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**HOW TO ACCESS THE BIGGEST DATABASE IN CANADA:  
FIND OUT HOW TO USE THE *ACCESS TO INFORMATION ACT*  
TO ACCESS GOVERNMENT RECORDS VAULTS!**

by

Colonel M<sup>e</sup> Michel W. Drapeau, (ret.)

and

M<sup>e</sup> Marc-Aurèle Racicot

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***Abstract***

What are the origins of access to information legislation? Which purpose does an access to information statute serve? What are the impacts of privacy? What use can a lawyer make from an access to information statute?

In the following concise text, the authors attempt to answer these questions in order to allow practitioners to grasp the importance of the access to information legislation in their everyday practice.

***Résumé***

Quelles sont les origines de la législation en matière d'accès à l'information? Quel est l'objet d'une telle loi? Quelles sont les répercussions sur la vie privée? Quelle est l'utilité de cette législation pour un avocat?

Dans le texte qui suit, les auteurs tentent de répondre à ces questions dans le but de permettre aux praticiens de saisir toute l'importance que peut avoir la législation en matière d'accès à l'information dans la pratique du droit au quotidien.

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M<sup>e</sup> Drapeau and M<sup>e</sup> Racicot are co-authors of *Federal Access to Information and Privacy Legislation Annotated 2004* and *Protection of Privacy in the Canadian Private Sector*, published by Thomson-Carswell. This text represents the opinions of the authors only.

## INTRODUCTION

The American people observe Freedom of Information Day on March 16 - the birth date of President James Madison, the primary author of their Constitution, who once said:

*“Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both.”*

James Madison, 4th U.S. President, August 4, 1822

With those words, James Madison has been credited as the Father of Freedom of Information (FOI). The notion is quite simple: public records belong to the people – not elected officials, and not bureaucrats. They are prepared at public expense for the benefit of the public, and every citizen should have an explicit right of access to public records.

In a nutshell, FOI has four basic functions:

- it gives people an enforceable right of access to documents held by public authorities;
- it gives people the right to ask for a review of decisions made under the *Act*;
- it imposes on government an obligation to provide information in its records about its organizations, functions, policies, rules, procedures and decisions; and
- It enables commercial firms supplying confidential proprietary information to the government to block access, if someone applies for access to that information.

## THE ORIGINS

FOI is not a new concept. And that it was not invented in Washington. Sweden has had an access to information law on its books from as far back as 1776. However, it took nearly two centuries for this Scandinavian concept to cross the Atlantic.

The first modern FOI law was signed into law in the U.S. in 1967. Of note, that law was substantially amended, due largely to Watergate (1972).

Ten years later, after much parliamentary debate and much public pressure, with some reluctance, Canada followed suit.

Enacted in 1982, in the wake of the *Charter of Rights and Freedoms*, at the time our access act was perceived by the political elite, the media, and the public in general as the beginning of a new era; the catalyst for changes in the way that public authorities would approach openness.

Although not specifically covered by the *Charter*, already this new “right of access” was qualified as being “quasi-constitutional,” forming an integral part of the “freedom of expression” concept.

By the beginning of 2004, more than 50 nations around the globe hopped aboard the bandwagon by enacting laws designed to facilitate access to government records. At least 30 more are currently considering FOI laws. Others have even gone as far as modifying their constitution to enshrine this right of access.

## **WHAT DOES A FOI LAW DO?**

The expansion of access across the community of nations is in response to the demands of international institutions, including pressure from the growing cross-national commerce, trade and banking sectors, civil society organizations, and the news media for more “democracy, transparency, integrity, and accountability” on the part of national governments.

For instance, promoting the enactment of effective FOI laws by member states in 1999 and again in 2000, the Commission on Human Rights at the United Nations promulgated 10 principles to be observed by nations in drafting legislation to that effect.

However, while the impetus for the passage of FOI laws is grounded in the promotion of human rights and the betterment of democratic principles, even nations with little interest in those precepts are considering FOI a modern necessity.

- China, for example, is currently studying FOI, primarily due to its interest in being an active player in the world marketplace.
- On the other hand, the World Bank, as well as the International Monetary Fund and the European Union, to name but three, are actively encouraging nations to adopt access laws in order to reduce corruption and to enhance integrity in public life.
- Also, in World Trade Organization disputes, countries sometimes use FOI laws for discovery purposes during WTO disputes. For instance, documents retrieved through our own *Access to Information Act* have played a role in the longstanding dispute between Brazil and Canada over whether or not the “Technology Partnerships Canada” program, and specifically its support of the regional aircraft industry, constituted an export subsidy in violation of WTO rules.

This commonality of purpose among the global community indicates that there is increasing recognition amongst modern states and international institutions of a need for a legal structure or a process to provide both the public and the business community with a degree of certainty as to:

- how one gains access to government records; and

- how certain records, including those affecting commercial, industrial, scientific and technical interests will be protected by the State.

### **“OPEN MEETING” OR “SUNSHINE” LAWS**

Partisan politics aside, the reality is that the development of a “culture of openness” in governments is beneficial to both the public and the government. This is true for any government, be it federal, provincial, or municipal.

Knowing that your actions and decisions run the risk of being exposed – either by your political opponents, the public or the media – focuses the mind of officials and parliamentarians alike and ensures a sustained high degree of frugality, decency, and rationality in the public administration of programs. It is something akin to having a police cruiser parked alongside a busy highway: one can only marvel how law-abiding every driver turns out to be at that precise time and place.

Seriously though, the FOI serves both as a “silent auditor” by guaranteeing accountability, checking corruption, improving many areas of human rights, and as an “open microphone” encouraging participation in government by every sector of society because:

- disclosure of public records serves as a means of enhancing the public’s understanding of the functions and decisions of government;
- it makes available records reflective of these decisions, and
- these documents provide the rationale or the impetus for making such decisions in the first place.

As a side benefit, the more that is disclosed about the decision-making process and about what the government is up to – in contemporary, and not in historical terms – the greater is the trust in government.

Finally, the more the public – the average person, whether rich or poor – can know about how his or her government functions, the more level the playing field, and the greater the likelihood of fairness by the government.

### **CANADA, A G-8 NATION, IS LAGGING BEHIND**

Although we live in a modern, rich, sophisticated, information-driven democratic society, the truth is that often the concept of openness and accountability is taken for granted by the Canadian electorate, and profiting from such nonchalance, our government officials are allergic or resistant to the ubiquitous presence of the FOI regime.

Given our rather passive citizenry and rather tame and domesticated news media, the Canadian access-to-information regime is not relied upon with the same frequency, intensity, or efficiency as that being experienced by our friends south of the border to

relentlessly ferret out information contained in government records and to ensure that governments are held accountable for their mismanagement of the public purse.

Hence, despite the hue and the cry resulting from the occasional disclosure of embarrassing documents under the access to information legislation, and the resulting whiffs of scandals,<sup>1</sup> by and large Canadian institutions are allowed a considerable amount of indulgence and lenience by an absent-minded citizenry. Moreover, despite the fact that Parliament and the courts have clearly said that the purpose of the Canadian freedom of information legislation is the adoption of openness as a concept of governance facilitating increased accountability of the executive to the people, in Canada, official secrecy continues to operate as the governing culture.

Hence, when those of us outside government demand the right to access the same information as those inside it, probing into the government information vaults has been largely a frustrating experience. And one of the primary reasons for this state of affairs is that numerous Crown corporations such as Via Rail and Canada Post – which are at the centre of the sponsorship scandal – do not fall under the access legislation.

### **LOOKING AHEAD**

Following its initial appearance during the last 30 years, the concept of access to information has been made into statutory instruments. However, we are now at a point where people need to make full and effective use of the instruments at hand.

Proactive dissemination (websites, news releases, formal publication, etc.), passive dissemination (libraries and virtual reading rooms), and informal access are interesting concepts, but how can we bring these to be promoted on a regular basis in governmental administrations? For access to become part of the organizational culture, it needs to be recognized by managers as a legitimate aspect of their staffs' work, on the same footing as their other duties.<sup>2</sup>

Access to information is meaningful only if there is efficient information management. Information is a valuable asset that governments must manage as a public trust on behalf of their citizens. Effective information management makes government program and service delivery more efficient, supports transparency, collaboration across organizations,

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<sup>1</sup> By and large, records which has sparked or fuelled the following scandals were obtained under the access to information legislation:

- |                        |                                       |
|------------------------|---------------------------------------|
| a. The Pearson Airport | b. Gas Rebate                         |
| c. Somalia Scandal     | d. Tainted Blood                      |
| e. Gun Registry        | f. Shawinigate and Auberge Grand Mère |
| g. APEC                | h. \$159 million HP Scandal at DND    |
| i. Sponsorship Scandal | j. Used British Submarines            |

<sup>2</sup> Government of Canada, *Access to Information : Making it work for Canadians*, Report of the Access to Information Review Task Force, p. 161

and informed decision-making in government operations, and preserves historically valuable information.<sup>3</sup>

Access principles instil a notion of public trust and respect the public interest by encouraging the greatest degree of openness and transparency while taking into account legitimate concerns such as personal privacy, commercial confidentiality, and intergovernmental affairs.<sup>4</sup>

The right to access public information seems more and more a right to be renewed. We need to refine the concepts by which we demarcate what falls into the public interest sphere and what must stay in the privacy sphere. Such analysis must be conducted not only for the benefit of the right to privacy, but must also take into account the value and the necessity of the free flow of information and the benefit of having a public forum. After all, can we image a society where an individual could only be approached or contacted by people that were “pre-authorized.” What kind of monotonous life would we be living?

We agree with Prof. Trudel that presently the protection of privacy is often used as a pretext and invoked as a means to censor information having a public character. For some, only personal information is worthy of protection. However, in light of rights like freedom of expression and access to information, this privacy right must be nuanced. Without this approach, we will find ourselves with more and more statutes imposing always more restrictions upon the circulation of public information relating to individuals.<sup>5</sup> For example, on Nov. 16, 2004, Bill C-23, *An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts* was tabled. Part IV of this Bill is titled “Protection of Personal Information.” This part sets out the rules that apply to the protection of and the making available personal information that is obtained by the minister of labour or the minister of human resources and skills development or the Canada Employment Insurance Commission under a program or prepared from that personal information. This part also sets out principles for the use of information for research purposes.<sup>6</sup> Why elaborate a special set of rules when the *Privacy Act*<sup>7</sup> is already an adequate instrument supervised by an independent commissioner?

Another example of strange reasoning when it comes to the protection of personal information: on May 21, 2004, the Ontario Divisional Court overturned a decision by the assistant information and privacy commissioner of Ontario. The Divisional Court

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<sup>3</sup> Treasury Board Secretariat, Policy on the Management of Government Information, May 1, 2003 : [http://www.tbs-sct.gc.ca/pubs\\_pol/ciopubs/TB\\_GIH/mgih-grdg-PR\\_e.asp?printable=True](http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_GIH/mgih-grdg-PR_e.asp?printable=True)

<sup>4</sup> Government of Canada, note 2, p. 17

<sup>5</sup> Pierre Trudel, *L'accès aux documents publics : des ajustements pour assurer la transparence de l'État en réseau*, in *Développements récents en droit de l'accès à l'information*, vol. 173, Éditions Yvon Blais, 2002, p. 51

<sup>6</sup> House of Commons, 1st Session, 38th Parliament, Bill C-23 - *An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts*, Part IV, s. 31 "purpose."

<sup>7</sup> R.S.C. 1985, ch. P-21

disagreed with the assistant privacy commissioner's finding that there was an exception in the *Municipal Freedom of Information and Protection of Privacy Act*<sup>8</sup> which required a central database to be made available if requested.<sup>9</sup> The central database contained personal information about millions of residential property owners in Ontario. We must mention that the personal "assessment roll" information is accessible on a read-only basis from one of the more than 400 municipal offices, although there is no central database of information made publicly available. The reasoning of the Court is astonishing: the documents may be public as long as they are difficult to find.<sup>10</sup>

We must not neglect the fact that information about an individual may be relevant to others without causing any harm to the dignity of the individual. It's the malicious use of personal information that we want to contain.<sup>11</sup>

In recent years, in addition to IAPP legislation, we have seen lobbyism, ethics, and whistle-blowing statutes being adopted or tabled. These statutes are all inter-related since they define and refine our democracy. In the years to come, the interrelations between these statutes will surely be analysed in more depth from an IAPP perspective.

## **WHY SHOULD LAWYERS BE INTERESTED?**

We all know that there is more about government than scandals (at least, let's hope so). And, as lawyers, we also have a legitimate interest in several areas generating government interest and documentation. As lawyers, it is also nearly impossible to escape the dominating influence and presence of the Canadian government in our everyday lives.

At the federal level in Canada, for instance, there are no less than 200,000 federal public service employees, spread out over than 150 separate government institutions, agencies and Crown corporations administering approximately \$150 billion of program spending a year on our behalf. That is a lot of people and that is a great deal of money.

This means that each day the federal workforce generates thousands and thousands of policy and discussion papers, studies, reports, memoranda, letters, analyses, charts, opinions, proposals, records of decisions, submissions, briefings, aide-mémoires, inspection and visit reports, manuals, directives, orders, minutes of meetings, emails, contracts, and cheques – all at public expense and, we all hope, all in the "public interest."

However, whether or not all these records document legitimate activities of the government, we, as a sophisticated, educated and free people, have every right to access information in records created by and for those who travel the corridors of power. Let there be no doubt about it; this information belongs to all of us, the governed!

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<sup>8</sup> R.S.O. 1990, Chapter M.56

<sup>9</sup> The Ottawa Citizen, 26.05.2004; Ont. Sup. Ct. of Jus. File 647/03

<sup>10</sup> Trudel, note 5, p. 52

<sup>11</sup> *Ibid.*, p. 52

## HOW TO GET ACCESS

If the information belongs to us, then why aren't we making more frequent use of it, you may ask? From our perspective, lawyers, in particular, should be encouraged to make a concerted effort to come to terms with the utility and scope offered by the FOI so as to promote FOI to their clients and by extension to the public at large.

The federal government is in reality a storehouse of information that can be of immense value to individuals and firms. Access requests can cover a very broad range of issues, such as:

- arrests and convictions as well as reports of police investigations;
- budgets and fiscal information;
- information about environmental findings and test results,
- data on air and water pollution and the nature of pollutants and toxic substances;
- records concerning public health including the approval of certain drugs;
- government employee records;
- contracts between the government and public employee unions or private entities indicating the nature of an agreement and the amount of taxpayers' money that is being spent;
- tripartite negotiations between the Canadian and the U.S. government and a Canadian supplier;
- studies, policies and directives issued by departments and agencies, such as Transport Canada, the Treasury Board Secretariat, Industry Canada, Canada Revenue Agency, Finance Canada, and Statistics Canada;
- Cabinet confidences after 20 years;
- the ill-fated military mission in Somalia in the early 1990s;
- contracts relating to the privatization of certain government services;
- investigative reports on fraud and harassment;
- expense accounts of ministers and senior public servants;
- discretionary benefits provided by government to certain individuals;
- personal services contracts;
- major decision-making documents on Crown projects;
- the purchase of goods and services as well as the solicitation of bids;

- inspection reports of meat plants and air transportation companies.

Clearly, lawyers, particularly those practicing in administrative law – trade, commerce and banking law, human rights, immigration, government procurement, competition, taxation, insurance, safety, finances, communications, labour, food and drug, transportation, security and defence – should see the federal government records as an information and resource institution accessible for the benefit of the public in general or their clients in particular.

Also, we should not forget that lawyers are excellent conduit for people who are interested in obtaining records from government agencies but who, for a variety of reasons – may not wish to reveal their identity to a specific government institution, i.e., they may not wish to put their contractual relationship in peril or advise their employers of their interest in a specific domain.

In an attempt to assist those of you to make use of this statute in order to obtain access to government records which could provide you either with useful information in your area of practice or allow you to better represent a specific client, in closing, we make two recommendations:

a. You may wish to consult the 25-page Guide contained in chapter 8 of the *Federal Access to Information and Privacy Legislation* which provides you proven techniques employed by experienced users of the Act.<sup>12</sup>

b. You may also wish to run your eyes over Schedule A to this article, which presents, in summary form, 12 tips that you should keep in mind when considering using the *Act*.

## **CONCLUSION**

In closing, in our opinion information is the lynchpin of the democratic process, because for a democracy to be a government-by-the-people, an informed public is absolutely essential. A strong FOI law improves and enhances the accountability of government institutions, as well as government officials and employees. Even better, the mere existence of such a law serves as a check on corruption and misconduct and, at the same time, encourages government to be honest.

In other words, openness enhances honesty.

However, for business – domestic and international – the operation of an access to information law provides a framework and a structure for predictability. In Canada, businesses know with a high degree of certainty that particular records will always be made available, while others will be protected. This is especially important in relation to economic planning and development and the growth of international trade. Companies

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<sup>12</sup> Michel W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation*, Annotated 2004, Thomson-Carswell, 2003, p. 1075

operating beyond our own nation's borders also have the ability to rely on the FOI structure that provides reliability and knowledge regarding disclosure to the public and, protection against harmful disclosure to business competitors.

Finally, disclosure of records indicating what the government has done, what it is doing, and what it plans to do create trust in government. The more “open” a government is with its citizens, the greater is the citizens’ trust.

When disclosure becomes the rule – the expectation – a nation can develop a “culture of openness,” enabling its citizens and its government to learn, to exchange ideas, and to thrive in an increasingly complex world.

The current sponsorship scandal provides ample evidence as to how quickly – and assertively – a people can react when confronted with facts heretofore hidden revealing excesses of patronage, favoritism, corruption and waste of public funds.

## SCHEDULE A

### TWELVE PRACTICAL TIPS FOR THE BUSY LAWYER

wishing to use the *Access to Information Act* as a venue for gaining access to federal government records  
**M.W. Drapeau & M.-A. Racicot**

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#### 1. Understand coverage of the law.

- Know which federal institutions are covered.

**NOTE:** Parliament has exempted organizations such as the Governor General, the Senate, the House of Commons, the Privy Council, the Treasury Board, the Supreme Court, the Federal Court, the Tax Court, the Auditor General, the Information Commissioner, the Privacy Commissioner, and several Crown corporations (i.e., Via Rail, Canada Post etc.)

- Know how government is structured.
  - Consult a copy of the "Estimates" for the specific departments/agencies you are mostly concerned with; and
  - Obtain a copy of a government phone book, which will indicate a working outline of the departmental structure and organization.
- Keep in mind that in Ottawa, power is concentrated in central agencies, such as the Privy Council Office, Department of Finance, Treasury Board Secretariat, and, to a limited extent, the Public Service Commission.

#### 2. The term “records” is very broad.

- Includes paper and electronic documents; and
- video and sound recordings, pictorial, holographs, films, drawings, diagrams; as well as
- correspondence, reports, directives etc.

#### 3. Presumption of access.

The law provides that all government records are accessible, except those records or portions of records that are excluded/exempted. Mandatory exemptions are:

- a) documents covered by solicitor-client privilege
- b) protection of personal privacy
- c) International Affairs, Defence, National Security;
- d) advice to ministers;
- e) intergovernmental relations;
- f) cabinet confidences; [20 years]
- g) trade secrets/commercial and scientific proprietary information
- h) law enforcement functions

**NOTE:** However, most of the records under the control of, say, Health Canada or Industry Canada – who are responsible for making sure that many of the country’s new and existing products, from medicines, to foods and cosmetics, to medical devices , which together account for a quarter of consumer spending, – are accessible. A mammoth task generating millions of pages in reports and official documents most of which can be accessed.

**4. Learn how to make an effective submission.**

- See Guide at Chapter 8 of the *Access to Information and Privacy Legislation Annotated – 2004*
- Seek advice from or hire an expert in access to information.

**5. It is OK to use the *Act* as a "fishing expedition."**

- Keep in mind that courts have stipulated that the motive of a requester is not relevant!
- It is OK to fire blanks. Test the waters to see what's available in your main practice area.
- Review the FOI database of requests to determine what has been previously released in the area you are interested in. Access of this database can be done online.
- Keep your client's identity secret. Every request goes up the chain (minister, etc.)
- Keep in mind that in the information age, government information holdings are in a shamble. Electronic records are routinely destroyed. Emails are not archived. However, government institutions are known to communicate with one another to co-ordinate their activities to obtain the required support or authority. Hence, as a rule, a request for information in a given domain should generate requests address simultaneously to three or more departments or agencies.

**6. Protect the proprietary information your client submits to a federal department.**

- Your client could be at the receiving end of a FOI request and you can block access if you take prior precautions. Hence, regulated industries should take proactive steps to protect their proprietary information.

**7. Time to respond is routinely ignored by institutions.**

- be patient but resolute; or
- file a complaint with the Information Commissioner.

**8. Costs.**

- A good deal: \$5 per request
- Search fees (first five hours are free). After that time, it is \$10/hour for search/preparation fees.
- Copying fees: \$0.20 per page, \$2.50 per audiocassette.

**NOTE:** Compliance with FOI is neither a gift nor waste of public funds, but rather the performance of a governmental obligation.

**9. Independent review of denials of access to records.**

When a request for a record is denied, the person denied access has a right to appeal the denial, first to the information commissioner, then to the Federal Court of Canada. There is no "costs" order associated with an investigation by the information commissioner.

- You have one year to file a complaint with the information commissioner

#### **10. The government has the burden of defending secrecy.**

Whether dealing with a challenge to the information commissioner or to the Court, the burden of defending secrecy must be borne by the institution that has withheld the records. The government has the burden of proving that the harmful effects of disclosure described in the exceptions to right of access listed in the law would indeed arise.

**11. Departments are required by law to have reading rooms** where the manuals used by their employees must be made available for inspection by the public.

#### **12. Seek records the informal way from the department concerned**

- Refer to Subsection 2(2) of the *Act*. The *Access to Information Act* enlarges, but did not replace, other informal methods of accessing information from government. Hence, the informal method of requesting access by writing to the minister or deputy minister of a federal institution is still acceptable. Alternatively, one could consider a visit to the headquarters of a government institution. Access laws require some institutions to provide a reading room with ready access to the manuals used by the departmental staff to manage the programs.

