ARTICLES

SPIN CONTROL AND FREEDOM OF INFORMATION: LESSONS FOR THE UNITED KINGDOM FROM CANADA

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The United Kingdom's new Freedom of Information Act (FOIA) is intended to empower citizens by granting a right to government documents. However, the law will be implemented by a government that has developed highly centralized structures for controlling the communications activity of its departments. How will the revolutionary potential of the FOIA be squared with government's concern for 'message discipline'? Experience in implementing Canada's Access to Information Act may provide an answer. The Canadian law was intended to constrain executive authority, but officials developed internal routines and technologies to minimize its disruptive potential. These practices restrict the right to information for certain types of stakeholders, such as journalists or representatives of political parties. The conflict between public expectations of transparency and elite concerns about governability may not be adequately accounted for during implementation of the UK Freedom of Information Act.

A CONTRADICTION IN REFORM?

The United Kingdom is entering an extraordinary period in administrative reform. It is a system of government in which, for many years, emphasis has been placed on the need for tight central control of media relations and other communications with the public. However, the Blair government has also committed itself to a new Freedom of Information Act (FOIA) which promises to create a broadly distributed power to gain access to government records. If journalists, legislators, and lobbyists exploit the potential of the new law, the capacity of government to maintain 'message discipline' and

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control of the policy agenda will be seriously undermined. In practice, how will these two contrary pressures – one for centralization of control over communications, the other for liberalization of access to documents – be reconciled?

The long-term trend toward centralization of control over communications functions within the United Kingdom's central government seems undeniable. As Bob Phillis has observed (Evidence to the House of Commons Public Administration Committee, 22 January 2004), authority for communications functions has been further concentrated within the Prime Minister's Office under the Blair government, with the task of news management 'tightly controlled' by the Prime Minister's press secretary 'and the machinery that he put in place'. The number of special advisors whose principal function is to handle contacts with the media has also grown substantially under New Labour (Committee on Standards in Public Life 2003, para 4.20). Communications specialists throughout government have been encouraged to take a more active role in policy-making, so that 'media handling [is] built into the decision-making process at the earliest stage' (Timmins 1997). Pressure on communications staff to 'raise their game' has led to widespread complaints about the politicization of career media officers (Committee on Standards in Public Life 2003, para 8.3; Government Communications Review Group 2004).

'New Labour', said Margaret Scammell at the end of its first term of government, 'has raised the business of political communications to a new plane' (Scammell 2001, p. 509). This may be so; nevertheless, it would be an error to assume that the preoccupation with 'spin control' would abate under any other party. The Thatcher and Major governments also attempted to build up their capacity to coordinate communications activities. James Barber as well as Bernard Ingham have charted the steady intensification of such efforts throughout the post-war period (Barber 1991, p. 33; Ingham 2003).

The reasons for this continued drive toward centralization are complex. The Committee on Standards in Public Life suggested in 2003 that governments are responding to 'a dramatic change in media pressure', caused by a proliferation of media outlets, an erosion of media deference, and the advent of a twenty-four hour news cycle. Governments, it suggested, now live in a state of 'permanent campaign' (Committee on Standards in Public Life 2003, para 4.18). The encroachment of 'spin-culture' can be seen outside of government as well, as other institutions of British life sharpen their capacity to hone the messages which they project to the public (Manning 1998; Miller and Dinan 2000; Pitcher 2003). Even the Phillis Committee, while repudiating 'misleading spin' of government policies, argued, in its January 2004 report, for further concentration of communications responsibilities at the centre of government (Government Communications Review Group 2004).

The capacity to maintain message discipline depends as much on the ability to determine what is *not* said by government officials, as it does on

the ability to coordinate what is said. In other words, it depends largely on the capacity to preserve secrecy. This point has been illustrated by the Hutton Inquiry, which exposed the Blair government's attempt to deal with the discordant messages about Iraqi military capabilities that were conveyed to journalists by a government official, David Kelly (Hutton 2004). (Lord Hutton affirmed the government's complaint about the violation of secrecy in this case, observing that Kelly was 'acting in breach of the Civil Service code of procedure' when he had an unauthorized meeting with the journalist Andrew Gilligan (Hutton 2004, p. 321).)

Here is the paradox: the Blair government has also introduced legislation which could in fact seriously compromise government's ability to preserve secrecy. The United Kingdom's Freedom of Information Act (FOIA), which gives citizens a right of access to documents held by public authorities, was adopted in 2000 and will go into effect in 2005. The Blair government has promoted the law as a key element in a program of reform intended to revolutionize British politics. In 1997, Prime Minister Tony Blair said that the FOIA would break down the 'traditional culture of secrecy' within the UK government and produce a 'fundamental and vital change in the relationship between government and governed' (United Kingdom 1997, Preface). In 1999, Home Secretary Jack Straw lauded the FOIA as a landmark in constitutional history that would 'transform the default setting' of secrecy in government (Straw 1999).

These expressions of commitment to openness have been accompanied by an enthusiasm for a decentralized approach to the administration of the FOIA within central government departments. In some countries, responsibility for dealing with FOI requests is given to a central office located high in the departmental hierarchy. The implementation plan for the UK law is quite distinct, as a 2002 government report explained:

> For the majority of departments procedures for handling freedom of information requests are still to be determined, although there are a variety of proposed approaches reflecting the different needs and size of departments. Some departments . . . will initially at least have some central co-ordination of requests for information in order to assess the level and type of demand. Other departments, notably the Ministry of Defence and the Home Office are planning for requests for information to be dealt with at a local level by the relevant policy official because of the wide range of departmental responsibilities. (Lord Chancellor's Department 2002, p. 19)

In short, some major departments plan a decentralized approach to FOIA administration, while others see centralized administration only as a transitional stage to accommodate uncertainties in the early stage of implementation.

The dangers inherent in this approach may not yet be fully appreciated by the Blair government. Evidence suggests that the new FOIA will be used

extensively by journalists, legislators and advocacy groups who seek information for the purpose of scrutinizing or embarrassing the government, or shaping its policy agenda. The proportion of requests under the existing administrative code on access to government information coming from these sources increased fivefold between 1998 and 2002, and accounted for about 40 per cent of all requests in 2002, according to annual reports published by the Department of Constitutional Affairs. The government presently anticipates that authority regarding the disclosure of this politically sensitive information will be devolved to the 'local levels' of its departments. This approach is radically at odds with the overall trend toward centralization of responsibility for governmental communications; is it tenable?

Canadian experience may show how the British government will deal with this tension. The structure of Canada's federal government is in many ways comparable to that of the United Kingdom. Authority is highly concentrated, often producing complaints about executive power that would be familiar to British observers. Canada also undertook an experiment with FOI legislation after the adoption of its Access to Information Act (ATIA), which marked its twentieth anniversary in 2003.

The lessons from Canada are sobering. The promise of increased openness has been undercut by the development of administrative routines designed to centralize control and minimize the disruptive potential of the FOI law. Special procedures for handling politically sensitive requests are commonplace in major departments. Information technology has been adapted to ensure that ministers and central agencies are informed about difficult requests within days of their arrival. Communications officers can be closely involved in the processing of these requests, developing 'media lines' and other 'communications products' to minimize the political fallout of disclosure.

These practices are largely hidden from public view. Nevertheless, they play an important role in shaping the substance of the right to information in Canada. As statistical analyses in this paper will show, requirements for the approval of 'disclosure packages' by ministerial offices or central agency staff often produce unjustified delays in the release of documents. These procedures also enhance the capacity of government officials to anticipate and minimize the damage that may be done by disclosure of information.

Canada's experience with its ATIA is not unique. There is evidence that other Commonwealth governments have adopted similar practices for managing politically sensitive requests. Indeed, this may be a common phenomenon, arising because of governments' need to reconcile growing demands for transparency with their own concern about the decline of governability. And so it seems likely that ministers and bureaucrats in the UK government may find similar ways of containing the disruptive potential of the new FOIA. This has two implications. First, it causes us to question the viability of current plans for a decentralized approach to FOIA administration. Second, it reminds non-governmental organizations of the importance of

monitoring the development of internal practices which, although difficult to observe, may have profound effects on the right to information.

AMBER LIGHTS AND RED FILES

Serious debate about the adoption of an FOI law in Canada began in October 1974, and eventually led to the adoption of a law – the Access to Information Act (ATIA) – in 1982. The law came into force in 1983. The rhetoric that accompanied the new law would be familiar to contemporary British observers. The ATIA, said the Trudeau government in 1977, would promote 'effective participation of citizens and organizations in the taking of public decisions', and provide 'an element of monitoring [of government] which will help to maintain the probity of administration, the consistency of handling of individual cases, and the quality of the analysis of policies and programs' (J. Roberts 2001).

The timing of the debate that led to the ATIA is significant. In August 1974, President Richard Nixon resigned and in October 1974 the US Congress, responding to the secretiveness of the Nixon administration, passed amendments that substantially strengthened the US FOIA. President Gerald Ford then vetoed the proposed amendments, arguing that they would erode presidential powers. Congress overrode the veto in November 1974. The enthusiasm for a strengthened US FOI law was part of a backlash against executive authority which typified American politics for the remainder of the decade.

Support for a Canadian FOI law was also driven by concern about the undue concentration of executive power. In 1969, the political scientist Denis Smith lamented that Canadian government had been transformed into a 'thinly-disguised Presidential system', without the benefit of a strong legislature to balance presidential power (Smith 1977). A combination of circumstances – declining economic performance, constitutional instability, fiscal indiscipline and apparent abuses of power by the national police force – contributed to disillusionment with central government in Canada in the 1970s. The ATIA was one of several measures that were intended to constrain the executive and diffuse political influence more broadly. The sentiment which buoyed public support for the ATIA was articulated by Joe Clark, leader of the opposition Conservatives, in 1978:

> What we are talking about is power – political power. We are talking about the reality that real power is limited to those who have facts. In a democracy that power and that information should be shared broadly. In Canada today they are not, and to that degree we are no longer a democracy in any sensible sense of that word. There is excessive power concentrated in the hands of those who hide public information from the people and Parliament of Canada. (Osler 1999)

However, Canada's policy elites did not share Clark's keenness to diffuse executive power. In the 1980s and 1990s, policy-makers worried instead

about challenges to national stability which seemed to be posed by secessionist pressures in Quebec, inter-regional conflict, economic liberalization, and growing indebtedness. Conservative and Liberal governments responded to these challenges by concentrating more authority at the heart of government, and developing a more sophisticated central capacity to poll public opinion and craft communications programs that advanced its agenda (Savoie 1999; Simpson 2001).

To ministers, the ATIA seemed at worst to pose a basic threat to order. In a 1993 court case involving an ATIA request for polling data on constitutional questions, the federal government argued that disclosure could undermine 'the very existence of the country' (*Canada (Information Commissioner) v. Canada (Prime Minister*) [1993] 1 F.C. 427. It seemed at best to serve only as a pointless irritant. 'In the vast majority of instances', said a senior Conservative minister after leaving government, 'embarrassment and titillation are the only objects of access-to-information requests' (Crosbie 1997). The disruptive effect of the ATIA was magnified as journalists, opposition politicians, and non-governmental organizations honed their ability to exploit the opportunities created by the Act. An ATIA officer in a major department observed in an internal memorandum in 2002, released in response to an ATIA request, that

> The requests are more probing than they used to be. There are many more of them and their requests frequently involve far more, and more sensitive, records. The result is that ATI is much more complex than it was 10 years ago – more challenging for us and more threatening for government-side politicians.

Throughout the 1990s, federal officials pursued three strategies designed to reduce the impact of the ATIA. The first was litigation aimed at confirming a restrictive interpretation of key provisions of the law. The second strategy consisted of repeated acts of omission: the consistent failure to include a series of new federal organizations under the ambit of the law (A. Roberts 2001). The third strategy, less easily observed, was the refinement of internal administrative routines designed to ensure special treatment for politically sensitive ATIA requests.

In 2003, Canadians were provided with a rare opportunity to learn more about these informal routines. A year earlier, the ATIA office within the federal Department of Citizenship and Immigration (known as Citizenship and Immigration Canada, or CIC) had undertaken a review of its procedures for handling politically sensitive requests. CIC receives more ATIA requests than any other department or agency in the Canadian government. Its review was prolonged, and involved close consultations with other major federal departments. The internal documents produced during this review became publicly available following an ATIA request by Ann Rees, a journalist who later revealed details about the handling of politically sensitive requests in reports for the *Toronto Star* newspaper (Rees 2003). The documents

obtained by Rees provide a detailed view of the mechanisms used to manage politically sensitive requests within several federal departments. (The following discussion is based on these documents.)

The procedure for handling politically sensitive requests is known within CIC as the 'amber light process'. The name is telling: as it is to drivers, an amber light is a warning to officials to proceed with caution in their handling of an ATIA request. The aim of the process, according to a senior member of the CIC communications staff, is to 'achieve the objective of proactive issues management' on ATIA requests.

CIC's amber light process begins at the moment an ATIA request is received by the department. A 'risk assessment officer' reviews incoming requests to identify those which are potentially sensitive. In practice, there is a presumption of sensitivity for requests submitted by journalists or representatives of political parties, including the offices of Members of the Opposition. Standard procedure requires that notice about media or partisan requests should be sent to the Minister's Office and the department's communications office within one day. In addition, the ATIA office produces a weekly inventory of new and potentially sensitive requests for review by the Minister's Office and communications staff.

The Minister's Office may then choose to tag an ATIA request for special attention. For a request to be tagged – or 'amber lighted' in departmental jargon – 'there must be potential for the issue/incident to be used in a public setting to attack the Minister or the Department'. In 2002, about 20 per cent of requests identified as potentially sensitive by the ATIA office were also amber lighted by the Minister's Office.

The office that holds the records that relate to the request – known as the Office of Primary Interest (OPI) – is immediately advised that the request has been amber lighted. ATIA staff work with the OPI to 'identify and assess issues for sensitivity and media product development'. Communications staff will also work with the OPI to develop 'media lines' – a memorandum that outlines key messages that should be emphasized by departmental spokesmen in response to questions raised after the disclosure of information. 'House cards', which provide the Minister with responses to questions that may be raised in Parliament, are also prepared.

The complete 'disclosure package' – including documents which are to be released to the requester, along with the 'communications products' – is sent to the Minister's Office for review. The role of the Minister's Office at this final stage is a sensitive matter for ATIA officers. The formal position is that the purpose of this review is to give the Minister's Office a warning or 'heads up' about the impending release, and not to allow an opportunity to question the ATIA officer's disclosure decisions. In practice, however, the Minister's Office may raise questions about disclosure decisions as well as the communications strategy. After approval by the Minister's Office, the disclosure package is returned to the ATIA office, and then sent to the requester. At the time of disclosure, the ATIA office also sends an email

notice that contains the communications products for the request to senior managers within the department.

Comparable amber light procedures have been adopted within other major departments. According to internal documents, the Department of Foreign Affairs and International Trade (DFAIT) amber lighted between 50 and 70 per cent of its ATIA requests in 2002. In the Department of National Defence (DND), about 40 per cent of ATIA requests were seen by the Minister's Office. DND staff told CIC in March 2002 that amber lighting decisions were taken during a weekly meeting of officials from the Minister's Office, the Public Affairs office, and Communications office: 'If anyone has interest [in a request], then the file is flagged for viewing by the Minister's office'.

The Treasury Board Secretariat (TBS), the central agency responsible for policy on the administration of ATIA within federal departments and agencies, follows a similar routine. (In the TBS, sensitive requests are tagged simply as 'interesting'.) The same is true of the Department of Justice (DOJ), which provides advice to other departments on the interpretation of the ATIA. According to an internal manual, DOJ's ATIA office sends a weekly inventory of new requests to the Minister's Office, the Deputy Minister's Office, the Parliamentary Affairs Unit and the Communications Branch. In other internal documents, the Justice Department reported that 166 cases completed in 2002 were tagged as 'sensitive'. Of these requests, 81 were submitted by political parties and 33 by the media. This represents a substantial majority of all requests received from parties and the media.

At the very centre of government, politically sensitive ATIA requests are known as 'Red Files'. According to the procedures manual for the ATIA office of the Privy Council Office (PCO),

> Approximately once a week the [Office of the Prime Minister] is provided with a list of newly received requests. If they wish to see the release package of any of the requests they notify the [ATIA] Coordinator who passes on the information to the officer handling the request.

A check of PCO's ATIA caseload in October 2003 showed that 39 requests currently in process had been tagged as Red Files – probably about one-third of all requests in process within PCO at that time. Of these, 17 were identified as requests from the media, and another six as requests from Parliament. Most of these requests asked for material relating to high-profile policy debates; after this, the most common type of Red File request was for information about travel and hospitality expenses of ministers and PCO staff.

Within PCO, lower-level staff may also trigger the process of managing sensitive requests. For every ATIA request, staff within OPIs must complete a 'communications form' to identify the 'communications implications' of disclosure. If a request has communications implications, OPI staff are required to consult PCO communications staff to discuss the preparation of media lines and other communications products. The communications

analyst is entitled to ask the ATIP officer for an opportunity to review the disclosure package before its release.

PCO's communications staff also play an important role in monitoring responses to ATIA requests received by other departments. For example, PCO communications staff insisted on reviewing responses to requests received by CIC – and probably other departments – during the 'grants and contributions' scandal that enveloped the federal government in 2000. (The PCO's role is discussed in an email released by CIC under the ATIA.) Later, PCO's communications staff monitored requests relating to the controversy over CIC's attempt to deport an alleged smuggler, Lai Cheong Sing, to China. An officer in CIC's ATIA office responsible for handling a file relating to the Lai Sing case balked at allowing PCO an opportunity to review CIC's file, but was told that CIC had no discretion to refuse. 'When Privy Council Office says they want to see a release package', a CIC communications officer explained, 'I am not at liberty to do anything but what they ask'. The Head of CIC's ATIA office agreed: 'A request from PCO Comm is essentially a "do it" for CIC.' (The comments were contained in internal CIC emails).

PCO's role in overseeing the ATIA system has sometimes been the subject of controversy. In 2002 a former director of research for the Liberal Party caucus complained that the PCO's "Communications Co-ordination Group" (CCG) had become

> [an] egregious example of bureaucratic politicization. . . . The CCG . . . is made up of the top Liberal functionaries from ministers' personal staff, along with several of the PMO senior staff, and the top communications bureaucrats from the supposedly non-partisan Privy Council Office. . . . While the CCG's mandate is supposedly to 'co-ordinate' the government message, in practice much of the committee's time each week is taken up discussing ways to delay or thwart access-to-information requests. (Murphy 2002)

A senior PCO official later conceded to Rees that the office actively manages the government's response to sensitive requests received throughout government. 'It is our role', the official said, 'to make sure that . . . the department releasing the information is prepared to essentially handle any fallout' (Rees 2003).

CONTROL ENABLED BY TECHNOLOGY

The administrative routines that have been developed to ensure special treatment for politically sensitive requests rely significantly on new information technologies. Within departments, ATIA databases have been adapted to streamline the process of tagging and tracking sensitive requests. A government-wide database has also been developed that allows central agencies to monitor incoming ATIA requests on an almost real-time basis.

Within federal departments, software initially acquired to aid in the management of ATIA caseloads has been adapted to facilitate the handling of politically sensitive requests. Today, most major federal departments use the same program – ATIPflow – to manage the flow of ATIA requests. ATIPflow was developed by a Ottawa-based contractor, PRIVASOFT, and widely adopted within the federal government in the 1990s. The use of case management software such as ATIPflow is not inherently problematic: on the contrary, it helps ATIA offices to track progress in processing requests, and collects statistics required for annual public reports on the operation of the law.

However, many departments have altered their ATIPflow software to support the task of communications management. For example, several departments have broadened the range of categories that are used to describe requesters, typically by adding the categories 'Political Party' or 'Member of Parliament'. These categories are not required for the production of public reports on the operation of the ATIA. However, they serve an important purpose within departments, by making it easier to search the ATIPflow database to generate a list of potentially sensitive requests. Such categories are particularly important because ATIA offices are generally barred from disclosing the identity of a requester to other parts of the department. However, there are no prohibitions on the disclosure of the requester category.

ATIPflow software has also been adapted so that ATIA offices can identify whether a request has been tagged as a sensitive file (Roberts 2002). Again, this feature allows the ATIA office to exploit the search features of ATIPflow so that the process of compiling a inventory of sensitive requests is largely automated. Without ATIPflow – and these changes to the software – the process of managing the inventory of sensitive requests would be more complicated.

The task of monitoring sensitive requests is also simplified by a separate and government-wide database, known as the Coordination of Access to Information Request System (CAIRS). CAIRS is maintained by the Government Telecommunications and Informatics Services (GTIS), an agency within the Department of Public Works and Government Services. According to a TBS directive, all ATIA requests received by federal institutions must be entered into CAIRS within one day of receipt (Treasury Board Secretariat 2001). (ATIPflow software has been adapted to accommodate this requirement by allowing a daily upload of information about new requests into CAIRS.) ATIA offices in all federal departments and agencies are able to search the CAIRS database by several criteria, such as keywords in the substance of the request, or the category of requester.

The development of CAIRS was approved by Cabinet in 1988 and became operational in 1990. The system was substantially upgraded in 2001. The government says that CAIRS is designed 'to enable the government to monitor the progress of Access to Information (ATI) requests made, facilitate the

coordination of responding to requests with common themes, and to facilitate communication and consultation with central agencies and institutions' (Government Telecommunications and Informatics Services 1999, p. 1). At the same time, CAIRS has been criticized as a tool for 'computer surveillance' of the entire federal ATIA system (Howard 1992).

The upgraded version of CAIRS is accessed by federal departments through a secure website. The access log for the CAIRS website was obtained through an ATIA request and analysed to determine which federal agencies rely most heavily on the database's oversight capabilities. An analysis of access log data from December 2002 to September 2003 is provided in table 1. On the left side of table 1 is a breakdown of the frequency with which computers associated with various federal institutions executed searches on the CAIRS website. To execute a search, individuals must send information about search criteria to the CAIRS server from the main search page of the website. Searches were executed 10 204 times in the period under study. The access log maintains a record of the Internet Protocol (IP) address associated with the computer sending the data, and institutional affiliations for specific IP addresses can be identified. Table 1 suggests that at least 56 per cent of searches on CAIRS were executed by two central agencies – TBS and PCO. (For technical reasons IP addresses for TBS and the Department of Finance cannot be distinguished. However, it is reasonable to assume that the preponderance of these searches are initiated by TBS.)

It is also possible to analyse the access log to determine which institutions appear to conduct broad searches of the CAIRS database. Every execution of the CAIRS search feature results in a response in which the results of a search are returned to the user. The access log records how much data is conveyed to the user in each response. It is presumed that the amount of data conveyed in these responses is correlated with the number of requests that were responsive to the user's search criteria. This part of the analysis begins with transactions with the CAIRS server that involved the transmission of data from the server to the main search page. However, it only

TABLE 1 *Use of the search function on the CAIRS database*

Searches executed (N=10204)	**%**	**Broad searches (n=1675)**	**%**
Treasury Board Canada/Finance Canada	41	Treasury Board Canada/Finance Canada	49
Privy Council Office	15	Privy Council Office	26
Indian and Northern Affairs	6	Public Works and Government Services	7
Public Works and Government Services	4	Indian and Northern Affairs	6
Foreign Affairs and International Trade	3	Foreign Affairs and International Trade	2
Justice	3	Canadian Heritage	1
Canada Customs and Revenue Agency	2	Environment	1
Environment	2	Industry	1

Note: Departments and agencies are listed by declining levels of activity. Several institutions that had lower levels of activity are not included.
Key: CAIRS=Coordination of Access to Information Request System.

examines the top 20 per cent of these transactions, in terms of volume of data transmitted. The right side of table 1 provides a summary of the institutions most frequently associated with these large searches. IP addresses associated with the two central agencies again appear to account for the preponderance of broad searches on the CAIRS database.

Generally, the results in table 1 substantiate the view that the main purpose of CAIRS is to improve central agencies' oversight of the entire ATIA system. Certainly CAIRS was used for this purpose in the months following the terror attacks of September 11, 2001. In following weeks, the Security and Intelligence Secretariat of PCO told other departments that it should be consulted about requests for information 'pertaining to post-September 11, security measures, security policy and operations, security planning, and ongoing efforts to combat terrorism'. The Secretariat said in an internal memorandum that it would also 'regularly review the CAIR report' and ask to be consulted on files on its own initiative. The PCO later said that it undertook 184 'security-related access consultations' between 11 September 2001 and 31 March 2003. Security concerns may have been mixed with an interest in communications management. Perhaps three-quarters of the 'security-related' requests reviewed by PCO were submitted by journalists, Members of Parliament, or representatives of political parties.

GAUGING THE EFFECT ON STATUTORY RIGHTS

The fact that major departments have developed special procedures for isolating politically sensitive requests may say something about the Canadian government's attitude toward the ATIA, but it does not necessarily follow that departments have compromised rights established under the law. To determine whether these procedures actually undermine access rights, further investigation is required. Analysis of data relating to the processing of ATIA requests within major departments suggests that these procedures do result in unjustifiable delays in the disclosure of information. It is more difficult to determine whether these procedures also result in indefensibly restrictive decisions about disclosure of information.

Delay in processing requests

Delay in processing ATIA requests can be very important, particularly for journalists, Members of Parliament or other party representatives. The news cycle has its own rhythm: an issue will not remain in the foreground indefinitely, and will soon be displaced by other topics. Delay can have the effect of substantially reducing the value of released information. At a certain point, the right to information can be substantially subverted by delay.

The stated policy of the government is that efforts at communications management should not delay responses to ATIA requests. The PCO says explicitly in its internal manual that its Red File procedure 'does not hold up the processing' of an ATIA request. Similarly, TBS says that efforts at interdepartmental consultation should 'under no circumstances . . . be used to

delay or obstruct a request beyond the time limits set out in the Access to Information Act' (TBS 'Policy for the Coordination of Access to Information Requests', provided informally to the author in December 2003).

However, there is good reason to question whether these aspirations are achieved in practice. Responding to a 1999 investigation by Canada's Information Commissioner, DFAIT conceded that its 'cumbersome process for preparing communications advice on potentially sensitive issues' had been a significant source of delay in processing requests (Information Commissioner of Canada 1999, p. 19). In June 2000, the Information Commissioner (OIC) also warned DND that the ATIA 'creates no right for a minister or department to delay responses for political considerations including the need to serve the communications needs of the minister' (Information Commissioner of Canada 2000, pp. 63–8). Internal documents relating to CIC's review of its amber light procedure show that ATIA officers were similarly frustrated by bottlenecks and delays in the review process.

An analysis of processing time for requests completed in several departments in 2000–2002 suggests that such concerns are justified. For this analysis (see table 2), this study uses ATIPflow data collected from eight institutions within the Canadian government's 'security and intelligence (S&I) community' relating to the processing of 25 806 requests completed between 1 January 2000 and 31 December 2002. (The 'S&I community' is 'a loose network of agencies and departments with responsibilities in the field of security and intelligence' (PCO 2001; Wark 2001).) Together, institutions included in this study account for roughly half of all ATIA requests received by the federal government. This data was collected by departments and agencies within their ATIPflow databases and obtained by making an ATIA request to each institution.

An ordinary least squares regression was undertaken for each of the nine institutions to test the significance of several variables as determinants of ATIA processing time, measured by the number of days between the date on which a request was received and the date on which the processing of the

TABLE 2 *Institutions included in the analysis*

Acronym	Institution	Cases
CIC	Citizenship and Immigration Canada	17 110
DND	Department of National Defence	2 841
CCR	Canada Customs and Revenue Agency	1 909
DFAIT	Department of Foreign Affairs and International Trade	1 122
TPC	Transport Canada	1 007
PCO	Privy Council Office	817
DOJ	Department of Justice Canada	761
SGC	Department of the Solicitor General	239

Note: SGC (the Department of the Solicitor General) only provided data for requests that were received and completed in the three-year range.

request was completed. These variables fell into three groups, as discussed below.

Complexity of request
Three variables were used to account for the complexity of a request. The variable LARGE was scored as 1 if a request required the review of 50 to 250 pages of material by the ATIA office. The variable VERY LARGE was scored as 1 if more than 250 pages were reviewed. The variable MULTIPLE EXEMPTIONS was scored as 1 if three or more statutory exemptions were applied to released material.

Consultation requirements
Five variables were added to account for consultation requirements. Court rulings state that government departments should consult with other governments before invoking section 13 of the ATIA, which protects information received in confidence from other governments. The ATIA itself obliges institutions to consult with businesses when it is contemplating the release of information that might be protected by section 20, relating to commercial information. Finally, there are *intra*-governmental consultation requirements. TBS policy requires institutions to consult with DFAIT or DND before invoking section 15, the exemption for international affairs and defence; similarly TBS requires institutions to consult with investigative bodies before relying on the law enforcement exemption, section 16 (TBS 1993, Chapter 3.2). Government policy also says that PCO must be consulted before invoking section 69, relating to Cabinet confidences (TBS 1993, Chapter 2.6). Each variable is scored as 1 if the relevant exemption is invoked in a particular case.

Communications management
Two variables – MEDIA and PARTISAN – are added to account for each institution's efforts at communications management. The premise is that requests from these sources are especially likely to be handled through special processes for politically sensitive requests. MEDIA is a category used by all institutions in the study. PARTISAN combines the category POLITICAL PARTY, used by six of the eight institutions, and the category PARLIAMENT, used by two institutions. (One institution – the Solicitor General of Canada – had no special code for partisan requests. It is probably not coincidental that this institution also received the smallest number of requests.)

The results of these regressions are shown in table 3. In general they are not surprising. For requests with no complications – small in size, involving no consultative requirements, not involving the media or partisan interests – the average response time hovers around the basic 30-day deadline. As requests grow in breadth and complexity, processing time lengthens. Consultative requirements can also have a clear effect on processing time. This is clearest with regard to the need to consult with PCO on the use of the cabinet confidences exemption (section 69), and the

TABLE 3 *Determinants of processing time (in days) in eight federal institutions, 2000–02*

	CIC	DND	CCR	FAIT	TPC	PCO	DOJ	SGC
Number of cases	17110	2841	1909	1122	1007	817	761	239
Adj R Sq	0.38	0.32	0.20	0.22	0.38	0.43	0.40	0.69
(Constant)	29	32	36	39	30	33	29	18
Complexity								
Large	31**	10**	12**	20**	27**	54**	17**	19**
Very large	62**	56**	47**	65**	64**	68**	64**	46**
Multiple exemptions	63**	20**	29**	20	14*	21**	31**	3
Consultation requirements								
Section 13	–1	32**	29**	8	17*	–5	4	33**
Section 15	3*	6	24	10	29	38**	–25	19**
Section 16	17**	5	4	–17	3	–4	49**	5
Section 20	82**	27**	42**	10	16**	19**	50**	8
Section 69	260**	70**	97**	75**	74**	38**	55**	53**
Communications management								
Media	48**	1	13**	20**	12**	–7	25**	6
Partisan	34**	18**	0	45**	10*	–8	15**	n/a

Note: Coefficients followed by **are significant at the 5 per cent level of significance. Coefficients followed by* are significant at the 10 per cent level of significance.

need to consult with firms on the use of the commercial confidentiality exemption (section 20).

For present purposes, the most relevant findings are those relating to the impact of communications management. There are significant effects for either media or partisan requests in six departments – most clearly in CIC, DFAIT and DOJ. These results may actually understate the effect of internal procedures, for two reasons. First, the analysis does not include requests that were abandoned, perhaps out of frustration with delay. Second, it may be that one effect of these special procedures is to have additional exemptions applied to a file, with an impact on processing time that would be attributed elsewhere in the analysis.

Probability of exceeding deadline

There is another way of assessing the impact of special procedures on processing time. An important question is whether processing time exceeds the statutory deadline for response to a request. Under Canadian law, a delay past the statutory deadline is known as a deemed refusal. The federal Information Commissioner uses the 'deemed refusal rate' – the proportion of an institution's caseload that exceeds the statutory deadline – as a key measure of compliance. A deemed refusal rate exceeding 20 per cent is regarded as a matter of serious concern – a 'red alert', in the Commissioner's parlance (Information Commissioner of Canada 2003, p. 58).

In fact, the deemed refusal rate for requests included in this study that were submitted by any type of requester other than the media or partisans

was 17.4 per cent – under the Commissioner's threshold. By contrast, the rate was more than twice as high for media requests (36.3 per cent); and even higher for partisan requests (39.7 per cent). However, an important question is again whether this disparity is actually attributable to factors such as the complexity of the request or consultation requirements.

The results in table 4 suggest that for most institutions this is not the case. The table indicates which variables proved significant in a binomial logistic regression that predicted the probability of exceeding the statutory deadline in each institution. In six of eight institutions, the probability of a deemed refusal increased significantly for media or partisan requests, even after other considerations such as complexity or consultation requirements were taken into account.

Effect on disclosure decisions

It is more difficult to measure the extent to which amber light procedures influence decisions about the fullness of disclosure. The key issue is not whether a Minister's Office use the final stage of the process – the review of the proposed disclosure package – as an opportunity to push for less fulsome release of information. Rather, the deeper problem is that the whole process is permeated with an awareness that the Minister's Office has a special interest in the file. The OPI – perhaps led by a civil servant four or five levels below the deputy minister – is told within days of a request's arrival that it has been amber lighted by ministerial staff. Over the next five or six months the OPI and the ATIA office may engage repeatedly with communications staff, who may themselves raise questions about the boundaries of disclosure. It would be surprising if ministerial concerns had not been fully anticipated well before the disclosure package went to the Minister's Office for final review.

TABLE 4 *Factors affecting the probability of exceeding the statutory deadline*

	CIC	DND	CCR	FAI	TPC	PCO	JUS	SGC
Large	**	**	**	**	**	**	**	**
Very large	**	**	**	**	**	**	**	–
Multiple exemptions	**	–	**	*	*	**	**	–
Section 13	–	*	*	–	–	–	–	–
Section 15	**	**	*	**	*	**	–	–
Section 16	**	**	–	**	–	–	–	–
Section 20	–	–	**	**	–	–	–	–
Section 69	**	**	–	**	**	**	–	**
Media	**	**	**	–	**	–	*	–
Partisan	**	**	*	**	**	–	**	n/a

Note: Based on a binomial logistic regression for each institution. The dependent variable was a dichotomous variable scored as 1 if the days taken to process a request exceeded days allowed. For ease of interpretation, coefficients are not included in this table. "**" means the variable was significant at the stricter 5 per cent level of significance; "*", at the 10 per cent level of significance.

DAMAGE CONTROL: AN ILLUSTRATION

It is similarly difficult to quantify the extent to which the government's routines enhance its ability to minimize the political fallout from disclosure of information. But there is no doubt that the benefit to government departments is significant. A description of the government's management of one recent ATIA request illustrates how risks associated with transparency are managed – and also how the law may be bent to reduce those risks.

In November 2000, journalist Stewart Bell – a reporter for the *National Post* newspaper specializing in national security issues – filed an ATIA request with CIC. Bell had been reporting on the connections between Tamil immigrant groups in Canada and Tamil terrorist groups in Sri Lanka, and the federal government's role in funding those immigrant groups. His request asked for records relating to the Tamil Eelam Society of Canada (TESC), which had connections to organizations already linked to terrorist groups by federal police and intelligence services. (This description of the handling of Bell's request is based on documents released by CIC and PCO in response to ATIA requests.)

Bell's request undoubtedly had 'communications implications' for the government. For the preceding five months, Finance Minister Paul Martin Jr had been criticized by Opposition Members of Parliament for attending a dinner organized by a group alleged to be a front for Tamil terrorists. Martin responded by denying the group's terrorist links and accusing Opposition MPs of bias against the Tamil community. Martin's defence was complicated when Reform Party MPs obtained emails written by Canadian diplomats expressing reservations about Martin's plan to attend the dinner.

Documents held by CIC (but not yet publicly released) threatened to intensify the controversy. Three years earlier, CIC's deputy minister had written a memorandum to CIC Minister Lucienne Robillard that asked for permission to stop funding for TESC because of internal concerns about its connection to terrorist groups. The Minister refused to terminate the relationship. 'We are to forget everything', a CIC official had explained to colleagues in an internal email, 'It is business as usual' (Bell 2002).

CIC 'amber lighted' Bell's ATIA request. A month later, the department also advised Bell that it intended to extend the statutory deadline for responding to his request by 190 days, to 25 June 2001. The case for an extension was strong: there were several thousand pages of relevant documents and these included many documents that could not be disclosed before consulting with other government departments.

Nevertheless, this delay dealt an advantage to CIC. In Spring 2001, it contracted with the auditing firm KPMG for a 'forensic audit' to determine whether TESC was spending CIC's money properly. The audit was commissioned, internal documents explained, 'because we thought that it was in the best interest of CIC and of the TESC to clear the air about various allegations that they were misusing public funds'. KPMG was instructed to complete its

investigation by 29 June 2001 – that is, on roughly the same deadline as Bell's ATIA request. The investigation revealed no major improprieties.

In fact, CIC was unable to meet the 25 June deadline for responding to Bell's request. As interdepartmental consultations continued, CIC took other steps to avoid allegations of mismanagement. In January 2002, CIC officials met with TESC to resolve minor issues raised in KPMG's final report, which had been delivered the preceding month. A PCO memo suggests that CIC and other federal departments also developed a 'framework . . . [for a] package to stop this type of group funding terrorists'.

CIC was now in a better position to respond to the controversy that might arise following its disclosure of documents to Bell. In early February 2002, media lines were drafted that emphasized the positive findings of the KPMG audit and steps taken to ensure that TESC spent public funds properly. CIC officials were told that Bell would not be given a copy of the KPMG audit and the TESC action plan. His request had been interpreted to exclude documents created after November 2000.

However, CIC still did not respond to Bell's request – notwithstanding complaints from Bell about the delay. CIC's media lines explained that the issues raised by the KPMG audit 'relate to internal operations and aren't related to security concerns'. Nevertheless, the Security and Intelligence Secretariat of PCO told CIC that it wanted to review the Bell file under the special procedure for 'security-related' requests established following the attacks of 11 September 2001. The file was sent back to PCO for review in January 2002.

Because the file had been amber lighted, it also had to be reviewed by the Minister's Office within CIC. The ATIA office of CIC tried to expedite the response to Bell's request by sending the disclosure package to CIC's Minister's Office for review at the same time that the file was returned to PCO. But the Minister's Office deferred, asking to be advised about 'comments from PCO on this file, as well as exemptions recommended by PCO, if any'. Meanwhile, the Security and Intelligence Secretariat of PCO expressed its own concern about the proposed disclosures, and signalled its desire to review the matter with CIC's legal branch. The Secretariat finally agreed to the proposed disclosure on 14 March 2002.

CIC released its documents to Bell the next day – 483 days after the request had been filed, and 263 days past the statutory deadline. Bell's story was published in the *National Post* in May 2002 but received no attention in Parliament or follow-up in the media. In part this was because of delay, which sapped the story of much of its newsworthiness. Since the filing of the request, the Liberal government had won a large majority in a general election; controversy over the Liberal government's connections to the Tamil community had dissipated; and the CIC minister implicated in the 1997 documents had moved to another portfolio.

The newsworthiness of the story was also weakened by CIC's capacity to make a strong and immediate response. CIC had identified the spokesman

responsible for handling Bell's story, and drafted his reply, over a month before it actually disclosed the information to Bell. Bell was required by professional norms to convey CIC's media line – that its 1997 concerns had been resolved by a later audit – in his story. This had the effect of squelching potential controversy. The fact that the audit had been commissioned four years after internal concerns had been voiced, and after the receipt of Bell's ATIA request, was unknown to Bell and unmentioned in the story.

RECONCILING CONTROL AND TRANSPARENCY

The handling of the Bell request was not unusual. It provides an illustration of the way in which Canadian government departments have designed internal routines to minimize the disruptive potential of the ATIA. These internal routines improve departments' capacity to control the timing of disclosure and rebut criticisms that may be made against the government after information is released. These routines provide strong protection for values that are important to players within government – such as control over the policy agenda and consistency in policy – at the cost of damage to values that are important to players outside of government, such as transparency and accountability.

These administrative routines are not easily observed, but play an important role in determining what the 'right to information' actually means in practice. I have argued elsewhere that these internal procedures may be described as constituting a 'hidden law' on access to information, which substantially restricts statutory rights for certain kinds of requesters (Roberts 2002). On the face of it, the law may appear to guarantee equal treatment for all requests – but in actual practice, journalists and partisans are treated differently. In general, their requests take longer to process. Statutory deadlines are more likely to be overrun. Relevant documents will be reviewed more closely. Special efforts will be made to enhance the government's capacity to rebut anticipated criticisms flowing from disclosure.

It is difficult to gauge whether such practices are commonplace in other governments, largely because they are not formalized in law or regulations; in addition, their existence may be actively denied by governments. Nevertheless there is some evidence that the Canadian federal government does not constitute an unusual case. In 2001, Ontario's Information Commissioner complained about informal procedures within provincial government departments that appeared to have an adverse effect on timely response and disclosure rates for politically sensitive requests. Even to the Commissioner, the exact requirements for handling sensitive requests remained unclear; nevertheless, they seemed to raise a 'systemic problem' of non-compliance throughout government (Information and Privacy Commissioner of Ontario 2001, pp. 4–6). Recent analysis has also shown that the British Columbia government has developed a central database that includes sophisticated mechanisms for tagging sensitive requests that could be related to administrative processes which cause undue delays (Roberts 2004).

Similar trends have been seen in Australia. 'As spin-doctors have moved closer towards centre stage in the operations of government', says Rick Snell, 'their impact on FoI has become potentially greater and more negative' (Snell 2002b, p. 194). Snell finds evidence of patterns of non-compliance in the handling of politically sensitive requests, followed by 'the use of a series of tactics to kill, swamp or divert attention away from the newsworthiness of any story or public use of released information' (Snell 2002a, b, p. 193).

Westminster systems, distinguished as they are by a concentration of executive authority, may be particularly likely to develop centralized procedures for handling sensitive requests. However, these procedures might be symptomatic of a more general problem. In many countries, public deference to government has declined precipitously. This has fueled a 'transparency revolution' that has affected all major social institutions, which is manifested in the rapid diffusion of FOI laws (Blanton 2002; Tapscott 2003). At the same time, however, policy elites have become anxious about the erosion of their capacity to govern in an era distinguished by the pace of social, economic and technological change. Concern about governmental competence in a time of 'rapid and profound change in the economic and institutional environment', was expressed in a 1996 meeting of OECD ministers, which concluded:

> Governments need to pursue more active communication policies, to keep control of their agendas and not just react passively to the pressure of events and emergency situations. Resisting excessive pressure from the media to influence the political and policy agenda was noted as both important and difficult. (OECD 1996)

This implies that the contradictions in reform in the United Kingdom – centralization of communication functions, and movement toward increased transparency – may be common to many other countries. The development of informal routines such as those used within the Canadian government may constitute a way of resolving the tension between the demand for transparency and elite anxiety about the decline of governability.

There are two broad implications for the development of freedom of information policy in the United Kingdom. The first relates to the likely viability of the proposed approach to the implementation of the FOIA. In November 2003 the Department of Constitutional Affairs reaffirmed its earlier view that a decentralized approach to FOIA, 'whereby requests are dealt with at the local level', would be common in many departments (Department of Constitutional Affairs 2003, pp. 24–5). This may prove untenable in practice. Perhaps a more realistic approach would be to develop formal and explicit procedures that accommodate the legitimate interests of ministers without compromising compliance with the requirements of the FOIA.

More generally, increased attention must be paid to internal procedures that may have a profound effect on the actual content of the right to information. The tendency in many jurisdictions has been for non-governmental

organizations to pay disproportionate attention to statutory rules which, although easily observed and perhaps noxious in principle, will have only a marginal impact on the operation of law. For example, Canadian advocates of openness vigorously protested statutory amendments barring 'frivolous and vexatious' FOI requests which in practice affect only a small handful of requests (Roberts 1999). At the same time, informal procedures that eroded compliance in a much larger number of cases went unnoticed.

There may be an analogous difficulty with the recommendations contained in the January 2004 report of the Phillis Review of Government Communications. The report proposes several amendments to the FOIA which are expected to improve openness and restore trust in government (Government Communications Review Group 2004, p. 24). The merit of several of these amendments is undeniable. However, there is an element of misplaced emphasis in the report and the debate which it engendered. Great emphasis was given to the proposed elimination of the ministerial veto (Campaign for Freedom of Information 2004) – which, although egregious, is unlikely to be invoked regularly, if the experience of other jurisdictions is a guide. At the same time, the Phillis Review neglects the tension between the FOIA and its own call for a more centralized and better coordinated system of government communication – a tension that will be worked out in the less easily observed recesses of bureaucratic practice.

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