Accessing Democracy: The Critical Relationship between Academics and the Access to Information Act

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Parliament recognized the fundamental importance of protecting access to government information when it enacted the federal Access to Information Act.[1] When the Act came into force on Canada Day 1983, Canada was just one of a handful of countries to have legislative protection of access to government information. Now, 27 years later, over 80 countries across the globe have enacted some form of access to information legislation.[2]

Although the world has followed Canada's lead in recognizing the importance of protecting access to government information, Canada has "fallen behind" (to borrow the descriptor used by journalist and author Stanley Tromp) and may even be "backsliding" (in the words of Laura Neuman of the Carter Center).[3] What has gone wrong with the federal access regime? Why should legal studies scholars care? I address these questions in this article. I start by outlining the symbiotic role between academics and access to government information. I then identify three key factors that have contributed to the decline of the federal access regime: administrative resistance, legislative degeneration, and political indifference. Finally, I close by briefly discussing three ways in which scholars can continue to work to protect and promote access to information in Canada.

Academics and Access

Academics took the lead in advocating for access to government information in the 1960s and 1970s in Canada. One of the earliest advocates was Donald C. Rowat, a professor of Political Science at Carleton University. In a 1965 article entitled "How Much Administrative Secrecy?", he summarized the key arguments in favour of protecting access to government information, writing

1 RSC 1985, c A-1 [*Access Act*]. This paper will focus on the federal access regime.

2 This is a commonly cited estimate of the number of countries that have access legislation in place, although the total is now close to 90. See, e.g., Robert Hazell and Ben Worthy, "Assessing the Performance of Freedom of Information" *Government Information Quarterly* 27 (2010), 352.

3 Stanley L. Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context* (September 2008), Canadian FOI Resource Web site http://www3.telus.net/index100/foi; Laura Neuman, "ATI Without Frontiers" (Presentation to International Perspectives on Access to Information Panel during Right to Know Week Events, 1 October 2010) [unpublished].

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> Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.[4]

Similar arguments were expressed by T. Murray Rankin, a professor of law at the University of Victoria. In 1977, he wrote "The right to confront the decision-making apparatus of the State with informed opinions is the foundation of liberal democracies. . . Access to government information is essential to participatory democracy."[5]

Canadian governments started, sometimes grudgingly, to acknowledge the need to provide access to government information by the late 1970s. At the federal level, this ultimately resulted in the enactment of the Access Act. Nonetheless, as we shall see below, access legislation does not always guarantee access to information. As such, the role of academics in advocating for access to government information has remained important. Contemporary Canadian academics have echoed the arguments advanced by Rowat and Rankin. Perhaps the foremost contemporary advocate of access to government information in Canada is Alasdair Roberts. Roberts argues that access to information is a necessary part of the structure of modern democratic society. In his words, "Rules to assure access to information then become part of the institutional arrangements—the 'civic architecture'—that must be built and maintained by governments so that individuals have the capacity to fulfill their political participation rights."[6]

Academics are not just vital protectors and promoters of the right to access government information, they are also important consumers of government information. Increasingly, academic research is fuelled by information generated and collected by government officials. As will be attested by my colleagues in this special volume, scholars in the field of criminology, sociology and legal studies have been leaders in the movement to use government information to more accurately understand and critique the process and politics of decision-making by government officials and other state agents, including

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4 Donald C. Rowat, "How Much Administrative Secrecy?" *Canadian Journal of Economics and Political Science* 31 (1965), 480.

5 T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977), 154–55. Other early academic discussions of access legislation include Donald C. Rowat, ed., *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, Department of Political Science, 1985); John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981); T. Murray Rankin, "The New Access to Information and Privacy Act: A Critical Annotation," *Ottawa Law Review* 15 (1983), 1; Tom Onyshko, "The Federal Court and the *Access to Information Act*," *Manitoba Law Journal* 22 (1993), 73.

6 Alasdair Roberts, "Structural Pluralism and the Right to Information," *UTLJ* 51 (2001), 243 at 263. For more recent discussions of the importance of access to government information see Gregory Tardi, *The Law of Democratic Governing: Principles*, vol. 1 (Toronto: Thomson Carswell, 2004), 38; Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law 'Complex,'" *Ottawa Law Review* 36 (2004–2005), 49, paras. 30–31; Vincent Kazmierski, "Something to Talk About: Is There a *Charter* Right to Access Government Information?" *Dalhousie Law Journal* 31 (2008), 351.

police. To return to the metaphor used by Roberts, access to information is not just part of the civic architecture of the state, it is a means through which the edifice itself can be better studied and perhaps even "deconstructed." For this reason, those of us working in the broader field of legal studies should be particularly concerned when existing access rights are threatened or undermined. More importantly, insofar as scholars remain insulated (at least in theory) from corporate pressures and daily publication deadlines, academics are probably better positioned to advocate for increased access than journalists, who are admittedly the more high-profile users of access legislation.

Finally, it is worth noting an important distinction between the approach to and use of access legislation taken by journalists and traditional legal and political science scholars and the approach adopted by many legal studies scholars. Journalists and scholars in the first group tend to focus their arguments concerning the importance of access to information on the ways in which access enriches democratic participation and accountability as key foundations of the liberal democratic state.[7] Where access legislation is relied upon, it tends to be relied upon to identify, publicize, and (ideally) correct misbehaviour of individual or group actors within the system. Although some legal studies research will fall into the same pattern, many other legal studies scholars rely on information obtained through access legislation to identify systemic problems rather than individual malfeasance, to question the very foundations of the system rather than to correct the behaviour of individual actors.

With the importance of access to government information for academics of *all* orientations in mind, I turn now to identifying some of the major barriers to access that have been identified in Canada.[8]

Administrative Resistance

The first barrier to address is administrative resistance. Although the introduction of access to information legislation in Canada was a progressive step in the fight against government secrecy, the actions of government officials, both elected and unelected, have too often thwarted the purposes of the

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[7] I make this distinction without pejorative intent, particularly since my own work to date on this issue admittedly falls into this first category.

[8] There are, of course, many more barriers. In particular, Alasdair Roberts has noted several other ways in which the government has undermined access to information, including under-funding of the Office of the Information Commissioner, outsourcing/privatization of the delivery of public services, and litigation resisting disclosure of information. See Alasdair Roberts, "New Strategies for Enforcement of the *Access to Information Act*," *Queen's Law Journal* 27 (2002), 647; Alasdair Roberts, "Retrenchment and Freedom of Information: Recent Experience under Federal, Ontario and British Columbia Law," *Canadian Public Administration* 42 (1999), 422; Alasdair Roberts, "Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government?" *Canadian Public Administration* 45 (2002), 175. Murray Rankin, now working as a lawyer, continues to produce studies of the access regime, such as Murray Rankin, "The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada," http://www.oic-ci.gc.ca/eng/pa-ap_acc-atia-ref.aspx.

legislation. This tendency has been documented and deplored by a number of different actors.

Not surprisingly, Information Commissioners have often been the most vocal critics of government resistance to access. In his 2003–2004 Annual Report, then Information Commissioner John Reid specifically identified the problems caused by intentional efforts by government officials to evade the reach of the existing legislation.[9] Commissioner Reid described the "disdain" shown for access legislation by former Prime Ministers Mulroney and Chretien, noting that this disdain "spread like a cancer through successive PMOs [Prime Minister's Offices], PCOs [Privy Council Offices] and the senior bureaucracy."[10] The result was that requests for allegedly "sensitive" information about government often met a "wall of obstruction, obfuscation and delay" raised by government officials.[11] According to the Information Commissioner, a pattern developed of "too many senior officials (elected and appointed) consciously evad[ing] public accountability by making sure there is no paper trail."[12] In all, the Commissioner questioned whether the government had the courage and honesty to "beat the secrecy addiction to which governments fall. . ."[13]

The tendency of government officials to improperly exercise their discretion when assessing access to information requests has also been noted by the Canadian judiciary. In *Canadian Council of Christian Charities v. Canada*, Justice Evans of the Federal Court of Appeal noted that heads of government departments are pre-disposed to prefer non-disclosure of government documents, stating "Heads of government institutions are apt to equate the public interest with the reasons for not disclosing information, and thus to interpret and apply the *Act* in a manner that gives maximum protection from disclosure for information in their possession."[14] Justice Evan's comment was quoted, with approval, by Justice Blanchard of the Federal Court in *Information Commissioner v. Minister of the Environment*.[15] In that case, Justice Blanchard found that the Privy Council Office had changed the format in which information was provided to Cabinet in a manner that limited access to information that would otherwise be subject to disclosure. He noted that "Such a change to the Cabinet paper system could be viewed as an attempt to circumvent the will of Parliament."[16]

More recently, in April 2010, then Interim Information Commissioner Suzanne Legault released a report that raised the alarm that administrative

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9 Information Commissioner of Canada, *Annual Report 2003–2004* (Ottawa: Minister of Public Works and Government Services Canada, 2004).
10 Ibid., 5.
11 Ibid.
12 Ibid., 6.
13 Ibid., 3.
14 [1994] 4 FC 245 at 255. See also 3430901 Canada Inc v. Canada (Minister of Industry), 2001 FCA 254, [2002] 1 FC 421 at para. 30; Canada (Information Commissioner) v. Canada (Commissioner of the RCMP) 2003 SCC 8, [2003] 1 SCR 66 at para. 17.
15 [2001] 3 FC 514 (TD).
16 Ibid. at para 45.

delays in processing access requests are paralysing the system.[17] The report identified "... increasing misuse of time extensions as well as the number and duration of inter-institutional consultations as the most common causes of delay."[18] According to Interim Commissioner Legault the delays are a serious threat to the right to access. In her words, "The right is at risk of being totally obliterated because delays threaten to render the entire access regime irrelevant in our current information economy."[19] The Interim Commissioner highlighted the importance of strong leadership in ensuring the effectiveness of access regimes.[20] Sadly, such leadership has often been lacking.

The above-noted reports and judicial decisions describe a disturbing disconnect between principle and practice, between the ideal of open and accountable governance and the reality of resistance and manipulation of access mechanisms. It is, to say the least, a disturbing picture of access against the odds, one that should make skeptics of citizens as well as Information Commissioners and judges.

Legislative Degeneration

The second barrier to access is the federal Act itself. More specifically, the barriers are raised by the failure to modernize the Act. Although there have been a number of amendments to the Access Act, there have been no major changes to the Act since it came into force. As such, the basic framework of the Act remains the same as in 1983. The failure to enact any meaningful reform of the Act in the quarter century since its enactment means that a number of the weaknesses of the original Act have been allowed to fester, degrading the effectiveness of the Act over time. Although many weaknesses have been identified, I will focus on just one of these weaknesses in this paper: the lack of meaningful enforcement mechanisms in the Act.[21]

The resistance of government officials to access requests is facilitated by the failure of the Access Act to provide the Information Commissioner of Canada with adequate powers to enforce the terms of the Act. Government departments that are required by the Act to respond to access requests within 30 days can give themselves "reasonable" extensions without the permission of the Information Commissioner.[22] More importantly, there are no

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17 Ms Legault has since been appointed as Information Commissioner.

18 Information Commissioner of Canada, *Out of Time: Systemic Issues Affecting Access to Information in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2010), http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_ficren_2008-2009.aspx, 3.

19 Ibid., 2.

20 Ibid.

21 Other weaknesses that have been identified by Information Commissioners, parliamentary committees and scholars include the exclusion of cabinet confidences from the ambit of the Act, the passive, complaints-driven orientation of the Act, and the lack of a public-interest override to exemptions within the Act.

22 *Access Act*, s. 9.

meaningful penalties in the Act for unreasonable delay. Similarly, in those cases where the Information Commissioner conducts an investigation and determines that information has been improperly withheld, the Commissioner may only recommend, not require, disclosure of the information.[23] Information claimants can ultimately apply to the Federal Court to review a decision not to disclose information, but the delay between the initial request for access and the final court decision can last years, often rendering the access meaningless. In too many cases, where the information relates to important issues of government policy or government malfeasance, access delayed is equivalent to access denied.

Admittedly, there are no guarantees that providing the Information Commissioner with order-making powers will decrease the number of refusals to provide access to government information. Indeed, this is an issue that would benefit from additional attention by academics. However, there can be little doubt that the absence of meaningful remedies for administrative delay within the Act remains a serious impediment to timely access.

Political Indifference

The third factor contributing to the decline of the federal access regime is political indifference. This indifference is the most damaging factor as it allows the first two factors to continue to fester. The indifference can be illustrated through a brief review of reform proposals in the past five years. In 2005, then Information Commissioner Reid tabled his office's draft Open Government Act with the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI).[24] The draft Act, prepared at the request of the ETHI Committee, set forth a new approach to access issues, emphasizing proactive disclosure and open government principles. The draft Open Government Act was endorsed in large measure by the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Commission). In particular, the second report of the Gomery Commission, entitled *Restoring Accountability*, endorsed the Information Commissioner's call for a reorientation of the existing federal access regime that would require disclosure of information unless the government could identify an injury to an important competing interest.[25]

On the heels of the Gomery Commission's report, a new Conservative government was elected after promising to implement many of the reforms

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[23] Ibid., s. 37.

[24] Information Commissioner of Canada, *Proposed Changes to the Access to Information Act: Presentation to the Committee on Access to Information, Privacy And Ethics* (Ottawa: Information Commissioner of Canada, 2005), http://www.oic-ci.gc.ca/eng/pa-ap_acc-atia-ref.aspx.

[25] Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability* (Ottawa: Minister of Public Works and Government Services, 2006), 183ff.

to the Access Act that had been suggested by both the Gomery Commission and the Information Commissioner.[26] However, instead of implementing those reforms as promised, the new Conservative government introduced a series of amendments to the Access Act that ultimately abandoned most of the changes endorsed by the Gomery Commission and the Information Commission.[27]

The Conservative government also issued a discussion paper on possible amendments to the Access Act that was roundly criticized as regressive by Commissioner Reid.[28] Like the amendments it enacted to the Access Act, the government's discussion paper effectively abandoned many of the reforms the Conservative Party promised to enact in its electoral platform. The course of action of the new government led Information Commissioner Reid to state the following:

> The clear lesson of my almost eight years of service as Canada's Information Commissioner, is that—by-and-large—public officials just don't get it! They don't get the basic notion that, in passing the Access to Information Act in 1983, Parliament wanted a shift of power away from ministers and bureaucrats to citizens. Parliament wanted members of the public to have the positive legal right to get the facts, not the "spin"; to get the source records, not the managed

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[26] Conservative Party of Canada, *Stand Up for Canada: Conservative Party of Canada Federal Election Platform 2006*, http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf. The platform stated:

A Conservative government will:

- Implement the Information Commissioner's recommendations for reform of the Access to Information Act.
- Give the Information Commissioner the power to order the release of information.
- Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations, and organizations that spend taxpayers' money or perform public functions.
- Subject the exclusion of Cabinet confidences to review by the Information Commissioner.
- Oblige public officials to create the records necessary to document their actions and decisions.
- Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.
- Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules
- Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.

[27] See *Accountability Act*, SC 2006, c. 9, ss. 141–72. For a critique of these reforms see Information Commissioner of Canada, "Remarks to the University of Alberta's 2006 Access and Privacy Conference's Appreciation Dinner—'The Future of Accountability'—the Federal Government's Accountability Act and Discussion Paper and the Open Government Act" (June 14, 2006), online from the Information Commissioner of Canada, http://www.oic-ci.gc.ca/eng/media_room-speeches-2006-junexx.aspx.

[28] Canada, Department of Justice, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act* (April 11, 2006), http://www.justice.gc.ca/eng/dept-min/pub/atia-lai/index.html.

> message; to get whatever records they wanted, not just what public officials felt they should know.
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> Still, after almost 23 years of living with the Access to Information Act, the name of the game, all too often, is how to resist transparency and engage in damage control by ignoring response deadlines, blacking-out the embarrassing bits, conducting business orally, excluding records and institutions from the coverage of the Access to Information Act and keeping the system's watchdog overworked and under funded. The clear lesson of these past years is that governments, even very new governments, continue to distrust and resist the Access to Information Act and the oversight of the Information Commissioner.[29]

In 2009, the new Information Commissioner Robert Marleau tabled a report with the ETHI Committee entitled *Strengthening the Access to Information Act to Meet Today's Imperatives*.[30] In his report, Commissioner Marleau listed twelve urgent recommendations that should be implemented to fix the Access Act. These twelve recommendations were offered in light of the failure to implement the more radical overhaul of the Act proposed through Commissioner Reid's draft Open Government Act. The vast majority of the recommendations made by Commissioner Marleau were endorsed by the ETHI Committee in its report, *The Access to Information Act: First Steps Towards Renewal* issued in June 2009.[31] The response of the Conservative government to the ETHI Committee's report and endorsement came in the form of a brief letter from the Minister of Justice, which indicated a continued reluctance to engage legislative change and emphasized the need to explore administrative options, noting "legislative amendments must be examined in the context of administrative alternatives."[32]

As noted above, Interim Information Commissioner Suzanne Legault tabled her own special report before the ETHI Committee in April 2010. Heeding the advice provided by the Minister of Justice in 2009, Interim Commissioner Legault's report focused on administrative fixes for the *Act* and, in particular, focused on ways to address the administrative delays that were undermining the effectiveness of the Act. Commissioner Legault advanced five recommendations that Treasury Board could implement in order to improve the administration of the Act, including adopting best practices for delegating powers for managing access requests, assessing the

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29 Information Commissioner of Canada, "The Future of Accountability."

30 Information Commissioner of Canada, *Strengthening the Access to Information Act to Meet Today's Imperatives* (March 4, 2009), http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx.

31 House of Commons Standing Committee on Access to Information, Privacy and Ethics (Paul Szabo, chair), *The "Access to Information Act": First Steps Towards Renewal*, 40th Parl., 2nd Sess., 11th report (June 18, 2009), http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E%20&Mode=1&Parl=40&Ses=2.

32 Government Response to Eleventh Report of the Standing Committee on Access to Information, Privacy and Ethics entitled *The Access to Information Act: First Steps Towards Renewal*, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4139070&Language=E&Mode=1&Parl=40&Ses=2.

magnitude of consultations between federal institutions concerning access requests and developing and implementing an integrated human resources action plan to address the shortage of access to information staff. It remains to be seen whether the government will implement the changes recommended in the *Out of Time* report.

This five-year history demonstrates a trend of ever more modest proposals presented in ever smaller packages by successive Information Commissioners (from an entirely new Act, to twelve recommendations for urgent legislative reforms, to five recommendations to address administrative problems). Of course, the Commissioners themselves are engaging in the politics of the possible. However, at some point, the politics of the possible must be recognized as the theatre of the absurd. In short, this key component of democracy in Canada is being hindered by a twentieth-century legislative framework that is, all too often, being applied with a nineteenth-century approach to governance. Perhaps of greater concern is the fact that the current approach is failing to respond to the rapid evolution of information technology that is driving change in the twenty-first century.

Concluding Thoughts: Academics Protecting and Promoting Access to Information

Access to government information is of key importance for academics in a multitude of disciplines who adopt a range of methods and objects of inquiry. In addition to promoting the democratic participation and accountability that act as core values of the liberal democratic polity, access to information rights provide access to data that can be used to critically interrogate the legitimacy of the system itself. For this reason, threats to access should be feared by both liberal and critical scholars, as well as by citizens. Academics must continue to engage as active defenders of this key tool for social inquiry. This is equally true of scholars who wish to reinforce the "civic architecture" as of those who wish to deconstruct it. The engagement can take three forms. The first is to continue, in the tradition of early academic champions like Donald Rowat, to argue for better access to government information through academic research and public advocacy. The second form of engagement is to continue as active users of the existing access regime in order to reinforce the importance of access to government information for both scholarly research and policy analysis. Finally, academics must actively foster the development of a new generation of access users by teaching their students how to use access to information regimes to obtain information that allows for more effective study and critique of our democratic system.

To date, the use of access to information requests has been a skill developed by individuals in practice, but largely ignored in undergraduate and graduate research courses in the social sciences and even in journalism programs. The work of the other authors in this special edition demonstrates that a new generation of scholars is ready to consider more seriously the role of access to government information as a research methodology.

Ultimately, academics have a critical role to play both in fostering and implementing access to information as a research methodology and in ensuring that this methodology can be applied within a robust and sustainable legislative framework.

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