NOTES FOR THE TREASURY BOARD SECRETARIAT'S REVIEW OF CANADA'S *ACCESS TO INFORMATION ACT*

June 29, 2016

This is Stanley Tromp, Canadian independent journalist for twenty years, with 100 of my FOI stories posted at my open government website: http://www3.telus.net/index100/foi I am also the author of *Fallen Behind: Canada's Access to Information Act in the World Context* (2008), a book one lawyer called "by far the most comprehensive comparative analysis to date of Canadian and international access to information laws."

I was most heartened by features in the new Prime Minister's 2015 mandate letter to the Treasury Board President: "Work with the Minister of Justice to enhance the openness of government, including leading a review of the Access to Information Act to ensure that Canadians have easier access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts."

Yet we are sadly familiar with the history of newly-elected governments' enthusiasm for open government cooling off the longer they hold power, and can only hope that does not occur in Canada. During the decade of the previous administration (2006-2015), I had lost all hope for any reform to the ATIA.

This government has pledged to "undertake a full review of the Act by no later than 2018." Yet I worry much of the slow pace of this review, and the prospects of significant ATIA reforms being actually passed into law before the next federal election.

I endorse most (but not all) of the ATIA reform recommendations given to the House Ethics Committee by the Information Commissioner; and all of the advice presented there by the Canadian Association of Journalists (CAJ), and the BC Freedom of Information and Privacy Association (FIPA).

At a bare minimum, I would urge this government to implement all the pledges made by the former one, promises never kept:

> EIGHT CONSERVATIVE PARTY PLEDGES ON ATIA REFORM, 2006
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> [From Stand Up For Canada. Conservative Party of Canada federal election platform. 2006 http://www.conservative.ca/media/20060113-Platform.pdf]
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> The Plan. A Conservative government will:

1. Implement the Information Commissioner's recommendations for reform of the Access to Information Act.

2. Give the Information Commissioner the power to order the release of information.

3. Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.

4. Subject the exclusion of Cabinet confidences to review by the Information Commissioner.

5. Oblige public officials to create the records necessary to document their actions and decisions.

6. Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.

7. Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.

8. Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.

Many conclusions from my 2008 book *Fallen Behind* are (unfortunately) still relevant today:

• On many key points, Canada's 1982 *Access to Information Act (ATIA)* fails to meet the international standards of freedom of information law as they are set out in the document *The Public's Right to Know: Principles of Freedom of Information Legislation,* 1999. (This document was drafted by Toby Mendel of the Law Programme of the London-based human rights organization known as Article 19, and then subsequently endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression.)

• Canada's *ATIA* also fails to conform to many central FOI recommendations from at least ten other global political organizations, such as Commonwealth Secretariat, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), and United Nations Development Agency (UNDP).

• (Chapter 1) More than half of the nations with FOI statutes explicitly grant the public some right to obtain government information in their Constitutions or Bill of Rights. These include France, Mexico, New Zealand, South Africa, and many Eastern European nations. Canada does not, yet should.

• (Chapter 2) The right of all people regardless of their citizenship or location to make access requests is the accepted international standard, included in the FOI laws of more than 50 nations, including that of Canada's parliamentary model, the United Kingdom. But under the *ATIA,* non-citizens who are not present in Canada have no right to file requests. There are already exemptions in the law to prevent potential harmful use of the right by foreign applicants.

• (Chapter 3) The Conservative Party of Canada's 2006 election platform statement pledged to subject the decision to invoke the Cabinet confidences to exclusion to a review by the Information Commissioner. This promise was not fulfilled.

• (Chapter 4) The Conservative party pledged in 2006 to "expand the coverage of the *Act* to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions." This promise was only partially fulfilled. (For more, see my section below on "Secret Quasi-Governmental Entities").

• (Chapter 5) The Conservative Party pledged in 2006 to "provide a general public interest override for all exemptions." This promise was not fulfilled. Yet the FOI laws of more than 40 other nations – and all the Canadian provinces and territories (except one) - contain much broader public interest overrides than are found in the Canadian *ATIA.* These include Mexico, New Zealand, South Africa, Ireland, the United Kingdom, India and most Eastern European nations. Some of the laws state that the override should apply to all the FOI exemptions and be mandatory, not only apply to two exemptions and be discretionary, as is the case in the *ATIA*.

• (Chapter 6) The Conservative party pledged in 2006 to subject all *ATIA* exemptions to a "harms test." This promise was not fulfilled. Seven *ATIA* exemptions still lack explicitly-stated harms tests and so are known as "class exemptions," a situation that falls seriously short of world FOI standards. Worse, in 2006 the government amended the *ATIA* to enable it to withhold draft internal audits, in Sec. 22.1(1).

• (Chapter 7) The *ATIA* exemption for policy advice (Sec. 21) is far broader than in most of the world. Unlike with the *ATIA*, the FOI laws of South Africa, the United Kingdom and Scotland include a harms test for some of their policy advice exemptions. These and other laws also have public interest overrides for policy advice records. The FOI laws of seven provinces and territories have shorter time limits for withholding records under their policy advice exemption than the 20 years prescribed in the *ATIA*.

• (Chapter 8) The records of cabinet discussions are excluded completely from the scope of the FOI law only in Canada and South Africa. Here, the Information Commissioner does not even have the legal right to review such records. Yet cabinet confidences were subject to a mandatory exemption – not an exclusion - in Canada's original federal *Freedom of Information Act*, *Bill C-15* of 1979.

Nine Commonwealth nations have such a mandatory exemption – better yet, the United Kingdom's is discretionary - and five of these are subject to public interest overrides. Many other FOI statutes have no specific exemption for cabinet records at all. Cabinet records can be withheld for 20 years in the *ATIA*, but only for 10 years in Nova Scotia's FOI law.

• (Chapter 9) The Conservative Party pledged in 2006 to "oblige public officials to create the records necessary to document their actions and decisions." This promise was not fulfilled. The harmful trend towards "oral government" has spread in Canada: officials often fail to commit their thoughts to paper, and convey them verbally instead, primarily in an effort to avert the information emerging in response to FOI requests. Several national FOI laws prescribe record creation, and the duty to catalogue records in a way that facilitates access.

• (Chapter 10) *ATIA* response delays have reached a crisis level. Among the world's FOI laws, the average request response time is two weeks. At least 60 other FOI jurisdictions in the world prescribe shorter timelines than in Canada, and some have strong penalties for delays. Yet under the Canadian *ATIA*, public bodies must respond to requests within 30 days, and may extend this for another 30. In the *ATIA*, the reply may be extended for an unspecified "reasonable period of time" – which is not the global legal standard.

• (Chapter 11) Today there are more than 50 other statutory provisions in other laws that override the *ATIA*. The Conservative Party pledged in 2006 to remedy this problem, and so render the *ATIA* supreme on disclosure questions. This promise was not fulfilled. (The generally agreed-upon solution is to abolish *ATIA* Sec. 24, which embodies this problem.) Several Commonwealth nations - including India, Pakistan and South Africa - establish that the FOI law will override secrecy provisions in other laws.

• (Chapter 12) The expressed purpose of the *ATIA* is to serve as a last resort for information seekers. But, on the contrary, many officials in Canada are now telling information seekers to use the *ATIA* for even the most innocuous records, instead of routinely releasing them as they should, a needless process that leads to delays and added costs to the state.

On the subject of pro-active publication and routine release, the rest of the world has left Canada far behind. Most nations from Albania to Zimbabwe prescribe the release of many vital types of information in sections of their FOI statutes and, unlike the *ATIA*'s perfunctory Section 5, many of these are exhaustive, sometimes over 400 words each.

• (Chapter 13) The *ATIA* does not contain any requirement for public education and the promotion of FOI rights. Yet several nations do mandate such activities in their FOI statutes, such as Mexico, Slovenia and Ecuador.

• (Chapter 14) There is just one narrow and discretionary case in which the public interest in environmental protection can override an *ATIA* exemption, one regarding third party information (Section 20). Yet as noted in Chapter 5, the FOI laws of more than 40 other nations have much broader public interest overrides, especially for environmental interests.

The United Kingdom passed a set of *Environmental Information Regulations* in 2004. Eight nations, mainly in Eastern Europe, explicitly mention the public's right to environmental information in their Constitutions (which is also implicitly included in the general FOI guarantee in the Constitutions of 50 nations). As well, the 1992 Rio Declaration of the U.N. Conference on Environment and Development, which Canada signed, prescribed transparency on environmental information.

The 1998 Aarhus Convention prescribes the sharing and free public access to vast amounts of environmental information amongst 40 European and Central Asian nations, and some nations try to fulfill their Aarhus obligations through their national FOI laws. Yet there is no North American equivalent to such a treaty.

• (Chapter 16) In 31 nations, the FOI law includes some kinds of penalties for obstructing the FOI process, including Ireland, Mexico, Pakistan, India, Scotland, and the United Kingdom. In the *ATIA*, there are penalties for destroying records and obstructing the Information Commissioner, but other nations go much farther. For instance, 20 nations impose fines for obstructing the FOI process, while 15 nations (eight of these in the Commonwealth) prescribe prison terms for impeding it. In Canada, Quebec's FOI statute contains the broadest definition of obstructionism.

• (Chapter 17) The right for the public to access meetings – for several entities such as parliament, courts, commissions, municipalities - is prescribed in several national FOI statutes, and in 'sunshine laws' of every American state, but not in Canadian federal law.

Secret Quasi-Public Entities

The government has committed to "Ensuring that the Access to Information Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts."

This extension is a welcome start, but its scope is far too limited. In Canada, public bodies have been spawning wholly owned and controlled puppet entities to perform public functions and manage billions of dollars in taxpayers' money, all while claiming these are not covered by FOI laws because they are "private and independent." (The British call these "quangos" and I will use the term for convenience). This trend is quietly and adroitly defeating the entire purpose of FOI.

The Conservative party pledged in 2006 to "expand the coverage of the *Act* to all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions." This promise was only partially fulfilled.

Yet in Canada more than 100 such quasi-governmental entities are still not covered by the *ATIA*. The exclusion of such entities such as the Canadian Blood Services and the nuclear Waste Management Organization could result in harm to public health and safety.

On this topic, Canada has fallen farthest behind the world FOI community. The FOI laws of more than 30 nations cover legal entities performing "public functions" and/or "vested with public powers." Britain's FOI law includes companies "wholly owned by the Crown." Such coverage is also found in the laws of the U.S., France, New Zealand, India, Nepal, Uzbekistan, Nigeria, and Russia.

The statutes of the United Kingdom, India, and New Zealand provide good models. Most provinces (notably Quebec) contain much broader definitions of what is a "public body" than is found in the *ATIA* – the criteria for inclusion can include public funding and control over appointments.

• In 2006 an FOI law was passed in the Islamic Republic of Iran.[1] (It was just translated from Persian: بسم‌الله الرحمن الرحیم) In Article 2 part H, the definition of public institution includes "each institution, company or foundation whose whole share or more than 50 percent of its share belong to the state or government."

• According to the CLD's RTI Rating and Access Info Europe, state-owned enterprises are covered in the Russian Federation. Coverage in the Russian FOI statute[2] (Российская Федерация) includes "information, created by government bodies, their territorial bodies, bodies of local self-government, or organizations subordinate to government bodies […]"

• For Israel (יִשְׂרָאֵל מְדִינַת), as the Justice Initiative noted: "The Israeli FOI Law was amended in 2007 and now includes all government owned corporations, except for some specifically excluded by the Justice Minister with consent of parliament. A "government owned company" is defined in law as any company in which the government holds more than 50% of the shares."

(Overall, of course, it would be better to follow the examples of emerging democracies such as Moldova, Bulgaria and Guatemala rather than Iran or Russia. I am well aware that the latter two nations and some others have dreadful human rights problems and I would not wish to endorse them here as models for anything else. My point is just to show that accepted global FOI standards have risen to such a level that even these nations endorse the quango principle, along with advanced democracies.)

I was buoyed to discover one good point upon which Iran and Israel agree. But not so in Canada. This, one regrets, can hardly be a source of national pride. Under the definitions above, airport authorities, Canadian Blood Services and the nuclear Waste Management Organization could never escape ATIA coverage as they now do.

After much contemplation and peer discussion, I arrived at this solution: Amend the ATIA to state that the *Act*'s coverage extends to any institution that is:

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[1] The Iranian law text in English, fascinating reading, is at http://www3.telus.net/index100/iran ('Many thanks to Kowsar Gowhari at Integrity Watch Afghanistan and Monir Ahmadi at Internews Afghanistan for their help in translating the document." - Toby Mendel, Centre for Law and Democracy, Halifax)

[2] The Russian law text in English is at http://legislationline.org/documents/action/popup/id/17759 with commentaries at http://www.freedominfo.org/regions/europe/russia/

[1] controlled by a public body; or

[2] performs a public function, and/or is vested with public powers; or

[3] has a majority of its board members appointed by it; or

[4] is 50 percent or more publicly funded; or

[5] is 50 percent or more publicly owned.

It is absolutely crucial that such entities be at least 50 percent publicly owned, and not "fully owned," for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as an adroit way to escape ATIA coverage. In fact, it might best be set to a degree less than 50 percentage, since in some cases 20 percentage ownership could mean control.

What are Canadian governments' usual arguments against FOI coverage of such quangos?

Firstly, such so quangos may complain of the risk of competitive harms but the claim is illogical; they cannot suffer competitive harm from FOI releases because *they have no real competition* – i.e., most are monopolies within their parent institution (e.g. airport authorities, nuclear waste).

Secondly, it does not even matter at all whether they face competition or not – because they are already fully protected from competitive harm in the ATIA, in Sec.20. Third party information (mandatory), and in Sec.18. Economic interests of Canada (discretionary). The vital question to ask these quangos that oppose FOI coverage can be summed up thus (and which I respectfully urge you to ask them for a specific answer to this specific question): "Why, exactly, do you assert that ATIA sections 18 and 20 are insufficient to protect your economic interests?"

One might learn that some responders are not or barely aware of those two exemptions, and may require enlightenment on these. Those sections were placed in the law for that very purpose.

If this illogical and indefensible claim of "competitive harms" was accepted, then no federal or crown corporation would be covered by any FOI law, and yet they all are. Indeed, even the most secretive prime minister in memory, Mr. Harper, amended the ATIA to cover all national crown corporations and their subsidiaries *(*and even some government-created foundations) – the same principle should apply to quangos. The sole purpose of **a** call for further study (e.g., to avert vague "unintended consequences") is an eternal stalling tactic, which is the graveyard of reform.

Several additional points

• In early June this year, it was reported that the privacy commissioner wants to limit planned new powers for the federal information czar, fearful the changes could upset a "delicate balance" concerning Canadians' sensitive data. He said proposed authority for the information commissioner to order the release of information should not include files that deal with personal details. In a brief to the Commons Ethics committee he said the matter should only be discussed two years from now, when the government does a full-scale review of the ATIA.

I completely disagree with the privacy commissioner's comments, because the ATIA already contains Sec.19. Personal information, which adequately protects such sensitive data. (I would also counter the opposition to such order power as expressed by Michel Drapeau - an isolated viewpoint - at the Ethics Committee this year.)

• I am doubtful of the necessity of reforming the ATIA to add a section barring "frivolous or vexatious" requests, as these cases are so rare that the cure may be worse than the ailment. In any event, I am strenuously opposed to allowing a public institution to make the initial determination (as this power would be far too widely misused); this power should be solely within the authority of the Information Commissioner.

Conclusion – The Way Ahead

> *The best project prepared in darkness, would excite more alarm than the worst, undertaken under the auspices of publicity. . . . Without publicity, no good is permanent; under the auspices of publicity, no evil can continue.* - Jeremy Bentham, 1768

> *I defy anyone to come up with a law that will force good access to information on a public body that doesn't want to do it.* - Frank Work, Alberta Privacy Commissioner

In America, debates over the same issues occur continuously. The conclusion of U.S. Senator Daniel Patrick Moynihan's 1998 book, *Secrecy: the American Experience* was succinct: "Secrecy is for losers." Why? First, he wrote, because it shields internal analyses from the scrutiny of outside experts and dissenters. As a result, some very poor advice is used to inform many government decisions. Second, secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments. As George F. Will wrote in a review of Sen. Moynihan's book: "Government secrecy breeds stupidity, in government decision making and in the thinking of some citizens."[3]

[3] *Newsweek*, Oct. 12, 1998. Cited in Information Commissioner John Reid's *Annual Report 1999-2000*

Might political leaders, on occasion, seriously consider not just the liabilities but also the many benefits of real transparency, and that, conversely, "Open government is for winners"? Rather than having secrecy project weakness and insecurity, genuine openly government projects honest and competent administration, confidence in one's own vision, and trust in the people.

Unfortunately with FOI in Canada, bureaucrats and politicians often act as if they have little or no faith in the public's intelligence or judgment – yet at the same time they want the public to trust them. This expectation is unworkable, for trust is a two-way street.

To hope for some bureaucrats to ever accept the spirit of the ATIA, one might sooner expect to see gravity reversed and water flow uphill. Information control is a key source of power, prestige and profit – and whoever wished to yield those? Meanwhile, politicians resist FOI not so often from desire to gain or consolidate power as from the fear of losing it (which explains their initial enthusiasm for FOI cooling off after assuming power) – a concern that one can, if not share, at least understand.

Consider too the BBC TV fictional character Sir Humphrey Appelby, the supremely suave British bureaucrat, who famously warned, "Minister, you can have good government or open government – but you can't have both."

In one *Yes Minister* episode of 1981 entitled Open Government, he and his ally Arnold rebuke a naïve junior named Bernard who supports more transparency: "Bernard claims that the citizens of a democracy have the right to know. We explained that, in fact, they have the right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity." Hence some bureaucrats are trying in their view, benevolently and with Orwellian doublespeak, to grant the public freedom *from* information.

Senior bureaucrats, political advisors and crown lawyers may advise cabinet - "The ATIA law is just fine the way it is now – it is not broken so don't fix it. In fact, it's already a bit too open and needs some more restrictions." These advisors have the inner ear of ministers continuously, in stark contrast to a member of the public who may give input on FOI law reform one day every few years to a parliamentary committee – which is a near-total power imbalance.

Future generations may look back upon this era in wonderment that anyone could seriously argue that Canada's FOI laws should *not* be raised to the accepted global standards (even to the point of wondering if, at times Canadians may be too passive and polite in insisting upon their basic rights). Yet there is no complexity, mystery or controversy to the issue. The need to do so is so obvious and common sense as to be - as the term goes - a "no-brainer."

In sum, on FOI reform, we know what needs to be done – there is no need to study more and to reinvent the wheel.[4] All we need is political will, of the kind shown with Newfoundland's sweeping FOI reforms of 2015. This must come from the Prime Minister and cabinet, for with their support nothing positive can happen.

In fact, *if* it wanted to, Canada could be the world leader on FOI law and practice. One of the most appealing features of FOI law is that it is a subject that completely transcends political parties and ideologies. Opposition parties are prolific users of the Act, and any current governing party content with inaction on an outdated law could itself be in opposition again one day, trying to use it and wishing it was more effective.

This great country surely needs to at least raise its own FOI laws up to the best standards of its British Commonwealth partners - and then, hopefully, look beyond the Commonwealth to consider the rest of the world. (The best examples for Canada to generally follow for overall inspiration are the access laws of India and Mexico.) This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present.

I do not have a monopoly on the truth, nor does any other individual or institution. I do not have all the answers, and most FOI advocates never expect to get everything they want. But we can, and must, do far better. MPs serve the public in their way as the news media do in ours. Here you have an opportunity to create a fine historical legacy for your constituents that will endure long after you depart office.

Respectfully yours,

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Vancouver, B.C., June 2016

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[4] In the BBC TV comedy *Yes Minister,* in a 1980 episode, the subject of "Open Government" policy comes up, and Sir Humphrey says the bureaucracy will have to steer the minister away from it, using more studies, explaining: "It is the Law of Inverse Relevance: The less you intend to do about something, the more you keep talking about it." Yet what is amusing on the screen is often less so in real life.