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"Freedom" of Information in Canada
Implications for Historical Research

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RESEARCH NOTE / NOTE DE RECHERCHE

"Freedom" of Information in Canada: Implications for Historical Research[1]

Dominique Clément

There is a rich and untapped source for historical research that is available to any scholar who is willing to navigate the quagmire of freedom of information legislation (FOI) in Canada.[2] FOI can be used to access records relating to hospitals, mental health institutions, prisons, the military, foreign policy, crown corporations, state agencies, policy development, policing, and much more. Historical records are also not only to be found within archives. Government departments often keep records for decades. In British Columbia (BC), for instance, the Attorney General's office has kept records on the Human Rights Branch and Commission dating from the 1970s. The only way to access these documents was through FOI. Developing familiarity with FOI can therefore open a variety of new avenues for research. And yet it is easy to understand why most historians avoid using FOI.[3] Provincial and federal law is

1. I would like to thank Steve Hewitt for his feedback on this article.

2. There is very little scholarship on the impact of access to information on Canadian historical scholarship. The two best discussions are: Steve Hewitt, "'He Who Controls the Present, Controls the Past': The Canadian Security State's Imperfect Censorship under the *Access to Information Act*," in Mike Larsen and Kevin Walby, eds., *Brokering Access: Power, Politics and Freedom of Information Process in Canada* (Vancouer: University of British Columbia Press, 2012); Larry Hannant, "Access to Information and Historical Research: The Canadian Experience," in Andrew Flinn and Harriet Jones, eds., *Freedom of Information: Open Access, Empty Archives?* (London: Routledge, 2009).

3. The number of people in Canada who use FOI, including journalists and others, is small. Compared to other countries, FOI requests are unusually low in Canada, albeit this might be the result of a federal system where people also submit FOI to provinces. For a survey of FOI usage in Canada compared to other countries, see Robert Hazell and Ben Worthy, "Assessing the Performance of Freedom of Information," *Government Information Quarterly* 27, 4 (2011):

Dominique Clément, "'Freedom' of Information in Canada: Implications for Historical Research," *Labour/Le Travail* 75 (Spring 2015): 101–131.

increasingly more effective at *concealing* government records than providing access.[4] The law restricts access to records as mundane as cabinet ministers' speeches or grants to community groups. This is not an isolated development. Rather, it is part of a growing trend towards excessive government secrecy.

Origins of FOI

Access to information is a legal right to review documents that are not already in the public realm. More than 120 countries around the world have FOI laws. "The FOI phenomenon is not an end in itself," explain Andrew Flinn and Harriet Jones:

> but is intended to help make government institutions more accountable in an age when not only are they holding vast amounts of data and information, but technology gives us an unprecedented ability to identify, interrogate and analyze the data and information effectively. … [FOI] is now generally viewed as a standard tool for increasing transparency and reducing corruption, and is widely perceived to be a basic right in any healthy, democratic system of government.[5]

FOI laws proliferated across the globe beginning in the 1960s, although some countries, such as the United Kingdom, did not introduce legislation until 2000.[6] In Canada, until the 1960s, access to public records was made available

352–359.

4. FOI laws do not simply assert a right of access. They also codify *restrictions* on access to information. The law, for instance, protects the Prime Minister's Office from having to disclose information. As Ann Rees explains, "the ATIA is as much about the codification of secrecy and executive branch control of government information as it is about granting the public, including parliamentarians, access to government records. In defining what the public may know, the ATIA also defines what the public may not know, with the scales heavily weighed in favour of the latter." Ann Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada," in Larson and Walby, eds., *Brokering Access*, 56.

5. Andrew Flinn and Harriet Jones, "Introduction," in Andrew Flinn and Harriet Jones, eds., *Freedom of Information: Open Access, Empty Archives?* (London: Routledge, 2009), 1.

6. Comparing FOI legislation between countries can be difficult. As Robert Hazell and Ben Worthy explain, "these difficulties typically arise for four reasons. First, there are differences of jurisdictional and geographical coverage: the jurisdiction of the federal governments in Australia and Canada is more limited than that of the governments in Ireland or New Zealand, which are unitary states. Second, there are differences between the laws: for example, there are those countries which initially included access to personal files within their FOI regime (e.g. Australia), and those which had a separate Privacy Act (e.g. Canada). Differences also exist in terms of the type of appeals system (whether using a commissioner, an ombudsman, or tribunal) and how the Ministerial veto can be deployed. Third, there are differences of coverage in terms of the number of agencies subject to FOI: the UK has exceptionally wide coverage, with an estimated 100,000 public bodies being subject to the Act all at once, whereas Ireland implemented FOI over the course of a number of years. Finally, FOI in Ireland and the UK took place within a very different context than it did in Australia, Canada, and New Zealand." Unlike Canada, these countries also allow for an executive veto on releasing information, although there is a high standard for exercising the veto. Hazell and Worthy, "Assessing the

on an *ad hoc* basis. There was, however, an informal policy to release documents after 35 years, with the notable exception of military and diplomatic records.[7] When the federal Access to Information Act (ATIA) was enacted into law in 1983, Canada was only the eighth country in the world to have FOI legislation. The provinces and territories soon followed suit; Prince Edward Island was the last to enact legislation, in 2002.[8] Provincial legislation covers a host of municipal and local state agencies, although many of Canada's large municipalities also have FOI policies and coordinators. A few jurisdictions, including the federal government, have separate statutes for information relating to individuals (*Privacy Act*) and government documents (ATIA). Several provincial statutes, unlike the federal ATIA, are also paramount to other statutes. Canada has not, unlike France and New Zealand, enshrined a right to access to information in its constitution.

Freedom of information legislation attempts to strike a difficult balance. In the past, governments arbitrarily denied access to public documents, and the judiciary tended to endorse almost any Ministerial objection to access. [9] The state, of course, has a legitimate interest and, in fact, an obligation to protect information. However, every FOI statute in Canada is built upon the assumption that citizens have a *right* to access public documents. The BC *Freedom of Information and Protection of Personal Privacy Act*, for example, was founded on the principle of "giving the public a right of access to records," and the federal ATIA "provides a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public."[10] As Canada's Federal Court has ruled in a recent decision on the ATIA: "Parliament considers access to information in Canada and document retention as essential components of

Performance of Freedom of Information," 354.

7. A 1977 federal policy directive established the following principles for access to information: "the continued primacy of departments in the determination of access; the definition of access in terms of research purposes rather than a general right of access; the possibility of access to records less than thirty years old and the right of access to all records more than thirty years old with the exception of those declared exempt; and the responsibility of the Dominion Archivist for advising departments on matters respecting access to government records." Robert J. Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18, 1 (1984): 49.

8. Nova Scotia and New Brunswick had passed legislation in the 1970s dealing with basic access rights but did not pass comparable FOI legislation until the 1980s.

9. For a survey of the history and conceptual issues surrounding access to information, see Mike Larsen and Kevin Walby, "Introduction," in Larsen and Walby, eds., *Brokering Access*. 1–34.

10. Revised Statutes of British Columbia, 1996, *Freedom of Information and Protection of Privacy Act,* c.165; Revised Statutes of Canada, 1985, *Access to Information Act*, c.A-1.

citizens' right to government information."[11] Access to information, according to the Court, is integral to our democracy:

> 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.[12]

The significance of access to information legislation has also been affirmed by the Supreme Court of Canada, which has ruled that such laws should be considered quasi-constitutional.[13]

FOI law poses three fundamental challenges for historians: its effectiveness as a research tool; the conflict between FOI policies and the proper management of historical documents; and the danger that FOI might encourage public officials to conceal their work by refusing to put it in writing.[14] These issues are examined below.

Restricting Historical Research

IT IS WORTH CONSIDERING to what extent FOI legislation facilitates transparency. There are myriad ways that governments resist access to information. The most common are delays, excessive fees, narrowly interpreting requests, and censoring documents. When dealing with local officials or small jurisdictions, it is not uncommon for civil servants to block or ignore requests for information. There is also the possibility that civil servants might put less

11. Bronskill v Minister of Canadian Heritage [2011] FC 983.

12. Bronskill v Minister of Canadian Heritage [2011] FC 983.

13. Canada (Information Commissioner) v Canada (Minister of National Defence), 2011 SCC 25.

14. Flinn and Jones, "Introduction," 2. FOI laws can have a disproportionate effect on marginalized citizens. Steve Maynard, writing in 1991, and more recently Patrizia Gentile in 2010, have argued that the ATIA has made it more difficult to access lesbian/gay-related materials. Gentile even goes so far as to suggest that the "state deploys the Act to continue the regulation of queer lives within the archives." Although some may see FOI as a commitment to transparency, Gentile fears that it might transform the archives into a site of conflict between citizens and governments. FOI laws, in essence, create an opportunity for the state to regulate, limit, and protect the information it creates. In the case of gays and lesbians, Gentile argues that the state continues to construct them as subversive (and denies queers a place in Canadian history) by using federal FOI law to restrict access to RCMP records on queer organizations in the 1970s. In this way, archives become a site of conflict and regulation over a broad spectrum of marginalized peoples in Canada. Patrizia Gentile, "Resisted Access? National Security, the *Access to Information Act*, and Queer(Ing) Archives," *Archivaria* 68 (2009):141–158; Steve Maynard, "'The Burning, Wilful Evidence': Lesbian/Gay History and Archival Research," *Archivaria* 33 (1991/2): 195–201.

information in writing.[15] In BC, for example, the number of requests to the Premier's office that have been rejected due to lack of records has risen from 21 per cent in 2009 to 45 per cent in 2013.[16] Sometimes, governments or their agencies simply destroy records. This is especially common with local police or court records. Other obstacles include exemptions in provincial and federal FOI legislation. The most common exemptions in Canada include crown corporations or executive branch records; cabinet confidences and legal opinions; third-party business information; personal information; information shared by other governments; and any documents that might prove harmful to public safety, law enforcement, economic interests, or heritage sites.[17] Government officials are also inconsistent in their application of the legislation: one official might redact information on a document that another will release. Often researchers will have to navigate a maze of government departments, bureaucrats, and incomplete finding aids in an attempt to simply determine if the records exist.[18]

My own experience with FOI began in the 1990s with a study on the Gouzenko affair. In 1946, the RCMP interrogated dozens of suspected Soviet spies who were being held without due process. I sought access to RCMP files on the interrogations. My request was rejected, however, on the basis that it would reveal "information relating to investigative techniques or plans for specific lawful investigations" (section 16.b, ATIA). Two years later, I was writing about the history of human rights activism in Canada. The project included an analysis of federal funding for social movement organizations in the 1960s. To my dismay, I discovered that access to such records was also restricted. Over the years, I have also worked with FOI in provincial governments in Nova Scotia, Ontario, BC, and Alberta as well as in departments and agencies of the Canadian government to secure records on human rights commissions, social movements and the October Crisis. More recently, I completed a large FOI request for RCMP records on the Montreal Olympics. The request, for 332 files, was submitted in December 2008. The first documents arrived in May 2010 and were, unsurprisingly, extensively redacted. The appeals process, which

15. A group of archivists published a study in 2003 in which they argued that the ATIA did not have an impact on whether or not civil servants produced written documents. Still, this study, as the authors note, was limited and preliminary. Kerry Badgley, Margaret J. Dixon, and Paulette Dozois, "In Search of the Chill: Access to Information and Record-Keeping in the Government of Canada," *Archivaria* 55, 1 (2004): 1–19.

16. Gary Mason. "Canada's 'Oral' Government Scourge." *Globe and Mail*, 8 March 2013.

17. Exemptions are divided between mandatory and discretionary: the latter include any exemption based on the probability of causing harm. For a survey of FOI legislation across Canada, see Gary Dickson, "Access Regimes: Provincial Freedom of Information Law across Canada," in Larsen and Walby, eds., *Brokering Access*, 68–96.

18. Hannant and Gentile provide more specific examples and details on these obstacles: Hannant, "Access to Information and Historical Research: The Canadian Experience."; Gentile, "Resisted Access? National Security, the *Access to Information Act*, and Queer(Ing) Archives."

resulted in the release of additional records, was not completed until August 2014.

The problem, in essence, is that FOI laws do not specify what materials should be restricted. Instead, FOI legislation in Canada creates a blanket prohibition that places the burden on the agency holding the documents to determine whether or not to release the records.[19] This is a far more restrictive policy than simply releasing all non-classified records after 30 years. Restrictions on access to information, as Larry Hannant has observed, can at times border on the absurd: "In one of my requests, Canadian Security Intelligence Service (CSIS) refused to divulge sections of a document which showed that in 1918 the RCMP consulted with British intelligence agencies about the possibility that Bolshevik agitators were active in Canada. Would releasing this decades-old truism jeopardize Canada's security intelligence cooperation with other countries?"[20] Steve Hewitt has documented similarly arbitrary redactions, if not outright censorship, of RCMP documents released under the ATIA.[21] I have also experienced unreasonable justifications for restricting access to public information. Federal and provincial legislation provides enormous latitude to civil servants for rejecting requests under FOI legislation.

A common technique for restricting access is excessive fees. Most jurisdictions charge a fee to search for documents and then assess additional fees to vet those documents. To its credit, the federal government has not changed the five-dollar fee established in the original legislation.[22] Alberta also has a base fee, and there is no fee in Quebec and BC. Other jurisdictions usually provide one or two hours for free, and then charge $10–$25 per hour (it is free to request access to your own personal information). Policies also vary according to municipalities but, overall, fees tend to be highest with municipalities and lowest with the federal government.[23] When I sought access to files relating to a single criminal investigation from the 1980s, the Toronto Police Service assessed a fee of $2700 simply to search for files (not to disclose – that would have cost more). More recently, I was quoted $6000 for access

19. In the case of Royal Canadian Mounted Police and Canadian Security and Intelligence Service records, the LAC holds the documents, but CSIS determines what is released by the LAC.

20. Hannant, "Access to Information and Historical Research: The Canadian Experience," 136.

21. Hewitt, "'He Who Controls the Present, Controls the Past': The Canadian Security State's Imperfect Censorship under the *Access to Information Act*."

22. "A 2001 study under the Access to Information Review Task Force revealed that for just over a quarter of requests, five dollars was the only fee collected, and that for 85 per cent of requests, less than 25 dollars was payable and the fee was waived under the Treasury Board guidelines. The low fees, however, come not so much because releasing the records is deemed to be in the public interest, but because departments see fee waiver as a trade-off for not meeting the Act's time requirements." Hannant, "Access to Information and Historical Research: The Canadian Experience," 131.

23. Fred Vallance-Jones, "National Freedom of Information Audit 2012 (Vancouver: Newspapers Canada, 2013).

to the BC Human Rights Commission's files, which the Attorney General's office insisted was necessary to cover the cost of shipping and hiring someone to vet the files. Researchers, however, can request to have the costs waived if they can make a case in writing that their work is in the public interest (FOI legislation in the United States has an explicit waiver for academics based in that country).[24] Although the Toronto Police Service rejected my request for a waiver, the Attorney General in BC agreed to waive the fee. There is also the option of appealing to the privacy commissioner to waive a fee. There are broad public interest overrides in every province except New Brunswick (BC has the strongest provisions, and the federal government has the weakest).[25] In only five provinces, however, do commissioners have order-making powers: BC, Ontario, Alberta, Prince Edward Island, and Quebec. Commissions in other jurisdictions can only make recommendations.[26]

Delays are endemic to the FOI system, and they are an indirect form of restricting access to public documents. Every federal Information Commissioner since the ATIA became law has complained about systemic delays.[27] Under the ATIA, departments have the prerogative to extend the 30 day requirement for responding to requests. In fact, most jurisdictions have a 30 day policy, and governments routinely extend the deadline to the point that it has become virtually automatic. In a 2008–09 study, BC's privacy commissioner revealed that one-third of all access requests directed to the provincial government exceeded the 30 day limit.[28] For my request on documents relating to the Olympics, the official extension was 364 days. And yet more than two years later, I had not yet received a single document. In the end, it would take six years for CSIS and Library and Archives Canada (LAC) to complete my request.

24. A mandatory public interest override was adopted in British Columbia, Alberta, Prince Edward Island, and Newfoundland. A duty to assist applicants is integrated into FOI legislation in British Columbia, Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Northwest Territories, Nunavut, and Yukon. Dickson, "Access Regimes: Provincial Freedom of Information Law across Canada," 71.

25. Stanley L. Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context* (Vancouer: Canadian Newspaper Association, 2008), chapter 5. On costs associated with requests to federal agencies, see Renu Mandhane, "Access to information now beyond the reach of most Canadians," *Globe and Mail*, 13 November 2014.

26. Larsen and Walby, "Introduction," 10–14.

27. "The problem is surely rooted in a combination of bureaucratic inertia and resistance, overly complicated processes for handling requests deemed to be sensitive, under-resourcing of ATIA offices, less-than-ideal recordkeeping practices, political interference with files, and, at times, increasingly complex requests that simply take longer to process." Fred Vallance-Jones, "Access, Administration, and Democratic Intent," in Larsen and Walby, eds., *Brokering Access*, 294.

28. Dickson, "Access Regimes: Provincial Freedom of Information Law across Canada," 85.

Filing FOI requests requires not only determination, but a strong grasp of the law. In the case of the BC Attorney General's office, none of the staff at the time had ever received a request for historical research. It took two years of patiently working in cooperation with the department to produce a research agreement that would allow them to release the documents. But at least they were willing to adhere to the spirit of the law. The federal Human Rights Commission, on the other hand, simply refuses to release their records. There is no inherent reason for restricting access to these records, which can be as innocuous as briefing papers and research reports. After all, historians can visit most provinces to review old case files and other historical records relating to the provincial Human Rights Commission. The federal commission, on the other hand, has arbitrarily decided that providing access to their files violates privacy. The only way to gain access to these records is to convince the staff that the research is – in their opinion – sufficiently worthwhile that they will commit time to vetting (i.e., redacting) the files. This is not a requirement under the law. The ATIA allows a government agency to release records for research purposes (section 8, *Privacy Act*) if it is accompanied by a written agreement to not disclose private information.

My experience with government agencies in BC is that they will be more amenable to releasing records if there is a written agreement to protect individuals' privacy. Most government documents produced in BC, including those dating back more than 50 years, are restricted by law. For example, almost anything produced by the Minister of Labour in the 1970s, including public speeches, is restricted. At the BC Archives, the staff will first review the files and then remove documents that contain legal advice from the past 30 years (an explicit exemption in the statute). The review can cause months of delay. Then the files are released after a research agreement is completed. The agreement is essentially a contract between the researcher and the government. It commits the former to not disclosing personal information found within the records. There are other stipulations, such as promising to destroy scanned or copied documents after a few years or safely storing the material. The use of a research agreement is far more efficient than reviewing and redacting every document. Clients must make a case that their research is in the public interest, but the interpretation is generous.

At the same time, BC is a perfect example of regulations gone awry. Using cameras to digitize archival records raises unique challenges for archives. In 2007, the BC Archives began enforcing an obscure section of the provincial FOI statute that requires users to permit civil servants to "audit" (inspect) their home and offices, including their computers. This is remarkably invasive for documents that were once in the public domain. I was the first person audited under the new system. The audit, carried out at the University of Victoria, is typical of what researchers should expect. The Manager for Corporate Information, Privacy and Records at the BC Archives arrived at the university with an assistant. The former proceeded to explain the process and the

reasons for the audit and then asked for a demonstration of how research materials are stored. Afterwards, his assistant reviewed how files were stored on my computer and asked questions about the computer network and anti-virus software. The entire process took approximately 45 minutes. At least two audits per year have been conducted in Victoria or Vancouver in a similar manner since 2007.[29]

The scope of the audit is extremely broad. A reporter covering the first audit described the situation as follows:

> British Columbia researchers who want to work with "sensitive" archival records -including writers, journalists and university professors - must now agree to random security checks of personal computers, offices and even their homes by the government. What defines a sensitive document? It contains an individual's name, address or telephone number; race, national or ethnic origin, colour or religious or political beliefs or associations; age, sex, sexual orientation, marital or family status; an identifying number, symbol or other particular assigned; fingerprints, blood type or inheritable characteristics; health care history including a physical or mental disability; educational, financial, criminal or employment history; anyone else's opinions about the individual; the individual's opinions, except if they are about someone else. Using this definition, the telephone book might qualify. A Bible with family records written on the flyleaf might.[30]

The audits are a shocking invasion of privacy that can only act to the detriment of writing BC's history. An individual who refuses to provide the auditors with access to their office, or is in violation of any aspect of the research agreement, will have their privileges revoked at the BC Archives. And the policy does not even pass basic due process. Only people in Vancouver or Victoria are subject to arbitrary inspections because the government will not pay staff to travel anywhere else. The policy of auditing researchers' homes also raises an important privacy issue: Does the process of auditing citizens' homes and offices sufficiently ensure researchers' obligations under the agreement to justify the invasion of privacy? After all, the inspection accomplishes nothing except to confirm that the client owns a locked cabinet and a computer with anti-virus software. The archives staff cannot ensure the client's compliance with the agreement after they leave. Moreover, the auditors must rely on the researcher to respond truthfully about their records and how they are stored. Ultimately, irrespective of the auditing process, the archives will continue to depend on the researchers' goodwill to comply with the agreement.

Perhaps the audit serves, not to police researchers, but to ensure that they simply have the capability of following the regulations under the agreement or to protect the government from some unforeseen liability? Fundamentally, then, the issue at stake is whether this objective outweighs the potential dangers of empowering government employees to require individuals to permit an audit of their offices. Graduate students are rarely given offices and

29. Stephen Hume. "Draconian Rules on Archives Use Cast a Chill on Researchers." *Vancouver Sun*, 28 November 2007.

30. Hume. "Draconian Rules on Archives."

thus must allow the archives' staff to enter their homes. Undoubtedly, many professional researchers (and journalists) who work from home suffer from a similar disadvantage. Since the BC Archives only has the resources to conduct audits in Vancouver and Victoria, researchers who live outside these two cities enjoy an unjust immunity from the audit. The auditing process is therefore not only invasive, but it creates two classes of researchers. People who fear home audits will have fewer avenues of research available to them if they live in Victoria or Vancouver. And will the archives' staff be entering the offices of the *Vancouver Sun* or the *Victoria Times-Colonist* to ensure reporters' compliance with their policies? What if a member of the archives' staff enters someone's home and observes a crime (e.g., illegal software, copyright violations, stolen property)? Will the staff be directed to report their observations to the police? The agreement also stipulates how researchers will record data in their personal notes. Scholars may have to self-censor their work if they wish to keep their notes private.

Some researchers will be confused by the technical requirements of securing a 256-bit FIPS-compliant hardware encryption and password or biometric access security (as well as anti-malware/spyware programs). The BC Archives does not have a clear appeal process for "failed" audits or regulating how employees determine whom to audit. Instead of facilitating researchers' compliance with the agreement, the auditing process may have the adverse effect of encouraging researchers to deceive the archives' staff to avoid allowing strangers into their homes.

There are better strategies available to the BC Archives. For instance, the archives could establish a digital database for researchers to store all electronic data. Instead of keeping their digital documents at home – a key issue with the proliferation of digital cameras as an essential tool for archival research – researchers could keep them in a digitally secured "vault" that they can access through the Internet with a secure password (i.e., cloud computing). In addition to facilitating access to research materials, such a system would enable the creation of a new digital archive. The archives could also require researchers to meet with the archives' staff at the archives to discuss storage security practices to ensure their compliance with the agreement. These and other methods would create a far better balance between the interests of the government and its citizens.

Strategies for Access

EVERY CANADIAN JURISDICTION has a privacy commissioner (or an equivalent) to investigate complaints.[31] As a matter of course, you should always submit an appeal to the privacy commissioner. Sometimes these offices can

31. Nova Scotia has reviewing officers. Manitoba's ombudsman has an access division, as well as a privacy adjudicator. The other provinces have an information commissioner.

be extremely helpful: many historians have successfully worked with privacy commissioners to have additional documents released or to reveal redacted sections. My own experience has been much less positive. In 2010, I submitted a complaint to the federal Information Commissioner because LAC and CSIS had delayed for more than two years in releasing documents relating to the Montreal Olympics (the original extension of 364 days had expired a year earlier). Ironically, the Information Commissioner delayed for more than a year before rejecting my appeal.[32] If the privacy commissioner's office rejects an appeal, then researchers' only recourse is to the courts. The resources necessary to pursue a court challenge are beyond most academics.[33]

A useful technique for avoiding delays and costs associated with a request under the ATIA is to submit a larger number of small requests, rather than a single request for numerous files. If, for instance, the request is more than ten files, do not submit the entire request in one application. The cost and delays permitted under federal legislation correlate to the size of the request. Instead of submitting one large request, divide the request into a series of small applications of no more than eight or ten files each. It is also important to resist pressure from staff to narrow your request. Since you do not have access to restricted finding aids or the collection, there is no way to know if you are missing a tangential but important document. And it is easier for officials to avoid processing documents if you concede to how they want to interpret your application. In any event, the nature of historical research requires us to have access to as many documents as possible, and narrowing the request defeats our purpose. In my case, I asked for "all RCMP and CSIS records relating to the Montreal Olympics."

The process is, in many ways, akin to mediation. Part of the process is negotiating with the access personnel to clarify and manage the request. Officers responsible for reviewing your application can be helpful or obstructive depending on the individual or the institution.[34] To ensure the best possible outcome, it is essential that you complete extensive background research on the topic before you submit a request (rather than beginning a project with

32. A few provinces have a statutory limit restricting delays on appeals.

33. "…limitations to using litigation as a data-gathering tool can include the costs, the commitment of time, and the delays involved. There is also a professionalization barrier. Unless individuals have the connections, training, education, and so on needed to research, write, and file a claim, it can be very onerous." However, the authors were able to demonstrate that litigation was far more effective than a submission under the ATIA for access to information. Yavar Hameed and Jeffrey Monaghan, "Accessing Dirty Data: Methodological Strategies for Social Problems Research," in Larsen and Walby, eds., *Brokering Access*, 151.

34. Some journalists routinely request copies of the ATIP Flow log, which gives them access to a list of activities relating to the access request. This is one strategy for policing how the request is handled. For more information on the ATIP Flow Log, as well as discussion of political interference with the ATIA, see Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada."

an FOI request). There will be pressure to narrowly construe your submission, and you need to ensure that you address all possible avenues of inquiry. The more knowledgeable you are about the topic, the fewer risks you are taking in narrowing your request.

When the records do arrive, they are often heavily redacted. For my Olympics project, at least 20 per cent of the documents were withheld, and many more were filled with redactions. Unfortunately, the privacy commissioner rejected all my appeals. The situation, however, changed in 2012. A reporter working with the Canadian Press, Jim Bronskill, had submitted a request under the ATIA in 2005 for RCMP records relating to Tommy Douglas. In 2007, CSIS released 400 pages, which was barely 30 per cent of the file. So Bronskill sued CSIS and LAC in court.[35] During the trial, Bronskill's lawyer cross-examined CSIS' Access to Information and Privacy Coordinator. It is evident from the deposition that there are no explicit guidelines for assessing potential harm when releasing documents. Many of the decisions are, in fact, quite arbitrary. When Nicole Jalbert, the CSIS Coordinator, was asked if there were any guidelines, she explained that "you don't have to be an intelligence officer working in that milieu to know what is sensitive and what isn't … judgment will take an individual very, very far and the more you're exposed to the milieu, the more you understand how it works, it's a very, very simple – very simple job to understand. It's a very simple world to understand in terms of the injuries, the complexities and the perils that are at play." The case highlighted widespread inconsistencies in how the LAC and CSIS determined whether or not records should be released, as well as an institutional bias against releasing public documents.

Bronskill's lawsuit was, to a degree, successful. It did not result in the release of many new documents, which was the primary objective of the suit. Still, a Federal Court judge ruled that LAC and CSIS violated the ATIA. In his ruling, Judge Simon Noel challenged many of the underlying policies that have thus far guided how CSIS and LAC determine what records to release. It is the most important legal ruling in Canada for interpreting how government agencies should respond to requests under the ATIA for historical documents. For this reason, the decision has the potential to have serious ramifications for FOI in Canada. At the very least, the ruling provides historians with a new tool for negotiating with FOI staff. Historians should be familiar with the decision, as well as the principles articulated in the ruling. Some of Judge Noel's key points include:

35. No author. "RCMP spied on Tommy Douglas, files reveal." CBC News, 18 December 2006; Joan Bryden. "Spy agency fights release of Tommy Douglas files." *Toronto Star*, 10 February 2010; Joan Bryden. "Tommy Douglas files not old enough for release: CSIS." Toronto Star, 10 March 2010; Steve Rennie. "Ottawa sued over censorship of Tommy Douglas dossier." Toronto Star, 13 October 2009.

- Inconsistent standards threaten to undermine the law, and are a legitimate basis for forcing disclosure of censored records.[36]
- LAC demonstrated excessive deference to CSIS. LAC staff failed to use their statutory discretion in applying the ATIA. The Information Commission also showed undue deference to CSIS.[37]
- It is reasonable for government agencies to withhold information that might reveal the name of human sources.[38]
- Information should not be withheld because it emanates from a human source unless there is a reasonable basis for determining that releasing the document would cause harm.[39]
- LAC has employed an overbroad definition of the term "prevention and detection of subversive or hostile action."[40]

36. "It would be highly illogical, and run counter to the Act, if the head of a government institution would apply inconsistent standards between different documents, more so if the inconsistencies would be in the very same ATI request. Where the decision-maker must make a determination of the injury caused by disclosure, inconsistent redactions and assessments of the injury resulting from disclosure may constitute grounds for additional disclosure ordered by the Court."

37. "Initially, the reliance by LAC on a general 'umbrella rationale' given by CSIS is clearly indicative of an extensive reliance on CSIS' assessment of the records. … In addition, the evidence on the record, both public and confidential, does not establish that the Office of the Information Commissioner duly acquitted itself of its duties, namely in regards to discretion. … Pertaining to the first review of the documentation, these concerns were serious and there was nothing to suggest that discretion was considered in any respect. For example, some facts lead to the conclusion that LAC forwent the section 15 analysis due to deference to CSIS during the consultations. Further, the short amount of time taken by the LAC analyst (less than a week) is indicative that no reasonable assessment of discretion was made. … Even more, and as stated above, the Office of the Information Commissioner did not even undertake the analysis of section 19 of the Act, deeming that all the records were properly withheld during the course of the first review of the documentation. In keeping with the principle of independent review in the Act, it is clear that the Commissioner has a determinative role to play. The Commissioner must not be dazzled by the claims made based on national security as a thorough and independent review must be undertaken with a critical mind, in keeping with the legislative objectives at play."

38. "This kind of information is reasonably withheld from disclosure. … Human sources in intelligence matters should benefit from similar protection as police informers benefit under the current state of the law. … The Court is of a mind that the identity of human sources must be protected and that it is well established that they are essential to CSIS' operations."

39. "LAC did release information pertaining to human sources, but did not do so in a consistent manner. … A human source reasonably expects that the information provided will be used. It can be said that the 'use' of this information also includes ATI requests pertaining to past investigations, so long as the source is not identifiable and that there is no reasonable expectation of probable harm in disclosure."

40. "Thus, there is no reasonable ground for injury preventing the release of these documents."

- Records should not be withheld solely on the basis that they might reveal the name of an RCMP agent who is still alive. The agency must prove the probability for harm.[41]
- Government agencies should err on the side of releasing documents if it is unclear whether or not records fall within the scope of the request. ATIA is not to be used in such a way as to prevent embarrassments or to hide illegal acts.[42]
- Government agencies should not use their discretion under the ATIA to withhold documents on the basis that they constitute "incidental reporting."[43]
- Subject to the court's limits on human sources and technical intercepts, documents containing "investigator comments" should be made public unless there is a clear case of causing injury.[44]

41. "LAC relied upon an umbrella rationale whereby the assessment made was one that involved the date of the report and the rank of the officer, so as to ensure that disclosure of reports from officers that could still be alive would not be released. … the redactions made in regards to the names of RCMP officers are completely inconsistent in regards to a section 15(1) injury assessment. … The names of all the RCMP officers must be disclosed save for those involved in covert operations as infiltrators or sources."

42. "It should also be noted that as the fact that a document is not directly linked to an ATI request does not necessarily constitute grounds for refusal of disclosure, it is not for the decision-maker to exclude what he or she determines as not relevant to the access request, so long as these documents constitute the record sought. … Justice Denault has stated clearly in *X v Canada* [1972] 1 CF 77, at para 44, that 'the fact that information is not directly related to an access request is not a basis for exemption under the Act.' As such, separating portions of a dossier under the premise that they are not related is an error in law. LAC, and all government institutions, must consider the documents sought under the Act as they are. They must not attempt to portion them off into categories based on relevance. Institutions are mandated under the Act to evaluate both whether an exemption exists, and if it is class-based or injury-based exemption. They must then consider their discretion to release the documents, despite the exemption. Nowhere in this analysis is 'relevance' a factor."

43. "For example, if T.C. Douglas was mentioned in passing at a Communist Party of Canada meeting, and this is frequently the case in the records, it would be illogical for LAC to block access to the records on the basis that the ATI request did not ask for anything pertaining to the Communist Party of Canada. In that case, an applicant would be frustrated in his or her requests for information and would have to multiply access requests in order to get the full picture. This cannot be the intent and purpose of the Act. … In sum, 'incidental reporting' constitutes relevant information on a person and his or her place in History."

44. "By way of example, during the course of the application and after the second review, a news article was referred to during the public hearing whereby a retired RCMP Officer was contacted for his comments in regards to T.C. Douglas. Surely, this cannot be the injury that LAC and CSIS refer to in regards to the opinions of RCMP officers."

- Discretion should not be used for the purpose of withholding records but, rather, should be based on a presumption of disclosure.[45]
- The historical value of the document, especially when it is held with the LAC, is a factor to be considered when exercising discretion to release records.[46]

Historians should be familiar with these standards, especially when writing letters of appeal to information commissioners.[47] The ruling is a useful resource

45. "There are many examples of documents where, despite a considerable historical interest … they are still withheld, despite the fact that severance could be undertaken to protect the information which requires it, such as the identity of human sources and current operational interests. … the Court does not find that discretion was exercised. … If discretion was found to have been exercised, it was not done in a reasonable manner. … the exercise of discretion for the disclosure of information, are to be taken seriously, with a presumption in favour of disclosure when exercising discretion. … the prejudice alleged in disclosure must not be abstract or speculative. … No clear policy has been submitted in regards to the way LAC and CSIS assess historical records under the Act and how discretion is to be considered by decision-makers. As for the exercise of discretion, the new 'policy' in regards to 'targets of a transitory nature' is one that more adequately describes the process under the injury-assessment than the exercise of discretion. As for the case at bar, the following factors are relevant in the assessment of whether discretion should be exercised. Firstly, the principles and objectives of the Act and of the *Library and Archives of Canada Act* are in and of themselves factors to be considered by the decision-maker. … [Secondly] the public's right to know is always at the heart of any ATI request, not least because of the Act's quasi-constitutional nature. Further to this argument, the Act itself cannot be used to hide embarrassments or illegal acts (see para 131 of these reasons), thereby recognizing an inherent public interest in the application of the Act. … [Thirdly] the historical value of a document, more so when LAC is the record-holder, is a factor to be considered in the exercise of discretion. In line with the historical value of a document is the fact that the exercise of discretion shall consider the passage of time between the inception of the document and the ATI request. … if injury is present, yet at a lower end of the spectrum, the passage of time may be an important factor. … In the case at bar, the prior public disclosure often created a context where there was no reasonable expectation of probable harm in disclosure. Where there was, and it is worthy of repeating that the evidence is insufficient in many respect to establish this, the prior public disclosure of information is clearly a factor militating for disclosure, given the passage of time."

46. "LAC has, or should have, the necessary resources to assess this [historical value], in keeping with its important mandate within our democracy. Historians are the experts in this type of assessment, and surely, their help can be summoned to help any institution in its assessment of whether documents are historically relevant. … To hold on to them, without any public access, goes against LAC's pragmatic mandate described above."

47. Justice Noel was especially critical of LAC and CSIS for how they handled the complaint by, among other things, failing to divulge the full scope of the file. The judge also took issue with government officials' attempts during litigation to overload the court with excessive documentation, and expecting the court to vet the records. "It is an access to *information* request that was addressed to LAC, not a literal access to *records* request. Surely, reasonable inferences must be made by LAC to address whether it is meaningfully responding to the ATI request. … Evidently, there are concerns as to not creating a context where requestors under the Act would be able to make broad, imprecise ATI requests. However, these reasons should not be interpreted as condoning this and encouraging overbroad and imprecise ATI requests.

for historians navigating access regimes in Canada and, in time, might encourage more openness among officials in releasing historical records. Judge Noel also articulated several important principles that should guide any future interpretation of the ATIA (the Federal Court of Appeal upheld the ruling in 2012).[48] It is worth quoting those principles here in some detail:

> History and Canadian democracy require that historical facts, like the monitoring of legitimate political activities, be known. Refusing disclosure under the Act of these historical events is unacceptable in most circumstances … Furthermore, the Court finds that the disclosure of these targets is in fact positive: Canadians learn from this disclosure and it informs the historical context in which our country's intelligence community operated in and in which decisions were taken…. Perhaps if Canada proceeded, as other democracies do, with a declassification process of dated records, many of these issues would arise in a more limited context. This would also make it easier for the Respondent to meet its evidentiary burden of providing specific and detailed evidence for documents or portions thereof still withheld despite declassification. It would also be less taxing for CSIS's resources, for LAC's resources, and indeed, for the Court's as well.
>
> Firstly, it can be said that the assessment of T.C. Douglas' person, affiliations and career is one for History and Canadians to judge. Surely, LAC and CSIS cannot choose to pre-empt this judgment and substituting it with one of their own. Citizens and professionals will study the records, discuss them and ultimately, conflicting opinions may arise. But this whole exercise is positive in and of itself and should not be precluded by LAC. In fact, LAC's mandate not only enables it, but makes it responsible, for the diffusion of such historical documents. As discussed above, sole custodianship by LAC of government records is simply not enough: more should be done to *facilitate* access and be more responsive to the legislative mandate conferred by the *Library and Archives of Canada Act*. … Furthermore, this case highlights the importance of transferring information to the public domain for the benefit of present and future Canadians, as well as our collective knowledge and memory as a country.[49]

This case had an immediate impact on my own ATIA request for RCMP records on the Olympics. The Information Commissioner's office reviewed the redacted records (again) and applied these new standards. As a result, I received hundreds of additional documents. After reviewing the newly released records, I determined that the redacted content shared two common qualities: First, many of the redactions were clearly arbitrary – there was little difference in the content of the redacted sections and content that had been released in the original request. Secondly, a great deal of the redacted material was

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Simply, in this case, the request was sufficiently clear and the Court is not satisfied that it has been meaningfully addressed." Bronskill v Minister of Canadian Heritage [2011] FC 983.

48. The Federal Court, in fact, allowed the government's appeal. However, the Federal Court upheld all of Judge Noel's decision with the exception of one minor technical issue. In judicial parlance, when even a single issue is reversed on appeal, the appeal is considered successful even if most of the original ruling still stands.

49. "It is clear that this decision should in no way be interpreted as downplaying concerns about the identification of human sources or important national security concerns such as current operational interests. Rather, this case addresses how the passage of time can assuage national security concerns."

surprisingly mundane. I had expected to find documents dealing with threat assessments or surveillance targets in Canada – but these documents are still restricted. Rather, they released documents that included training manuals for RCMP personnel, lists of equipment to be ordered for the Olympics, budget estimates and memorandum requesting additional staff to be hired. One line that had been redacted in the original request was a memorandum indicating that $260,000 had been allocated to the Security Service for the Olympics. For whatever reason, CSIS and LAC had felt compelled to refuse access to this and similar information, even though the ATIA provides no justification for such a redaction. Moreover, that amount had been listed anyway in other budget documents that had been previously released.

Conclusion: Recommendations

HISTORIANS HAVE STRUGGLED with FOI legislation since its inception. Writing in 1988, Gregory S. Kealey explained that his attempts to use the legislation in the early 1980s to "gain access to CSIS records and appeals to the Information Commissioner against exemptions have proven futile."[50] Kealey identified many of the same problems that Judge Noel noted in his recent ruling: an institutional culture of secrecy within the RCMP; excessive deference on the part of the LAC towards the police; extensive delays; and a weak appeals process. These problems continue today; if anything, they have intensified. The percentage of cases over the past decade in which the federal government releases all the information requested has dropped from 40 per cent to 16 per cent. The numbers of requests that are completed within the mandatory 30 days have also fallen, from 70 per cent to 56 per cent.[51] Canada is also falling behind other nations. A 2008 study sponsored by the Canadian Newspaper Association on the FOI system concluded that the country's laws rate poorly when compared with other western democratic countries.[52] Three years later, a study of FOI laws in Canada, Australia, New Zealand, Ireland, and the United Kingdom came to the same conclusion: Canada ranked last because of a "combination of low use, low political support and a weak Information Commissioner."[53] According to the latter study, the proportion of requests granted was much higher in other countries, and there were a higher proportion of appeals in Canada, which suggests dissatisfaction with the system. The ATIA is much more restrictive than many of its counterparts in other countries, including broad exemptions

50. Gregory S. Kealey, "The Royal Canadian Mounted Police. The Canadian Security Intelligence Service, the Public Archives of Canada, and Access to Information: A Curious Tale," *Labour Le Travail* 21 (1988): 199.

51. Steven Chase. "Can Access to Information be Fixed?" *Globe and Mail*, 14 January 2011.

52. Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context.*

53. Hazell and Worthy, "Assessing the Performance of Freedom of Information," 358.

for internal audits, policy advice, cabinet discussions as well as restrictions on the Information Commissioner's right to review documents.[54]

The situation is not as bleak as it may seem. Canada is still a world leader in the sense that the federal and provincial governments all have FOI legislation as well as an infrastructure for processing requests. Each statute recognizes access as a public right. Few people in this country would challenge the validity of the right to information. Rather, what is needed is legal reform and changes to institutional practices to fix the current system:

Automatic Release (30 year rule): FOI legislation should dictate the automatic release of documents after 30 years, with explicit exemptions for certain types of documents (e.g. military). In addition, government agencies should not be able to unilaterally deny researchers access, especially when the probability for causing injury is low. State agencies have an overwhelming advantage, not only because they possess the records, but because they have access to taxpayer-funded legal counsel to resist FOI applications.

Delays: The legislation should impose strict limits on extending delays in order to discourage automatic extensions of 364 days or more. In addition, there should be provisions for civil penalties or disciplinary measures for civil servants who violate the law (e.g., failing to complete the request in the required time period). [55]

Waiving fees: The current practice of waiving fees is opaque and subjective. Each jurisdiction should provide written guidelines for determining whether or not to waive fees.

Application Process: Most jurisdictions continue to depend on paper submissions and written checks for payment. Online applications and payments would make the system more accessible.

Legislative reform: There should be periodic reviews of the legislation (the current federal legislation was passed in 1985).

54. For an international comparative study of the ATIA, see Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*.

55. Several countries, including Ireland and the United Kingdom, have penalties for obstructing FOI requests. Canada does not. Instead, the ATIA proscribes penalties for destroying records or obstructing the information commissioner. The penalties range from $1000 fine to a $10,000 fine and two years in jail.

Privacy and Information Commissioners: Information commissioners should be given more power to order the release of records, as well as additional funding and staff to fulfill their statutory mandate.[56]

Library and Archives Canada: The LAC could act as a hub for sharing digital documents. The cost is low, and it would encourage collaboration (not competition) between researchers and archivists. During the five years since I submitted my first access to information request in 2008 for records relating to the Montreal Olympics, the LAC shifted away from paper documents towards electronic records. Rather than sending researchers a hardcopy with redactions, we now receive a CD with PDF files. It is unclear what happens to these electronic files within the LAC, but the current policy is to treat each new request under the ATIA as if there were no precedents. In other words, instead of the simple expedient of sharing these files with other researchers, the LAC restarts the process. And the LAC no longer maintains up to date lists of RCMP/CSIS files released through FOI. This is an incredibly inefficient system that fails to take advantage of years of work and energy to release these documents. The LAC could easily provide access on its website to every electronic document released through ATIA.

Record Sharing: LAC should also facilitate the sharing of electronic records, especially those scanned by users with digital cameras during visits to the archives (for non-restricted records). Such a policy could, within a few years, revolutionize online archival resources by facilitating sharing among citizens. It would not solve the problems associate with Canada's FOI regime, but it would at least demonstrate a commitment to collaboration and transparency.

Academic training: Historians would benefit from a greater focus on training graduate students to use FOI legislation. It should be a component of all history graduate programs in Canada.

In addition to these specific reforms, we need to encourage greater public debate around transparency and the public's rights to information. John Grace, the federal Information Commissioner in the 1990s, described the problem at that time as a "culture of secrecy" in government.[57] The BC and the federal information commissioners have both reiterated concerns about government

56. Information and privacy commissioners have always struggled with lack of funding and staff. The federal Information Commissioner's budget, for example, was cut by 9 per cent between 2009 and 2014, while requests increased 31 per cent in 2013–14 alone. Editorial, "Harper government cutbacks hurting access to info," *Globe and Mail*, 10 November 2014.

57. Quoted in Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada," 58.

secrecy in recent years.[58] The 9/11 attacks exacerbated this problem. Canada's *Anti-Terrorism Act* expanded the power of the state to restrict information and limit access to state documents.[59] Census data and medical records, among others, are also becoming less accessible.[60] As Erika Dyck has argued, governments are exaggerating threats to personal privacy as part of this trend towards greater secrecy. The federal government introduced the Pan-Canadian Health Information Privacy and Confidentiality Framework in 2005, followed soon thereafter with similar provisions in health and privacy legislation. These policies are designed to protect patients' personal information without restricting health service providers' access to essential data. Yet these policies prevent historians from accessing medical records from the past. Access is often contingent upon securing permission from each patient named in the document. The only alternative is for staff to review every document in order to redact personal information, which is beyond the resources of most archives and government departments. Tommy Douglas, again, figures prominently in this debate. Despite having passed legislation that all of his papers should be available after his death, the *Saskatchewan Health Information and Privacy Act* restricts access to his records. The unnecessary burdens imposed by health and privacy legislation, combined with dwindling resources for archives, creates impossible delays for historians. As Dyck argues, "the difficulties associated with accessing medical information poses a threat to the continued efforts of social historians working within health and medical history who seek to balance the published accounts with even whispers from the patient's voices."[61]

Eric Sager has made a similar argument about census records.[62] The federal government has exaggerated the threat to personal privacy to justify, among other things, eliminating the mandatory long-form census. Statistics Canada goes to extraordinary lengths to protect private information collected in the census. Individual-level information, including names, is released only after a

58. Gary Mason. "Canada's 'Oral' Government Scourge." *Globe and Mail*, 8 March 2013.

59. Jennifer Wispinsky, *The USA Patriot Act and Canada's Anti-Terrorism Act* (Ottawa: Parliamentary Information and Research Service, 2006). "The most important amendment in terms of limiting public access rights allowed a minister to issue a certificate vetoing the release of a record that would otherwise qualify for release under the ATIA. The ministerial override could not be challenged by the Information Commissioner … Nor was there any avenue for appeal to the courts." Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada," 62.

60. Eric Sager, "Canada's Census: A Short History of the Long Form" (paper presented at the Canadian Historical Association, Fredericton, New Brunswick, 2011); Erika Dyck, "Searching for the Voices of Patients: Medical Records, Health Information Laws and Challenges/Opportunities for the History of Medicine" (paper presented at the Canadian Historical Association, Fredericton, New Brunswick, 2011).

61. Dyck, "Searching for the Voices of Patients."

62. Sager, "Canada's Census: A Short History of the Long Form."

delay of 92 years and for censuses after 2005 only if the respondent consents to such release. All other information is released in aggregated or tabular form, or in public use files available in Research Data Centres (and in the files for recent censuses names and other personal identifiers are suppressed). Even within Statistic Canada itself, access to personal information is restricted: census forms returned electronically are subject to double encryption; the computers that process census information are not networked externally and so are not subject to hacking; employees have access to personal information in limited and tightly controlled circumstances; government departments and agencies have no access to the individual-level information. According to Sager, these developments are a product of changing public understandings of privacy. Ironically, we learned in 2013 that the federal government, like its American and British counterparts, is collecting vast amounts of "meta-data" on its citizens. Unlike historical documents or the census, these practices are genuine infringements on citizens' right to privacy.

The debate over FOI is also part of a fundamental realignment in the nature of archival work and archives' relationship with researchers. Since the 1970s, there has been a profound shift in archivists' professional training. In the past, many were trained as historians and encouraged to publish and work in cooperation with historical researchers. As Tom Nesmith argues, Canada probably retained the historian-as-archivist model longer than most western countries. In the first half of the 20th century, the "archivists in Canada's leading archives saw themselves largely as professional historians who worked in archives."[63] In recent years, however, the focus has been on records management. Archival theory has replaced the production of historical knowledge.[64] While this has the potential to positively transform the management of archives to the

63. Tom Nesmith, "What's History Got to Do with It?: Reconsidering the Place of Historical Knowledge in Archival Work," *Archivaria* 57, 1 (2004): 7.

64. Nesmith argues that there is a need for archivists to focus more on the production of historical knowledge: "At that time [1970s], when the Canadian archival profession distanced itself from the historical profession, and even from an identity as a type of historical professional, society's historical information needs were much narrower and focussed on the needs of professional historians … Given the heavy pressures in other areas of archival administration, it seemed reasonable to orient professional identity and priorities in new administrative, technical, standard setting, and contemporary directions, and toward cultivating new users who were not academic historians. But society's historical information needs have been radically transformed since the 1970s, in volume, variety, and complexity, and archivists need to respond to that with the new ways of employing historical information in their work that have been discussed above. Indeed, archivists cannot advance the administrative, technical, and contemporary aspects of the profession's agenda without doing so. Without the intellectual substance and direction this gives to the overriding historical purpose of archival work – of making information from the past available now and in the future for an expanding array of uses – efforts to administer archives will be seriously hobbled." Nesmith, "What's History Got to Do with It?" 23. See also Patricia Demers, *The Future Now: Canada's Libraries, Archives, and Public Memory* (Ottawa: Royal Society of Canada, 2014), 166–72.

benefit of historical research, it might also engender conflicting attitudes towards access to information. The Manager for Corporation Information and Records for the BC Archives, for example, was insistent during my audit that access was a privilege, not a right – even though the provincial FOI statute explicitly says the opposite in its preamble.[65] What this example highlights is the need for greater dialogue among practicing historians and archivists. A report prepared by the Royal Society of Canada in 2014 on the future of archives in Canada found that "practitioners regret that faculty members seem disengaged from professional conferences, workshops and institutes."[66] Both archivists and researchers have a responsibility to further this dialogue.

Archives have an important role to play in the life of a nation. Archivists and professional records managers are not obstacles to historical research but, rather, an integral part of our profession. In most cases, they are as frustrated with the system as their clients. They are struggling to adapt to extraordinarily difficult conditions that include budget cuts and legitimate concerns surrounding privacy. The Royal Society of Canada's report found that, among staff at the LAC, "morale is at an absolute low, with some of the morale deficit attributed to human resource issues."[67] LAC alone will see its budget cut by $9.6 million between 2013 and 2016, which has already resulted in extensive layoffs, reduced hours and discontinuing the inter-library program.[68] Unsurprisingly, many archivists and records managers are often overwhelmed with the amount of material they have to retain, organize, and cull with increasingly fewer resources. New technologies, however, provide a vision for the future. Digital cameras are inexpensive and incredibly efficient. A researcher with a Wi-Fi enabled point-and-shoot camera, cell phone (or tablet), tripod, and OCR software can digitize hundreds of documents into high quality text-readable records in a few hours. Archives are ideally situated to use cloud computing technologies to facilitate sharing among researchers, which would transform access to documents in Canada at minimal cost to the government.[69] Archivists, however, remain constrained by the legislation and a risk-averse political leadership. The federal statute, for instance, pre-dates the Internet age. Legislative reform is an essential precursor to ensuring that records are available to historians.

65. Hume, "Draconian Rules on Archives." Gary Mitchell. "Research Agreements Required by Law," *Vancouver Sun*, 4 December 2007.

66. Demers, *The Future Now: Canada's Libraries, Archives, and Public Memory*, 169.

67. Demers, *The Future Now*, 42.

68. No author, "National museums, Canada Council spared cuts." CBC News, 29 March 2012.

69. A report published by an expert panel of the Royal Society of Canada in November 2014 on the future of archives and libraries offered a similar recommendation. The report called for all levels of government to invest in digital infrastructure; a national digitization program; and to facilitate collaboration through cloud storage. Demers, *The Future Now: Canada's Libraries, Archives, and Public Memory*, 12.

The following is a copy of the Research Agreement the author produced in cooperation with the British Columbia Ministry of the Attorney General. This is a standard research agreement that could be used in future applications. A PDF version of this agreement may be downloaded at Dominique Clément, Canada's Human Rights History*: http://www.HistoryOfRights.ca/FOI.*

MINISTRY OF ATTORNEY GENERAL

TERMS AND CONDITIONS

RELATING TO

THE DISCLOSURE OF PERSONAL INFORMATION
FOR
RESEARCH OR STATISTICAL PURPOSES

Contents

General Information

Section 35 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (the Act), provides that British Columbia public bodies may disclose personal information in their custody or control for research or statistical purposes.

Research use of records containing personal information in the custody or under the control of the Ministry of Attorney General must be conducted according to the provisions of the Act. The Act both guarantees public access to government records and protects the privacy of individuals identified in these records.

For the Ministry of Attorney General, this means reviewing public requests for access to government records in order to determine whether records contain personal information that may be restricted. For the research public requesting access to this type of record, Section 35 of the Act provides an option for the researcher to access restricted material by entering into a legal research agreement which governs the conditions of use of such government records.

A research agreement, once approved, gives the researcher timely access to the desired records, and it permits the Ministry of Attorney General to make materials available to the researcher without substantial costs and possible delays caused by

the need to examine and sever personal information from large numbers of documents.

Research agreements can only be granted for a bona fide research project therefore, it is important that the applicant carefully complete a research proposal that responds in substantial detail to all elements in Part B of the application. The applicant must provide a curriculum vita and three references.

A research agreement is a binding legal document, granting access only to those records specified in Part C of the agreement to those individuals noted in Parts A, B, and D of the agreement. Any changes or additions to the agreement must be made in writing and be approved in writing by the Ministry of Attorney General.

The Ministry of Attorney General will consider the date when the complete research agreement is received as the date of receipt of request. Proper completion of the form will hasten the process by which access to the records can be granted.

Under the Act, **personal information** may not be disclosed to any person other than the individual to whom it relates except in certain limited circumstances:

"**Personal information**" is defined in Schedule 1 of the Act as follows:

"personal information" means recorded information about an identifiable individual other than business contact information;

Personal information does not include business contact information but may include information similar to the partial list below:

(a) the individual's name, address or telephone number,
(b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
(c) the individual's age, sex, sexual orientation, marital status or family status,
(d) an identifying number, symbol or other particular assigned to the individual,
(e) the individual's fingerprints, blood type or inheritable characteristics,
(f) information about the individual's health care history, including a physical or mental disability,
(g) information about the individual's educational, financial, criminal or employment history,
(h) anyone else's opinions about the individual, and
(i) the individual's personal views or opinions, except if they are about someone else.

Disclosure for research or statistical purposes is one of the circumstances in which personal information may be accessed by another person. At the Ministry of

Attorney General, approval is given by the Deputy Attorney General under the terms prescribed in Section 35 of the Act:

"Disclosure for research or statistical purposes

35 (1) A public body may disclose personal information or may cause personal information in its custody or under its control to be disclosed for a research purpose, including statistical research, only if

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the commissioner,

(a.1) subject to subsection (2), the information is disclosed on condition that it not be used for the purpose of contacting a person to participate in the research,

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest,

(c) the head of the public body concerned has approved conditions relating to the following:

(i) security and confidentiality;

(ii) the removal or destruction of individual identifiers at the earliest reasonable time;

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body, and

(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

(2) Subsection (1) (a.1) does not apply in respect of research in relation to health issues if the commissioner approves

(a) the research purpose,

(b) the use of disclosed information for the purpose of contacting a person to participate in the research, and

(c) the manner in which contact is to be made, including the information to be made available to persons contacted."

MINISTRY OF ATTORNEY GENERAL
APPLICATION AND AGREEMENT
FOR

ACCESS TO PERSONAL INFORMATION
FOR
RESEARCH OR STATISICAL PURPOSES

Purpose: This form is for use in requesting access, for research or statistical purposes, to personal information found in records covered by the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (the Act). Once the researcher has signed this form and the terms and conditions of access have been approved by the Ministry of Attorney General, it becomes a legal agreement between the researcher and the Ministry of Attorney General.

Collection of the information which the applicant provides on this form, and the conditions of access described, are authorized by Sections 26 and 35 of the Act. Any questions about this form may be directed to Knowledge and Information Services through the OCIO Privacy Help Line at 250-356-1851 or by email to CPIAadmin@gov.bc.ca.

PART A - Identification of Researcher

_____ _____
Name (last name/first name/initials) Registration number (if applicable)

Please provide the following additional information if applicable:

Institutional Affiliation: University of Alberta

Position:

PART B - Description of Research Project

Please attach the following information:

1) A general description of the research project (include the objectives of the project and the proposed method(s) of analysis).
2) An explanation of why the research project cannot reasonably be accomplished without access to personal information in individually identifiable forms (i.e., personal information about named or identifiable individuals).
3) An explanation of how the personal information will be used, including a description of any proposed linkages to be made between personal information in the records requested and any other personal information.
4) The expected period of time during which access to these records may be required.
5) The benefits to be derived from the research project.

Please also provide a curriculum vitae including the following information: education; research experience; knowledge of subject and proposed methodology; three references.

PART C - Records Requested (Use additional sheets as required)

Please list **all** records containing personal information to which access is requested. Access will be given **only** to records listed below. Any changes or additions to this list after the application is submitted should be made in writing and will require approval in writing from the Ministry of Attorney General.

In each case, please provide the following: Ministry of Attorney General identifying number of requested records, if known (e.g. file, box, volume or reel number(s)); title; outside dates. If access to less than an entire box is requested, please also provide the number(s) and title(s) of the file(s) requested.

Example: 40380-20 Student award case files (Part-time assistance), 1988-1989.

<u>All records relating to the B.C. Human Rights Commission and Branch before 1985. For example: boards of inquiry decisions and related documents; correspondence; reports and research documents; memorandums; and lists of staff and appointments.</u>

Originals may be consulted only at the Ministry of Attorney General. Will you require that the above records be copied (at your expense) for viewing elsewhere?

Yes ___ No ____

PART D - Agreement on Terms and Conditions of Access

If I am granted access to the records listed in Part C, I understand and will abide by the following terms and conditions:

Security and Confidentiality

1) I understand that I am responsible for maintaining the security and confidentiality of all personal information found in or taken from these records.

2) Apart from myself, only the following persons will have access to this personal information in a form which identifies or could be used to identify the individual(s) to whom it relates:

   N/A

   Before any personal information is disclosed to these persons, I will obtain a written undertaking from each of them to ensure that they will not disclose that information to any other person and that they will be bound by all terms and conditions of the present agreement. I will maintain a copy of each such guarantee, and will provide the Ministry of Attorney General with a photocopy.

3) None of these records (including copies of them or notes containing personal information taken from them) will be left unattended at any time, except under the conditions described in Paragraphs 4, 5 and 6, below. If I am using these records on the premises of Ministry of Attorney General, I will comply with the Ministry of Attorney General's security procedures.

4) Any copies of the requested records and any notes which contain personal information taken from them will be kept, in a secure manner, at the following address(es):

   They will not be removed from the above premises without the prior written consent of the Ministry of Attorney General.

5) Physical security at the above premises will be maintained by ensuring that the premises are securely locked, except when one or more of the individuals named in paragraph 2) are present, as well as by the following additional measures (e.g. locked filing cabinet):

   Locked filing cabinet in a secure and private office.

6) Individually identifiable information from the requested records will be maintained on a computer system to which users other than those listed in

paragraph 2) have access.

Yes_____ No

If yes, access to the information will be restricted through the use of passwords and by other computer security measures that prevents unauthorized access or that trace such unauthorized access, including the following methods:

_____

_____

Use of Personal Information

7) Personal information contained in the records described in Part C of this form will **not** be used or disclosed for any purpose other than as described in Part B (including additional linkages between sources of personal information), nor for any subsequent purpose, without the express written permission of the Ministry of Attorney General.

8) Reports, papers or any other works which describe the results of the research undertaken will be written and/or presented in such a way that no individuals in the requested records can be identified and no linkages can be made between any personal information found in the requested records and personal information that is publicly available from other sources. There will be **no** exceptions to this rule without prior and specific written permission from the Ministry of Attorney General.

9) Any case file numbers or other individual identifiers to be recorded on computer will be created by myself or one of the persons listed in paragraph 2) and will not relate to any real case numbers found in the records. Any such identifiers are to be used for statistical purposes only.

10) No case file numbers or other individual identifiers assigned for the purposes of the research project described in Part B will appear in any other work.

11) It is preferred that, no personal information which identifies or could be used to identify the individual(s) to whom it relates will be transmitted by means of any telecommunications device, **including** telephone, fax or modem. If personal information is transferred by modem, the personal information will be encrypted or a dedicated line will be used. In addition, if facsimile (fax) is used, it will be a secure fax.

12) Unless expressly authorized in writing by the Ministry of Attorney General, no direct or indirect contact will be made with the individuals to whom the personal information relates.

13) Individual identifiers associated with the records described in Part C, or contained in copies of them, will be removed or destroyed at the earliest time at which removal or destruction can be accomplished consistent with the research purpose described in Part B. At the latest (maximum 2 years), this will occur by:
[date]

Any extension to this time limit must be approved in writing by the Ministry of Attorney General. The removal of individual identifiers will be done in a manner that ensures that remaining personal information (including any found in research notes) cannot be used to identify the individual to whom it relates. **If necessary, this will be done by destroying copies of requested records or pages of notes in their entirety**. All destruction or removal of individual identifiers will be confidential and complete in order to prevent access by any unauthorized persons.

Audit and Inspection

14) The Ministry of Attorney General may determine it is necessary to carry out on-site visits and such other inspection or investigations that it deems necessary to ensure compliance with the conditions of this agreement. Such measures may include, but are not limited to:

- on-site inspection of premises or computer databases to confirm that stated security precautions are in effect;
- receipt upon request of a copy of any written or published work based on research carried out under the terms of this agreement;
- written verification from the researcher that the destruction of all information about identifiable individuals has been carried out by the date specified in this agreement.

Agreement to the Terms and Conditions

15) I understand that I am responsible for ensuring complete compliance with these terms and conditions. In the event that I become aware of a breach of any of the conditions of this agreement, I will immediately notify the Ministry of Attorney General in writing. Contravention of the terms and conditions of this agreement may lead to the withdrawal of research privileges; the Ministry of Attorney General may also take legal action to prevent any further disclosure of the personal information concerned.

The Ministry of Attorney General reserves the right to demand the immediate return of all records and to withdraw access to records without prior notice if this becomes necessary under the Act.

I accept that the expiry date for access to the records in Part C is the date as listed by Ministry of Attorney General below.

Signed at _____, this _____ day of _____, 20____.

_____ **_____**
Signature of Researcher **Signature of Witness**

_____
Name and Position of Witness

PART E - Approval of Terms and Conditions (to be completed by Ministry of Attorney General staff)

The Ministry of Attorney General approves the terms and conditions of this agreement under which the Ministry of Attorney General grants access to the researcher.

The expiry date for access to the records listed in Part C is: **[date]**

_____
Signature

Deputy Attorney General

_____
Date