

Access to Information

Ottawa, 7 January 2016

The Honourable Scott Brison
Treasury Board of Canada Secretariat
President's Office
90 Elgin Street
Ottawa, Ontario K1A 0R5

Dear Mr. Brison,

The Canadian Historical Association / La Société historique du Canada is a bilingual not-for-profit and charitable association devoted to fostering the scholarly study and communication of history in Canada. The Association's mandate is to encourage the integration of historical knowledge and perspectives in both the scholarly and public spheres, *to ensure the accessibility of historical resources*, and to defend the rights and freedoms of professional and emerging historians in the pursuit of historical inquiry.

As advocates of open access to historical records, which is necessary in order for high quality research and knowledge generation to occur, we are calling on the Government of Canada to reform the *Access to Information Act* (hereafter referred to as ATI Act). Passed in 1985, the Act refers to the right of all Canadians (citizens and permanent residents) to "access to any record under the control of a government institution." (s. 4.1)

Access to information is necessary for a full understanding of our history: it is also a cornerstone of an informed democracy. In *Bronskill v Minister of Canadian Heritage* [2011] FC 983, Justice Noel made the direct connection between history and democracy: "History and Canadian democracy require that historical facts, like the monitoring of legitimate political activities, be known." This decision laid out access as a public or human right: "The purpose of the *Access to Information Act* is to enshrine an essential component of democracy: the public's right to government information. This right to government information is mandatory for both public scrutiny of government activities, as well as the full and meaningful participation in public debate and discussion. If the adage that information is power holds true, then our democracy depends on the broad and liberal interpretation of the Act, subject to valid concerns represented by the exemptions provided."

However, in practice the legislation is failing its mandate to guarantee this right. ATI does not in all cases guarantee reasonable access to government information for historians and for the public. In the interest of greater transparency and in recognition of the importance of access to government records for a full and meaningful knowledge of the country's past, reform of the law is a priority for the CHA. We ask that the government also make it a priority. Not only is the Act thirty years old, but revisions

could take into account changing modes of information collection that have resulted from the digital revolution and electronically-born resources.

The very essence of historical practice relies upon open access to documents created in the past, whether by government, private organizations or institutions, or quasi-public bodies (those receiving government funding, or in formal partnership with government). There is simply no way to gain or deepen historical awareness without the ability to examine, re-examine and re-interpret the archive. Failure to recognise this reality devalues history, and in so doing devalues our sense of community and a shared past.

The ATI had an immensely broad mandate, not only covering government departments, but many related state institutions such as crown corporations; research on health, policing, the military, social policy, political decisions, and *many* other areas can fall under ATI legislation. Given how broad this reach is, we must ask not only whether access is open and timely, but also what areas of historical research are *not even attempted* due to the cumbersome nature of the process. An ineffective ATI can create a “chilling” effect on research never pursued.

The federal ATI Act has been extremely important to us, as it enshrines in the law our right to make requests to access public records, even when these records may tell stories government or society more generally finds difficult to hear. The public and historians make hundreds of access requests to governments each year. There are, and should be, reasonable limits under the law to the right of access; however, such limits must be decided through free and open debate in a democratic society. We are concerned that ATI law is increasingly being used to limit access, rather than guarantee it. Since every province has its own ATI legislation, differences between the federal and provincial laws sometimes highlight the narrowness of federal access. For example, historical studies of the federal Human Rights Commission have been hampered by lack of access to its records, while provincial commissions have developed confidential “research agreement” protocols to allow such research to be done. Although it is exactly same type of historical material, federal law enables its agencies to more easily arbitrarily dismiss access requests than provincial law.

In some cases, ATI is being circumvented through the use of parallel legislation, which may or may not be constitutional. For example, early in 2015, the CHA became concerned about the implications of the former Conservative government’s Bill C-59, an ‘omnibus’ bill which included provisions to retroactively make legal the denial of access to public documents related to the Long Gun Registry. Only as a result of court action by the Information Commissioner of Canada (supported by organizations including the CHA) has the constitutionality of retroactive closure and destruction of government records been challenged.

This case, which is still before the courts, has highlighted for the CHA the need for stronger legislative protection against the destruction of documents that form the historical record. However, C-59 is not the only extant threat to Canadians’ right to access government documents. The CHA has also been concerned for some time that

the uses of this law have allowed government departments to refuse access to information based on “privacy” issues. A culture of delay and denial has come to dominate the response of government departments to access requests coming from citizens, including from our members, whose interest lies in historical research

Long delays in processing ATI claims now appear to plague the system. We have had our members approach us with examples of delays of up to 18 months. According to the Information Commissioner, concerns about delays are the most significant cause of public complaints to the Commissioner’s office in recent years. There is evidence that this problem has increased over time. To cite only one example: statistics cited by the Information Commissioner’s Office on extensions granted to requests shows that “since 2002–2003, the length of extensions has increased significantly across all categories. In 2002–2003, 55 percent of extensions were for more than 30 days. This number stood at 79 percent in 2013–2014.”

Access to information under the law lacks meaning when delays are routine. Unreasonable delays can, of course, be extremely frustrating for members of the public as well as researchers, but are particularly problematic for those performing research as part of graduate study (Masters or PhD) or post-doctoral work. The prospect of significant delay is a very real deterrent to the development of certain areas of historical research; emerging scholars are unfortunately dealing with tough challenges studying subjects dealing with public records. We know that some graduate supervisors discourage students from pursuing topics that involve ATI legislation for this reason.

Similarly, historians with public research funding (Social Sciences and Humanities Research Council, Canadian Institutes for Health Research, or other funders) must confront the impact of delays upon their research schedules. Our members frequently must anticipate delays that affect their ability to meet research grant timelines. These delays have a negative effect on the climate in which we do our work, and they negatively impact historical knowledge in significant ways.

Government departments should determine the root causes of delays in fulfilling ATI requests, and they make a good faith effort to address these causes. It is our view that such efforts are much more likely to succeed if the law is amended to introduce meaningful sanctions for unreasonable delay, and to enhance the power of the Information Commissioner to compel departments to comply to ATI requests in a thorough and timely manner.

Recent responses to ATI requests have also made it apparent that certain sections of the ATI Act are being invoked in such a way as to prevent full disclosure of the historical record upon the request of researchers. For example, section 15 of the Act states that government can refuse to disclose information that “could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.” In “Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act,” released in March 2015, the Office of the

Information Commissioner has noted that current broad application of s. 15 has effectively denied historians access to records, even when there can be little reasonable expectation of present-day security threats associated with opening the records. The CHA argues that this practice should be curtailed, if necessary through reform of the law.

Similarly, s.19, which covers personal information, is exercised at times in an unreasonable fashion. Protection of personal information that is collected as part of the work of government is a sensitive and complex social issue. However, personal information provides key insights for historians. The CHA supports full public discussion of s. 15, s. 19 and other sections of the legislation that currently unduly limit the right to access government records, in order to find a meaningful balance between privacy and transparency; between security and accountability. The CHA advocates reform measures that narrow and/or clarify the instances in which exemptions or exclusions from the public right of access can be invoked, so that the legislation is not used merely to maintain a closed culture of government through unreasonably broad application of legal exemptions.

The Information Commissioner has suggested that the law should be amended to introduce a Duty to Report any destruction of records or loss of information to LAC, and applicable sanctions in cases in which destruction and loss occur. The CHA supports this proposal. This and other reforms which can prevent the ongoing or retroactive destruction of government records are essential for the preservation of the past, for future generations as well as our own.

Reform of the ATI has been recommended for several years. The legislation is out dated and the access culture of government has been allowed to erode. We believe a meaningful step towards improved ATI legislation would be broad and open public consultation on reform, at which stakeholders could express their views. We encourage the Minister to undertake consultation that would allow Canadians to articulate their concerns about access and transparency and to make recommendations for reform.

All levels of government in Canada have laws that affect access rights and limits to those rights. By reviewing and reforming the ATI Act, the federal government can be a leader in modernizing our approach to ATI in Canada, and a strong promoter of the public right to access that characterizes the spirit of the law. All researchers -- whether historians, scientists, journalists or the inquiring public -- will benefit from a reformed ATI law. Access goes hand in hand with both transparency and accountability in government, both touchstones of an informed, vibrant democracy that both knows its past and is able to make informed judgements about its present. We hope this new government will take these issues of knowledge, information and research to heart and begin a process of consultation leading to a reform of the ATI legislation.

Sincerely,

Joan Sangster
President
Canadian Historical Association

Cc: Access to Information Commissioner

- See more at: <http://www.cha-shc.ca/english/advocacy/the-cha-writes-to-the-minister-responsible-for-ushering-in-promised-access-to-information-reforms.html#sthash.xSffaNUC.bVYe0diL.dpuf>