Canada, even the United Kingdom, ironically, which is Canada's model for parliamentary secrecy, and which passed an FOI law nearly two decades after we did.

Canadian bureaucrats, to deter *ATI* reform, still invoke the great tradition of Westminster-style confidentiality. If so, how do they explain why the U.K.'s *Freedom of Information Act 2000* grants the information commissioner there the power to order record release, contains a broader public interest override and a harms test for policy advice, and covers a vastly wider range of quasi-governmental entities - all of these features lacking in our *ATI Act*?

The best examples for Canada to follow for inspiration are, I believe, the access laws of India, Mexico and South Africa, in most, but not all, of their respects.

By the way, it seems troubling to note that the only other nation that has publicly cited Canada's *ATI Act* as an inspiration is Zimbabwe, whose government told the African Commission on Human Rights that its own FOI law of 2002 was “moulded along the lines of Canada's laws on the same subject.” Another purpose of Zimbabwe's FOI law is requiring journalists to register and prohibiting the “abuse of free expression,” with 20 year jail terms prescribed.

There is one vital point I need to emphasize, and which we all need to remember. At first I considered writing the report and Chart for FOI experts. But then I changed the style, to accommodate the general public, to hopefully make legal topics accessible to all, to move FOI out of the sole realm of authorities. In Canada and around the world, we have been regularly told by senior bureaucrats and crown lawyers – wrongly in my view - that FOI law reform is ‘too complex’ for the public to understand, and so it had best not even try. Such a paternalistic and self-serving outlook, of course, contradicts the entire purpose and philosophy of FOI laws.

As well, responding to potential critics, I repeatedly stressed that I was comparing only legal texts, not national FOI practices. A global comparison of FOI practices might not have been to Canada’s advantage anyways, since our practices fall so short of our anemic *ATI Act*. In Canada, for example, agencies coolly grant themselves 240 day FOI reply extensions, missing deadlines with breezy impunity. (In reply to my last *ATI* request, it took an incredible nine months to obtain 20-year-old cabinet meeting minutes.) To dismiss a comparative study of national FOI statutes mainly on the grounds that the actual practices of the day might not follow their texts is a red herring, beside the point.

The response to the report and Chart has been overwhelmingly positive, and the website has received visits in the past year from hundreds of readers from government, academia, law firms and the public from more than 35 nations.

Yet one is startled and bewildered to see the utter tenacity of the government’s denial of Canada’s position in the global FOI reality.

Canada’s Justice Minister Mr. Nicholson quite angrily told the House of Commons ethics committee on May 4 of this year that: “I want you to know that I completely disagree with anybody who would suggest that this country has a dismal record on anything related to access to information issues. And when they say “dismal on the world stage,” I want to see that list, who they’re putting on that list. I want to tell you something - this country has an outstanding record, and if anyone has anything different to say, then I say they are completely wrong.”

If, as the minister says, he wants to see “that list” of other countries, he is welcome to consult the book *Fallen Behind* and the World FOI Chart, which respond to all his questions, and which were widely publicized and posted online 8 months before he spoke.

On May 27, Commissioner Marleau responded to the minister’s comments by saying: “I do not agree, with all due respect, that Canada continues to be at the forefront today. . . . The cold reality is that Canada's regime has not aged well. It lags behind the next generation of laws.”

The justice minister’s comments are all the more astonishing for the fact that he had served as the vice-chair of the House of Commons committee that studied the *ATI Act*

intensively, and produced the valuable 1987 report *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. This report advised many necessary changes to the Act, such as that all government funded and controlled entities should be covered by it, that a harms test should be added to more sections, that the public interest override should be greatly expanded, that the policy advice records should be accessible in 10 years instead of 20, and so forth. None of those recommendations came to pass.

Above all, I plead with senior bureaucrats and crown lawyers not to oppose needed *ATI* reforms, and instead begin supporting them. Some explanation for the logjam may be suggested by the Canadian Justice Department's 2005 discussion paper, which states: "There is nothing seriously wrong with the *Access to Information Act* as it is today."

At times it seems that one would sooner expect to see gravity reversed and water flow uphill than for the Canadian bureaucracy to accept the Prime Minister's *ATI Act* reform promises. And yet to some eyes, in the two most recent governmental *ATI* discussion papers, the old hardline resistance appears to be melting slightly, as though even the reports' authors sensed that times have changed since 1982.

The incentive for transparency cannot succeed without direction from the top. We have seen the current Prime Minister's approach to transparency. By contrast, U.S. President Barack Obama, on his very first day in office, issued an executive order to reverse the default secrecy position of his predecessor. He wrote: "All agencies should adopt a presumption in favour of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government."

In its report of November 15, 2005, the House ethics committee stated "This Committee believes that after almost 20 years of pressure for its reform, there can be no further delay in the modernization and overhaul of the *Access to Information Act*."

One of the great attractions of FOI is that it is one of the rare subjects that, ideally, transcends political parties and ideologies. This was the vision of the all-party committee, set up in 2000 by Liberal backbench MP John Bryden, in defiance of the government that he was then a part of. It is also worth noting that any party in government today could be in opposition again tomorrow, itself trying to use the *Act* effectively, as it has so often done before.

Before looking forward, we might also have a glance backward to the little-known pioneers that laid the groundwork.

For Conservative Party MPs, one could ask them to continue the legacy of Alberta Tory MP Ged Baldwin, who was known as the "Father and Grandfather" of the *Access to Information Act*. He organized a group of FOI advocates and MPs, called ACCESS, and in 1974 he introduced a private member's bill which received extensive parliamentary study. Former information commissioner John Grace wrote that "Ged Baldwin was the single irresistible force which inspired Canada's information law. He showed what a

private and solitary Member of Parliament, even in opposition, can do when the cause is good and the will is strong.”

For Liberal Party MPs, besides acknowledging the labours of Senator Francis Fox, one can consider the vision of Prime Minister Pierre Elliot Trudeau in passing the *ATI Act* into law. As Senator Fox wrote: “The longer the work of the parliamentary committee went on, the greater the bureaucratic pressures became to change and even withdraw the legislation. . . . In the final analysis, had it not been for Prime Minister Trudeau’s support, the bill probably would not have passed.”

For New Democratic Party MPs, one can recall the legacy of Barry Mather, a journalist and NDP MP from British Columbia, who back in 1965 introduced our first freedom of information bill. It died on the order paper, but in each parliamentary session between 1968 and his retirement in 1974, he reintroduced identical legislation. Four times it reached Second Reading, but went no further.

For Bloc Quebecois MPs, one can say that Bloc members, with no chance of ever forming government, have creditably pushed for *ATI* reform, and one hopes they will continue to do so. Premier Rene Levesque passed one of the best provincial FOI laws in 1982, and Quebec had been at the forefront of FOI for decades. Its law includes positive features missing from the *ATI Act* that was passed in the same year, such as order-making power for the provincial commissioner, a much broader definition of public bodies, a strict 20 day time limit for FOI replies, and a duty to classify records in a manner that facilitates their retrieval for FOI. Quebec is also the only province that has tried to grant a kind of constitutional status to the public’s right to obtain government information, in Quebec’s 1975 *Charter of Human Rights and Freedoms*, Section 44.

Today, one hopes that all MPs will work together on the needed *ATI* reforms, with the purpose of creating a lasting legacy for their constituents. Such reforms may be possible in a minority parliament that would not be so in a majority one. But it will never be easy - information is a source of power, prestige and profit, and whoever wished to yield those?

In sum, Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners, and then look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present.

Although major *ATI Act* reform may initially cause the Canadian government discomfort, its long-term value will become evident. Innovations that we accept as routine today, and even express pride in, were considered unrealistic in their day. Future generations of Canadians would neither comprehend nor excuse this nation’s failure to raise our FOI laws up to world standards. But the choice is yours.

Thank you, merci.
