LIMITED ACCESS:

ASSESSING THE HEALTH OF CANADA'S FREEDOM OF INFORMATION LAWS

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SUMMARY

Public sector restructuring threatens the effectiveness of federal and provincial freedom of information (FOI) laws.

FOI laws give citizens a right to obtain government-held records, except in certain cases where it is in the public interest to maintain secrecy. All provinces except Prince Edward Island have an FOI law. The federal government also has an FOI law, known as the Access to Information Act.

Many governments are restructuring their public sectors to reduce costs and improve efficiency. However, several of the steps being taken by governments – including budget cuts, the transfer of functions out of government, and increased fees for information services – may weaken governmental openness and accountability.

EFFECT OF CUTBACKS WITHIN THE PUBLIC SERVICE

Cutbacks within government have caused increasing delays in processing FOI requests:

- The federal Information Commissioner calls delay in handling federal FOI requests "a festering, silent scandal." On average, it takes longer to process an FOI request today than at any point since adoption of the law in 1982.

- The median response time for FOI requests to the provincial government in British Columbia has doubled in the last three years.

- Response times for requests to the Ontario government have been steadily declining since 1992. The number of requests handled within one month has dropped from 63 percent to 39 percent.

Newfoundland's FOI law was weakened when the government abolished the position of Ombudsman as part of a 1991 restraint exercise. On a per capita basis, Newfoundland's act is now the least-used law in the country.

TRANSFERRING FUNCTIONS OUT OF GOVERNMENT DEPARTMENTS

Several governments are experimenting with new methods of delivering public services that may also limit access rights:

- Contracting-out is being used more aggressively. Contractors are exempt from FOI laws, and may use confidentiality provisions in FOI laws to block or delay the release of government-held information about contracts. Some FOI laws may provide too much protection for confidential business information.

- Activities are being delegated to industry-run organizations that are exempt from FOI laws. Nav Canada, which now provides air traffic control services, is one federal example. Ontario, Alberta, and British Columbia are using a similar model, although limited steps have been taken to preserve access rights in these cases.

- Governments are also experimenting with the transfer of activities to new single-purpose agencies that are still wholly-owned by government. In some cases, these new agencies are exempt from FOI. Even when new agencies are still covered by FOI laws, however, compliance could decline as the traditional public service is fragmented.

LOOKING FOR NEW SOURCES OF REVENUE

Attempts by governments to find new non-tax revenues may also undermine access rights:

- Several governments are attempting to increase revenue by selling information. Information that is available for sale is generally exempt from FOI laws, regardless of price. This may undermine equal access to government information.

- Several governments – including New Brunswick, Manitoba, and British Columbia -- are considering increases in the fees that are charged for processing FOI requests. Fee increases will do little to improve cost-recovery and will seriously limit access rights. In 1995, the Ontario government increased fees for FOI requests and appeals to the provincial Information Commissioner. This is thought to have caused a 10 percent drop in requests and a 40 percent drop in appeals. The increase in revenue was negligible.

OTHER CHALLENGES TO FOI LAWS

Three other challenges to the effectiveness of FOI laws are also noted:

- Older FOI laws, including those in Nova Scotia, New Brunswick, and Newfoundland, do not cover many important public institutions, such as municipal bodies.

- Other governments – Ontario, Manitoba, and Alberta – have recently amended their laws to restrict access to certain kinds of records held by public bodies.

- Observers in many jurisdictions complain that FOI laws are undermined by official adversarialism – that is, the attempt by elected and non-elected officials to stretch FOI laws in order to protect departmental or governmental interests.

PROTECTING ACCESS RIGHTS IN A RESTRUCTURED PUBLIC SECTOR

Changes to current FOI laws can be made to ensure that access rights are protected in a restructured public sector. Many of these proposals will be included in the new FOI law that will be adopted by the British government this year:

- In the future, public services will be delivered through a variety of publicly- and privately-owned organizations. FOI laws should be broadened to include a wider range of organizations that deliver important public services or fulfill statutory functions.

- In some cases, contractors should be obliged to provide access to records that relate to the execution of contracted activities. A reappraisal of third-party privacy rules for contractors may be desirable.

- Information Commissioners should have the authority to review the reasonableness of fee schedules for FOI requests and the authority to authorize the release of marketed information where price is an unreasonable barrier to access.

There is a danger that consistent compliance with FOI laws may be eroded as the traditional public service is fragmented into a variety of new organizations. Three reforms will also help to improve compliance within a restructured public service:

- Commissioners should have the authority to order disclosure of records in cases where citizen complaints are justified. Only four jurisdictions – Quebec, Ontario, British Columbia, and Alberta – provide this authority.

- Commissioners should have the authority to monitor the performance of the FOI system as a whole. Public institutions should be required to provide commissioners with statistical reports on their handling of FOI requests, and commissioners should use this data to identify and report on patterns of non-compliance within the public sector.

- It may be useful to give commissioners more authority to deal with institutions that systematically fall out of compliance with FOI requirements.

CONTENTS

1. THREATS TO THE HEALTH OF CANADA'S FOI LAWS

Just before British Columbia's 1996 election, Finance Minister Elizabeth Cull proudly produced a budget that promised an $87 million surplus in 1997. It would have been good news – if the government hadn't fudged the numbers. Documents obtained through British Columbia's freedom of information (FOI) law showed that the government was using grossly exaggerated revenue estimates.

FOI laws are built on the "basic principle . . . that government information ought to be publicly available wherever possible" (Canada, Secretary of State, 1977, 3). Most laws establish a statutory presumption that records will be accessible except in limited circumstances where important considerations -- such as the desire to protect the personal privacy of other citizens, or the need to protect the public interest in sensitive negotiations -- make it necessary to maintain the secrecy of those records.

British Columbia's budget controversy illustrated one of the reasons why citizens value FOI laws: they help keep governments honest. And not just in British Columbia. In recent months, news reports based on records obtained through FOI laws have revealed doubts within the federal bureaucracy about the Finance Minister's views on unemployment and inflation, the need for a new government facility to be built in the Prime Minister's riding, and the accuracy of government statements about the cost to consumers of reforms to drug patent laws.

FOI laws serve other functions as well. In the last year, they have helped to promote public safety by revealing weaknesses in the operation of nuclear plants, and unexpected complications from new kinds of surgery. They have provided citizens with evidence about job programs that have failed to provide steady employment, insurance programs that are riddled with fraud, delays in providing treatment for the mentally ill, and morale problems within the Canadian military.

FOI laws have also helped citizens understand how governments make decisions about public policy. In some instances the records that are released – such as the minutes of the 1977 meeting in which the federal Cabinet pondered how to respond to Quebec's new separatist government – have given a better understanding of our history. But the information gleaned through FOI often has immediate importance. Recent news reports have relied on FOI laws to investigate the regulation of the east coast seal hunt, military exports to Indonesia, and government support of the nation's tobacco growers.

Focussing on news reports alone may give a misleading impression of the manner in which FOI laws are used. Most often, FOI requests are made by citizens to obtain personal information held by government. The role that government plays in our daily lives is unprecedented, and the availability of access rights under FOI laws provides a reassurance to citizens who might otherwise worry about the dominance of public institutions.

In other words, FOI laws are important instruments for educating the public about government, and for holding government accountable to citizens. It ought to be good news that most Canadian governments – including the federal government, nine provinces, and two territories – now have FOI laws.[1] To a point, it *is* good news. However, there are important weaknesses in Canadian FOI laws, most of which stem from governments' own ambivalence about the principle of

[1] Prince Edward Island is the only jurisdiction which does not have a freedom of information law, although draft legislation was introduced in the provincial Assembly in 1996 (See Table 1).

As Table 1 shows, most Canadian jurisdictions refer to access legislation as "freedom of information" (FOI) law. However, the federal law, like those in the Yukon and Northwest Territories, prefers the phrase "access to information." The New Brunswick law uses the phrase "right to information." In this paper, the phrase "freedom of information" will be used exclusively.

governmental openness. The purpose of this study is to survey some of the most important challenges to the effectiveness of Canadian FOI laws.[2]

The study is broken into three main parts. The first identifies three familiar but still serious difficulties with Canadian laws. In some jurisdictions with older FOI laws – particularly in Atlantic Canada – important parts of the public sector are entirely excluded from FOI requirements. In other jurisdictions -- such as Ontario, Manitoba, Alberta – governments have amended their laws to exclude certain kinds of records from FOI requirements. The third problem is official adversarialism -- that is, the attempt by some public officials to stretch statutory requirements in an effort to protect governmental or departmental interests.

These are familiar but still important difficulties. However, Canadian FOI laws are also confronted by a new and serious threat. Recent attempts by Canadian governments to trim and restructure their public services have weakened the effectiveness of FOI laws. The principle of openness is being compromised in the effort to make government leaner and more efficient.

The second part of this study examines how public sector restructuring is weakening access rights. It suggests that cutbacks within government have produced growing delays in processing requests, undermining the right of timely access. Several governments have also begun transferring important functions out of traditional government departments, either to new organizations that are completely outside the FOI law, or to organizations whose willingness to comply with FOI requirements is uncertain. In an effort to increase non-tax revenue, governments are also raising fees for FOI requests, and sometimes selling government information. Both actions threaten access rights.

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[2] This survey is not intended review all issues relating to the operation of Canadian FOI laws. For example, it does not consider how to balance demands for access to government-held information against demands for privacy of personal information held by governments.

The last section of the study considers what can be done to protect access rights in a restructured public sector, in which public services will be delivered by a wider variety of organizations. It makes two main recommendations, which follow the proposals recently put forward by Britain's Labour government. First, an effective FOI law should be comprehensive. It should cover any institution that undertakes statutory functions or provides important publicly-funded services, and it should allow withholding records only in instances where disclosure would cause significant harm. Second, information commissioners should have the powers needed to protected access rights, including the power to order disclosure of documents where a complaint is found to be justified; the power to make judgements about the reasonableness of fee schedules; and the power to make judgements about the reasonableness of prices set by governments for marketed information.

The study suggests another method of encouraging compliance with FOI requirements within a restructured public sector. Commissioners should have the authority to require the production of statistical reports that show how public institutions have processed FOI requests, and should use the data obtained in these reports to identify patterns of non-compliance among public institutions. No jurisdiction in Canada does an effective job of monitoring the overall performance of its FOI system. It may also be useful to give commissioners the authority to negotiate with institutions that have a well-established history of non-compliance with FOI requirements.[3]

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[3] This report is based on a review of government reports and studies, court decisions, and news reports on FOI issues, as well as proceedings of recent legislative reviews of FOI laws in British Columbia and Quebec.

In addition, the author conducted 108 interviews with frequent FOI requesters, government officials, and information commissioners and their staff. Some of these interviews were conducted on background and some were conducted on a not-for-attribution basis. Consequently attributions for some quotations in this study are not provided. The sample of requesters interviewed was not

2. PRE-EXISTING CONDITIONS: THREE FAMILIAR THREATS TO ACCESS

The challenges that threaten access rights can be divided into two groups: some which, while important, are generally well known; and some new challenges that are associated with efforts by Canadian governments to cope with mounting debt. In this section, three familiar problems with current FOI laws are discussed. First, many of Canada's older FOI laws do not cover important classes of public institutions. Recent attempts have also been made by some governments to narrow the range of records that can be accessed by the public. Finally, FOI laws are undermined by politicians and public servants who are reluctant to respect the principle of openness in the day-to-day application of the law.

2.1 EXCLUDED INSTITUTIONS

A simple but powerful method of undermining the right of access to public records is to exclude important institutions from the scope of FOI law. The clear trend in Canada has been to expand the range of public bodies that must comply with FOI requirements. For example, Manitoba's newly-revised law will, when proclaimed, extend FOI requirements to local governments and educational and health care institutions. In adopting this law, Manitoba follows practice in other jurisdictions with relatively new FOI laws, such as Alberta, British Columbia and Saskatchewan. Older laws, however, are not nearly so broad in their reach (See Table 2).

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representative of the actual population of FOI requesters: in particular, it contained a disproportionate number of organizational or institutional requesters. The main purpose of these interviews was to identify current issues in each jurisdiction.

The author is grateful for the invaluable assistance of Dr. Craig Jones, who coordinated much of the work for this research project.

Nova Scotia, the first jurisdiction in Canada to adopt FOI legislation, also has the most narrowly applied law in the country. A range of public institutions that are required to comply with FOI requirements in other provinces -- municipalities, school boards, health care institutions, colleges and universities -- are not affected by Nova Scotia's law. A committee which reviewed the statute in 1996 characterized this narrowness as the law's greatest weakness:

> Members of the public have a right to know how tax dollars are spent, why programs are created or cut, how laws are administered and a host of other information about how they are governed. We see no reason why openness and accountability should be limited to the provincial government. Bodies that operate in the public interest, spend public money or are administered by public appointees should be subject to the Act and open to public scrutiny. The public deserves nothing less (Nova Scotia, Advisory Committee, 1996, 4).

The extension of access rights in Nova Scotia would not require legislative amendments. The current act allows the government to take this step by regulation. However, the government has not followed the committee's recommendation for expansion of access rights. In fact, it has taken steps that have narrowed the scope of the law. The establishment of the Queen Elizabeth II Health Sciences Centre in 1996 was accomplished by merging functions formerly covered by FOI law into a new unit which now asserts that it falls outside the law.[4] Questions about mismanagement in the Centre -- which receives more than one-

[4] The Nova Scotia Government Employees Union made a request to the new Centre in February 1997. The Centre told the NSGEU that it was not covered by the provincial FOI law. The NSGEU appealed to the provincial FOI review officer, who decided in July 1997 that the Centre was covered by the law. The Centre is not obliged to follow the review officer's decision and contests his finding. The NSGEU has appealed to the Supreme Court of Nova Scotia.

third of the province's acute-care budget -- provoked debate during the recent provincial election campaign.

New Brunswick's law was as narrow as Nova Scotia's until 1996. The law now extends to school boards and health care institutions. However, local bodies remain unaffected, as do post-secondary institutions and some important provincially-controlled bodies, such as the Workplace Health, Safety and Compensation Commission. The province's ombudsman, who is responsible for arbitrating FOI disputes, said in 1992 that the law should be extended to municipal bodies, and said in 1996 that the provincial government should review the list of provincial bodies that are subject to the law (New Brunswick, Ombudsman, 1992, 21; Meagher, 1996). In 1995, a judge criticized the government for not providing access rights with regard to the Atlantic Lotteries Corporation, noting that this allowed the government to "defeat the disclosure legislation by placing requested material in the hands of a captive organization" (CBC v. Minister of Finance, C.Q.N.B. Trial Division, October 1995).

In a recent discussion paper, the New Brunswick government suggests that it may revise the law to cover municipal bodies and post-secondary institutions (New Brunswick, 1998). On the other hand, it's said this before. A government report issued eight years ago conceded that municipalities and many provincial agencies should be brought under the law (New Brunswick, 1990, 134), but no action was taken.

Other older FOI laws are also have significant gaps in coverage compared to newer laws. Newfoundland's law (adopted in 1981) also excludes municipal bodies, as well as school boards. The federal law (adopted in 1982) excludes federal crown corporations such as Canada Post and the Canadian Broadcasting Corporation (See

Canada, House of Commons, 1987, 9-11).[5] Ontario's law (adopted in 1987) excludes many healthcare and post-secondary institutions. In every case this means that bodies that spend large amounts of public money, or rely heavily on public credit, or exercise authority given to them by legislation, are held to a lower standard of accountability than are traditional government departments and agencies.

2.2 RECORDS RECENTLY EXCLUDED FROM FOI LAWS

Access rights are also compromised when governments remove certain kinds of records held by public institutions from the ambit of FOI laws. Several governments have recently amended their laws to eliminate or restrict access rights for certain kinds of records.

For example, the Ontario government amended its FOI laws in 1995 to eliminate access rights for records pertaining to "labour relations or employment-related matters in which the institution has an interest" (Labour Relations Act, S.O. 1995, c. 1, ss. 82 and 83). The government may have intended to adjust the balance of power in public sector collective bargaining, but the provision has been interpreted by the provincial information commissioner as excluding employment information even when it does not relate to a process of collective bargaining or arbitration (Ontario, Information and Privacy Commissioner, Order M-835).

Alberta has also removed some classes of records from the scope of its FOI law. When first adopted, Alberta's law was one of only two in Canada that established access rights for records held by the Office of the Legislative Assembly. However, the statute was soon amended to restrict access to these records (S.A. 1995, c. 17). Alberta's information commissioner recently concluded that the

[5] A current private member's bill (C-216) proposes an expansion of the federal law to include many crown corporations.

amendment allows the Office to deny access to the expense records of provincial legislators (Alberta, Information and Privacy Commissioner, Order 97-017).

Last Fall, the Alberta government again restricted the scope of its FOI law by passing a regulation which made clear that confidentiality provisions in several other provincial laws would trump openness requirements in the FOI law (A.R. 182/97). For example, access to information provided by businesses for provincial environmental assessments is governed only by the Environmental Assessment and Enhancement Act, which has more restrictive access rules, weaker requirements for timely responses, and no appeal procedure (McKay-Panos, 1996, 22-28).

Although the Manitoba's newly-revised FOI law expands the range of institutions subject to FOI requirements, it also shrinks the range of records held by public institutions that are accessible under the law. The bill originally introduced by the Manitoba government in June 1997 would have made it more difficult for individuals to obtain agendas and minutes of meetings and records in electronic form, as well as records that contained information that was, in the opinion of the institution, already available (Bill 50, ss. 10(1)(b), 13(1), and 23(1)(f)). The government withdrew these proposals, but the new law still gives institutions more discretion to withhold records that relate to Cabinet deliberations and policy advice that is generated by or given to public bodies (S.M. 1997, c. 50, ss. 19(1) and 23(1)).

2.3 OFFICIAL NON-COMPLIANCE

The right of access is established by law but made effective by public officials who are prepared to honour it in practice. Many of the persons interviewed for this study told us of instances in which officials had done their best to honor that right by giving full and timely access to records. However, we were also told that FOI laws were often abused by ministers and public servants.

It is useful, when thinking about the problem of non-compliance, to break it down into distinct types. The most egregious form might be called malicious non-compliance: a combination of actions, always intentional and sometimes illegal, designed to undermine requests for access to records.

In the last three years, citizens have witnessed two spectacular instances of malicious non-compliance within the federal government. The first arose after an individual made a request in 1989 under the federal FOI law for minutes of the Canadian Blood Committee, the body responsible for oversight of the national blood system in the first years of the AIDS crisis. The records that were the subject of the request were later destroyed by public servants within the federal Department of Health. In 1996, the Information Commissioner concluded that the records had been destroyed in a deliberate attempt to thwart the FOI request. The Commissioner condemned the action but had no statutory authority to punish the department or the public servants involved (Canada, Information Commissioner, 1997, 64-74). (A similar complaint is unlikely to arise again. The Canadian Blood Agency, which replaced the Committee in 1991, is not subject to the federal FOI law.)

Another case of malicious non-compliance arose during the controversy over mistreatment of Somali citizens by Canadian military forces in 1992-93. The controversy resulted in a sharp increase in the number of FOI requests made to the Department of National Defence. In June 1997, the Létourneau Commission found "incontrovertible evidence" that Defence officials had engaged in concerted efforts to avoid responding to these requests. Some records had been destroyed, and others had been manipulated to remove compromising information. Yet others had been renamed so that officials could have a pretense for denying requests that referred to documents by specific titles. Requesters had sometimes been assessed prohibitively high fees for records that were readily available. All of

this, the commission concluded, constituted a "vulgar scheme to frustrate" FOI requests, which seriously undermined the ability of civilians to hold Canada's military accountable for its conduct (Canada, Somalia Inquiry, 1997, 1236-1246).

There have been other instances in which public officials are alleged to have engaged in malicious non-compliance. The federal Information Commissioner's 1996 report describes an instance in which a senior official within the Department of Transport ordered the destruction of records that might otherwise have been released through an FOI request (Canada, Information Commissioner, 1996, 9 and 45-46). Nova Scotia's FOI review officer recently protested about the alteration of a record that summarized a Cabinet decision on the development of Jim Campbells Barren ("Penalty needed," 1997. The inquiry into the Westray mine disaster discovered an instance in which a government official had removed references to "potentially embarrassing matters" from records that were accessible under the province's FOI law (Richard, 1997, 491). A case of document-tampering has also prompted reform of the Yukon Territory's FOI law.

The new provision in the Yukon's FOI law makes it an offence for officials to destroy or make records with the intention of misleading any person about official actions (Yukon Access to Information and Protection of Privacy Act, s. 67(1)(a.1)). The Yukon is now one of four jurisdictions -- the others are Alberta, Manitoba, and Quebec -- that have established penalties for document-tampering. The committee which reviewed Nova Scotia's law also proposed a legislative amendment that would make it an offence to destroy or falsify records with the intention of evading an FOI request (Nova Scotia, Advisory Committee, 1997, 27). Similarly, a private member's bill in the current federal Parliament would make it an offense to tamper with documents with the intention of denying the right of access under the federal FOI law (Bill C-208, 36th Parl., 1st sess.).

These proposals are sound, but they should not be expected to produce dramatic improvements in governmental openness. Any charge that is built on an intentional subversion of access rights will be made infrequently, and difficult to prove in court. Furthermore, other forms of non-compliance pose greater threats to the integrity of FOI laws.

For example, a prosaic but important problem is that of administrative non-compliance, in which public bodies undermine the right of access because of inadequate resourcing, deficient record-keeping, or other weaknesses in administration. (This difficulty is discussed in more detail in section 3.1.) Another very common form of non-compliance might be described as adversarialism: a practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected.

Adversarialism manifests itself in several ways. Officials may adopt very broad interpretation of exemptions and exclusions, or use several exemptions or exclusions to defend the withholding of the same material, with the expectation that information commissioners or ombudsmen will narrow the exemptions and exclusions down to their appropriate scope when the request is appealed. One frequent requester complains that in sensitive cases, officials treat discretionary exemptions as though they were mandatory exemptions: given the choice, they err on the side of withholding information. Another requester complains that officials "never learn": they rely on statutory exemptions as an excuse for withholding records even when, in previous cases, they have been told by the information commissioner that the exemption should not be applied.

Adversarialism is manifested in other ways as well. Several requesters suggested that estimates of the fees that would be levied for processing requests were sometimes exaggerated with the aim of discouraging requesters. (In fairness,

it should be noted that some of the requests that were described to us required substantial collection and manipulation of information, rather than the disclosure of existing records.) Requesters also believed that in many instances officials delayed responses with the hope that the value of records to the requester would be diminished.

Several information commissioners share this concern about adversarialism on the part of public officials. The federal Information Commissioner recently observed that:

> Departments still do not take seriously their obligations to undertake a two-step process before applying discretionary exemptions. Too often departments are content with address only the question: "May the requested records be kept secret?" They should also be asking: "Even if they may, why should the records be kept secret?" (Canada, Information Commissioner, 1995, 8)

Similarly, Manitoba's Ombudsman observed in November 1997 that:

> Many discretionary exemptions authorize denial of records where there is a reasonable expectation of harm should disclosure be made. . . . Unfortunately, at times, support for denial is based on the theoretical premise that harm will result. This gives the perception that a department is looking for reasons for denying access rather than providing access (Manitoba, Ombudsman, 1997, 8).

And in February 1998, British Columbia's Information and Privacy Commissioner expressed his concern about the widespread "resistance to transparency":

> My sense is that the Act has been under attack from both old and new critics since the 1996 provincial election. The Government has been embarrassed on occasion, on large and small issues, when public bodies have disclosed records in response to requests under the Act. Senior

> government officials have complained that they were no longer free to give candid advice to their political masters . . .
>
> [A] senior public servant in this province said to me that the public's right to know was limited to what it could ask for through its elected representatives. When I countered that this sounded too much like the BBC-TV series *Yes, Minister*, I heard unabashed acclaim for Sir Humphrey as an outstanding public servant (British Columbia, Information and Privacy Commissioner, 1998).

Government officials concede the legitimacy of these complaints. "Civil servants are bound to be cautious in their approach," former Cabinet minister Mitchell Sharp said in 1986, "if only because it is safer to refuse access than it is to take chances by revealing documents about which there is doubt as to their accessibility" (1986, 576). The public servants who must craft responses to FOI requests often feel an intense pressure from colleagues and superiors to withhold information (See Mann, 1983). A 1986 survey of federal FOI coordinators found that their major problem was that of balancing the FOI requirements against the "protective attitudes" of managers and the expectation of "loyalty to the institution." A sample position description for coordinators distributed by Treasury Board Secretariat placed heavy emphasis on their obligation to "protect departmental interests by controlling the release of documents" (Canada, Treasury Board Secretariat, 1988, 11 and 22-23).

A more recent illustration of official reticence is found in an independent study commissioned by the federal Treasury Board Secretariat. The study was intended to measure departmental views about the desirability of publicly releasing documents prepared by federal departments during an intensive review of their activities in 1993-95. The Secretariat had told departments to make review reports available without a formal FOI request. The study concluded that the

directive had been widely ignored. Some officials took the view that FOI requests ought to be required, while others, noting the "adverse impacts" of openness, questioned whether reports should be released even when an FOI request had been received (KPMG, 1997).

While it is widely acknowledged that adversarialism is a significant problem, it is difficult to assess its severity more precisely with currently available data. One crude approach might be to compare the rate of disclosure across jurisdictions (See Table 3). However, this approach has serious weaknesses. It may be that the citizens in different jurisdictions tend to request different kinds of information: one jurisdiction might have proportionately more requests for personal information, rather than requests for information about policy and management, which might improve its disclosure rate (See Table 4). Citizens may also avoid making difficult requests in jurisdictions that have weaker appeal mechanisms. Jurisdictions in which commissioners have the power to compel disclosure of records (rather than making recommendations about disclosure) have FOI laws that are more frequently used but also have lower disclosure rates (Tables 3, 5, 6).

To make the case that governments generally play by the rules, officials sometimes point out that, in most jurisdictions, a relatively small proportion of requesters appeal (See Table 7), and that the orders or recommendations issued by ombudsmen and commissioners often rule in favour of the institution, rather than the requester (See Table 8). (Nova Scotia is a notable exception: most requesters who do not obtain full disclosure seem to appeal their decisions, and most appeals are resolved in favour of the requester.) There are, however, two serious problems with this interpretation of the statistics.

The first is that there may be a substantial proportion of requesters who are dissatisfied with the response to their request but who choose not to pursue an

appeal. If information has become valueless because of delays, then there may be little point in an appeal, which may itself consume months.

Several requesters also told us that they do not file appeals because they doubt the ability of the appeal procedure to produce a fair outcome. This was particularly true in jurisdictions where the information commissioner or ombudsman lacks the power to order disclosure of records. While a further appeal to the courts may be available in law, for many requesters it is not available in practice, because of its cost and inconvenience. (Requesters may also be skeptical about the likely effectiveness of an appeal to the courts. Several jurisdictions limit the right of courts to override the judgement of public officials about the use of discretionary exemptions.) If this interpretation is correct, we might expect to see higher rates of appeal in jurisdictions where the commissioner has the power to order disclosure of records. As Table 7 shows, this holds true in the larger jurisdictions -- Canada, Ontario, Alberta, and British Columbia -- but the pattern does not hold in smaller jurisdictions. No data is available for Quebec.

Caution must also be exercised in analysing the outcomes of orders or recommendations issued by commissioners or ombudsmen in response to appeals. For example, government officials in British Columbia note that seventy percent of orders issued by the Information Commissioner uphold the decision of public bodies to withhold information from requesters. However, orders are only issued in a small proportion of appeals (Table 8(a)). The vast majority of cases are resolved through informal mediation by the Commissioner's staff, which may often result in the release of further information by institutions. A representative of the Office of the Information Commissioner told a legislative committee last Fall:

> When you back up one stage before the formal inquiry process and before the commissioner, and look at the mediation process . . . those numbers would look considerably different. You would not see the 70

percent confirming exactly what the government did (British Columbia, Legislative Assembly, December 3, 1997).

It is impossible to say with precision how much the figure of 70 percent would decline if the outcomes of mediations were taken into account, because the Office of the Information Commissioner does not track such outcomes.

A similar argument can probably be made in Ontario. Here, roughly half of orders uphold the institution's decision to withhold records; but the proportion would likely drop if the outcomes of mediations were taken into account. However, Ontario's Information Commissioner does not track mediation outcomes.

Few, if any, of Canada's FOI laws are designed to deal with the problem of adversarialism effectively. One approach is to give information commissioners, rather than courts, the power to resolve complaints and order disclosure of documents. But only four Canadian jurisdictions -- Quebec, Ontario, British Columbia, and Alberta -- give commissioners an order power (See Table 5). (Quebec's law is actually not so strong as those of the other three jurisdictions. It provides more leeway for institutions or requesters to appeal to the court to overturn a decision of its Commission d'accès à l'information (CAI). The CAI and many observers have complained that this right of appeal is often used by public bodies to avoid timely disclosure, and have recommended a revision of this part of the law (Bergeron, 1997; Quebec, CAI, 1997, s. 3.3.1; Macdonnell, 1997).) In all other jurisdictions, the ombudsman or review officer does not have the power to order disclosure of documents, and complainants must rely on the good will of institutions in complying with recommendations, or pursue a further remedy in court.

However, the order power is not a complete remedy for adversarialism. It still takes time for commissioners to investigate complaints, and in those weeks or

months the usefulness of information may erode substantially. Furthermore there is no strong incentive for institutions to resolve cases appropriately before a complaint is made. No Canadian law provides for penalties for institutions against whom complaints are repeatedly filed and upheld.

3. A NEW THREAT: PUBLIC SECTOR RESTRUCTURING

In the last ten years, many Canadian governments have dramatically restructured their public services. Canada is not alone: many other western democracies have undertaken similar reforms in an effort, as the Clinton administration puts it, to make government "work better and cost less" (United States, 1993). The "new paradigm" which is said to be the foundation for these reform efforts (OECD, 1995) includes three key ideas, whose impact has been obvious in recent Canadian restructuring exercises. The first is the need to cut all "non-essential" or "non-core" public spending. The second is the need to rely less on conventional government bureaucracies as the vehicles for delivering public services. The third is the need for public institutions to rely less on tax revenue to finance their operations, and more on non-tax revenues, such as fees for services.

The main aim in these reform efforts is typically to improve the efficiency of the public sector in producing services. However, recent Canadian experience shows that there is a substantial hidden cost to restructuring: the undermining of access rights. Efforts to downsize, transfer functions out of government departments, and increase non-tax revenues, are all limiting the capacity of citizens to obtain information and hold governments accountable.

3.1. THE EFFECT OF CUTBACKS ON FOI LAWS

As the federal government recently noted, an important element of restructuring efforts consists of restraining "non-essential spending" and improving

the efficiency with which government programs are administered (Canada, Treasury Board Secretariat, 1997, 5). To many public officials, FOI is not an essential program. Openness is "disruptive and costly" (KPMG, 1996), and FOI requirements are a major impediment to efficiency improvements. It is consequently not surprising that access rights have suffered during the recent bout of governmental downsizing.

The most obvious illustration of this trend is seen in Newfoundland. Newfoundland's FOI law, first adopted in 1981, allowed individuals who had a complaint about the official response to their FOI request to appeal to the provincial ombudsman (R.N. 1981, c.5, s. 12). Individuals could also appeal to the Trial Division of the Newfoundland Supreme Court, but this option was not often used because of its cost and the legal expertise which it required. Almost all Commonwealth FOI laws allow individuals to make complaints to ombudsmen, who also resolve other types of citizen complaints, or to an information commissioner, who investigates FOI complaints exclusively (See Hazell, 1995).

In March 1990, the Newfoundland government announced its intention to abolish the position of ombudsman, as part of a larger effort to "eliminate spending that is no longer serving a useful purpose." The provincial treasurer explained: "In the Government's view, the number and substance of complaints investigated by the Ombudsman and his staff did not warrant an office costing $236,000 annually" (Newfoundland, 1990, 11). The legislation abolishing the position took effect in January 1991 (See S.N. 1990, c. 64).

The elimination of the ombudsman is thought by many FOI requesters to have made the Newfoundland act largely ineffective. Statistics provided by the Newfoundland Department of Justice show that its FOI law is now the least-used law in Canada, even after accounting for the province's small population (See Table

6). "The act is virtually toothless," says one journalist, "It doesn't work at all. It's brutal." Another journalist agrees:

> The law works horribly. If the minister denies you the information, your only choice is to take it to the Newfoundland Supreme Court, which is something you don't very often do. That's a pretty major impediment. It almost makes the Act a farce.

In other jurisdictions, the effect of expenditure restraint has been more subtle. All Canadian FOI laws were drafted with the recognition that public institutions should not be allowed to delay their response to FOI requests, since the usefulness of information may diminish rapidly over time. As a federal government report observed in 1977, "the essence of the so-called 'freedom of information' idea is not simply access to government documents, but *timely* access" (Canada, Secretary of State, 1977, 21). The general approach in Canadian laws is to require institutions to provide responses to FOI requests within 30 days. (The limit is 20 days in Quebec.) Laws usually allow an extension of the 30-day limit if the request covers a large number of records or requires consultations with other institutions.

One of the most widespread complaints among the requesters interviewed for this study was that the principle of timely access is no longer respected by governments. Some smaller jurisdictions do respond to a large proportion of requests quickly. The Manitoba government, for example, responded to ninety percent of the 712 requests which it received in 1996 within one month (Table 9). But in larger jurisdictions, requests are not handled with such promptness. The evidence suggests that delay is not caused simply by the unwillingness of public

officials to release information, but also by the failure of governments to provide the resources needed to provide timely responses to FOI requests.[6]

The federal Information Commissioner calls the problem of delay a "festering, silent scandal" (Canada, Information Commissioner, 1997, 5). His complaint that delays are becoming substantially longer is justified by the government's own data. In 1993-94, the federal government responded to 62 percent of requests within thirty days. This proportion had dropped to 48 percent by 1996-97. At the same time, the proportion of requests which took longer than 60 days to process increased from 21 percent to 33 percent (Canada, Treasury Board Secretariat, InfoSource Bulletins nos. 14 to 20). (The number of requests received by the federal government increased from 10,422 in 1993-94 to 12, 476 in 1996-97.)

These delays have had a dramatic impact on the workload of the Information Commissioner himself, who has jurisdiction to hear complaints about abuse of statutory time limits by federal institutions. The number of complaints about delay or misuse of time extension provisions increased by 320 percent between 1991-92 and 1996-97. Such complaints now account for half of the Commissioner's workload (Canada, Information Commissioner, Annual Reports 1991-92 to 1996-97).[7] The deterioration in response times corresponds to the period in which the federal government became most aggressive in its attempt to restrain expenditures.

Delays are also becoming more common in other large jurisdictions. In British Columbia, for example, the proportion of requests which are answered by

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[6] The four governments which receive the vast majority of FOI requests filed in Canada are those of British Columbia, Ontario, and Quebec, and the federal government. However, the Quebec government does not keep a central record of processing time for FOI requests which it has received, and is not included in this discussion.

[7] The total number of requests received by the federal government increased by twenty percent between 1991-92 and 1996-97.

provincial institutions within thirty days declined from 55 percent in 1995 to 34 percent in 1997. In the same two years, the proportion of requests requiring more than two months for response increased from 18 to 49 percent, and the proportion requiring more than requiring more than three months increased from three to 37 percent. An official attributes the delay to the "pressure of demand" on the FOI system and the "financial climate" confronting the provincial government. In early April 1998 the province's information commissioner took the unusual step, in response to rumours of new cuts to staff in FOI offices, of publicly protesting about the erosion of "open and accountable government" in British Columbia (British Columbia, Information and Privacy Commissioner, 7 April 1998).

In Ontario, the time required for a response by provincial institutions has been increasing for the whole of this decade. In the last five years, the proportion of requests processed within thirty days has dropped from 63 percent to 39 percent. At the same time, the proportion of requests requiring more than 60 days has increased from 15 percent to 37 percent. The number of requests did not differ substantially in 1992 and 1997. Officials attribute the increasing delays to cutbacks within the public service. "It isn't a deliberate attempt to frustrate the [Freedom of Information and Protection of Privacy] Act," says one official, "There are a lot of big changes going on, people are stretched out, and FOI requests are not a high priority."

Few jurisdictions have FOI laws that are effective in dealing with problems of delay. Some jurisdictions do not even track the time taken to respond to requests. (This is symptomatic of a larger difficulty: the fact that under Canadian laws, the main function of commissioners or ombudsmen is to resolve individual complaints, rather than addressing *patterns* of non-compliance. See Section 4.4.) When individuals appeal to commissioners or ombudsmen about delays, few remedies are available. Commissioners or ombudsmen may prevent institutions

from collecting fees in these cases, but fees represent such a small proportion of total FOI costs that the penalty is not a substantial one.

British Columbia's law attempts to minimize delay by requiring public institutions to ask for the Information Commissioner's approval to extend response times beyond sixty days. In 1997, 2,500 requests to provincial institutions were delayed more than sixty days; this figure excludes requests to other public bodies covered by the law. The Information Commissioner received only 85 requests for time extensions from all public bodies in roughly the same period (British Columbia, Information and Privacy Commissioner, 1997)

In fact, problems of delay may be aggravated if FOI requesters are obliged to file an appeal to an ombudsman or information commissioner. The average time required by the federal Office of the Information Commissioner to process complaints about departmental responses to FOI requests has also increased substantially in recent years. The average processing time for all types of complaints increased from just under four months in 1992-93 to five months in 1996-97. Many of these complaints are relatively straightforward protests about delay by departments. For more complex protests about departmental decisions on the withholding of records, the increase in processing time within the Office of the Information Commissioner is more substantial: it took almost two months longer to have this sort of complaint resolved in 1996-97 than in 1992-93.[8] The Commissioner attributes the delays to increasing workload and a budget which has declined in nominal terms over the last five years.

Processing times for complaints are not publicly reported by other ombudsmen and information commissioners. However there is reason to believe in some other cases that prompt handling of appeals may be compromised by resource constraints. In British Columbia, for example, the number of complaints

received by the Office of the Information and Privacy Commissioner doubled between 1994-95 and 1996-97 -- an increase that is largely attributable to the expansion of the FOI law to a broader range of public bodies. However, the Commissioner's budget increased by only fifty percent in the same period.[9] Similarly, the caseload of Quebec's Commission d'accès à l'information doubled between 1992-93 and 1996-97 -- an increase that is also largely attributable to more expansive legislation (Quebec, Commission d'accès à l'information, 1997, Table 20). At the same time the commission's budget increased by only twenty percent in nominal terms. During recent legislative hearings on the Quebec law, an independent research group complained that it may now take the commission five months or more to hear a complaint about a public body's response to an FOI request (Quebec, Legislative Assembly, 23 October 1997; testimony of the Mouvement au Courant).

3.2 TRANSFERRING FUNCTIONS OUT OF GOVERNMENT DEPARTMENTS

A key element of restructuring programs undertaken by many governments in western democracies is the transfer of functions away from conventional bureaucracies to other organizational forms. Governments, it is argued, should "steer, not row": they should set policy, and perhaps provide funding, but they need not actually produce services (Osborne and Gaebler, 1992). Canadian governments have acted on this general principle in three ways: by delegating service delivery and regulatory functions to industry-run associations and non-profit corporations; transferring activities to private sector contractors; and moving work out of departments into special purpose agencies that are wholly-

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[8] This data is presented in the federal Information Commissioner's annual reports.

[9] Annual reports.

owned by government but expected to operate at arm's-length from it. All of these approaches threaten to undermine access rights.

3.2.1 INDUSTRY SELF-MANAGEMENT

The federal government, and several provincial governments, are actively experimenting with the delegation of service delivery and regulatory functions to new organizations that are owned and managed by the industry which consumes the service or is engaged in the regulated activity. These experiments present a clear threat to access rights, since governments are often exempt these new organizations from the scope of FOI laws.

The federal government, for example, recently transferred air traffic control activities from the Department of Transport to Nav Canada, a corporation that is owned and operated by aircraft operators and which finances its operations through fees for services that are charged to operators. The legislation which established Nav Canada did not provide for it to be covered by the federal law, even though the same functions were subject to the Act when they were located within the federal Department of Transport.[10]

A government bill in the current Parliament would make similar arrangements for other functions currently performed by the Department of Transport. Control over the St. Lawrence Seaway would be transferred to an industry-run not-for-profit corporation similar in structure to Nav Canada. The existing St. Lawrence Seaway Authority is subject to the Access to Information Act, but the proposed new seaway corporation will not be.[11]

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[10] Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20.

[11] Proposals to reorganized the Seaway Authority and the Canada Ports Corporation can be found in the proposed Canada Marine Act, Bill C-9, 36th Parl., 1st Sess. The bill was passed by the House of Commons in December 1997 but has not yet been approved by the Senate. The existing Seaway Authority and the Canada Ports Corporation are currently listed in Schedule I of the Access to Information Act.

Another bill now before Parliament would reorganize the Canadian Wheat Board in a similar way.[12] Under the new law, the Wheat Board will be governed by a board of directors that is mostly elected by grain farmers. The existing Wheat Board is not covered by the federal FOI law, but farmers' groups have recently argued that it should be. However, the government has not amended the bill to establish FOI requirements for the Board, which has a statutory monopoly on some domestic sales, and all export sales, of wheat and barley.

The rationale for excluding Nav Canada and similarly-structured organizations from FOI law is unclear. The argument in defense of this position is that the new entities are private bodies, established under general corporations law, and responsible to a board that is elected from the community of individuals or firms who use the services provided by those entities. It is not public policy in Canada to impose openness requirements on private bodies, the argument goes, and so openness requirements should not be imposed on Nav Canada and similar entities.

However, the government is not consistent in its assertion that Nav Canada is a purely private entity. The establishing legislation requires that it and similar bodies be regarded as "federal institutions" for the purposes of the Official Languages Act. But there are other, more important ways in which Nav Canada is unlike most private enterprises. It is exercises a function that directly affects the public interest. It is given a statutory monopoly over the delivery of services and does not compete for the right to provide these services on behalf of government. Furthermore it has statutory authority to levy charges for the use of its services that are ultimately recovered from the Canadian public. It is precisely in circumstances such as these that openness requirements are appropriate.

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[12] The Canadian Wheat Board Act, Bill C-4, 36th Parl., 1st Sess.

Provinces have also transferred functions to industry-run organizations that are wholly or partly excluded from FOI law. The Safety and Consumer Statutes Administration Act (S.O. 1996, c. 19) permits the Ontario government to delegate some regulatory functions to industry-operated not-for-profit organizations, which the government calls "administrative authorities." In the last year, Ontario's Ministry of Consumer and Commercial Relations has delegated functions to four new authorities: the Ontario Motor Vehicle Industry Council, the Technical Standards and Safety Authority, the Real Estate Council of Ontario, and the Travel Industry Council of Ontario.

None of these authorities is subject to the requirements of Ontario's FOI law. Some arrangements for access to records are included in the contract that is negotiated between each authority and the Ministry of Consumer of Commercial Relations, but these have limited usefulness. Exemptions are broadly worded, and there are no requirements for timely responses. Furthermore there is no remedy for individuals who are dissatisfied with the authority's response. The provincial Information Commissioner has no jurisdiction to deal with complaints against these authorities. The only remedy lies with the Ministry, as a party to the contract (See, for example, Ontario Ministry of Consumer and Commercial Relations, 1997, Schedule K). Officials observe that the arrangements made in these contracts are intended primarily to ensure proper handling of personal information, rather than access to records relating to general operations of the authorities.

The Alberta government is also transferring functions to industry-run organizations. In one case, the new body is entirely outside the scope of Alberta's FOI law. The Racing Corporation Act (S.A. 1996, c. R-1.5) allowed the government to transfer licensing activities relating to horse-racing from the Racing

Commission to a new industry-run corporation. Although the Commission was subject to the FOI law, the new Racing Corporation is completely excluded.

In other cases, the Alberta government has taken a more moderate approach. Alberta's Government Organization Act and its Environmental Protection and Enhancement Act allow the delegation of regulatory functions to industry-run entities known as Delegated Administrative Organizations (DAOs).[13] Since 1994, several DAOs have been set up, including the Alberta Propane Vehicle Administration Organization, the Alberta Boilers Safety Association, Petroleum Tank Management Association, the Alberta Elevating Devices and Amusement Rides Safety Association, and the Tire Recycling Management Association. More DAOs are planned (See Bruce, 1997a, 1997b).

Like Ontario's "administrative authorities," none of these DAOs is subject to Alberta's FOI law. However, the agreements which govern the transfer of responsibilities to DAO make clear that records created "in the course of carrying out" delegated functions are property of the government, which makes those records accessible through a request to the delegating ministry. The agreements also require DAOs to cooperate with the delegating ministry in responding to FOI requests (See, for example, Alberta, Department of Labour, 1996). This approach, although preferable to that taken in Ontario, still has limitations. DAOs may be reluctant to cooperate fully with FOI requirements and may be strict in deciding which of its records relate to delegated functions.

At the same time, the Albertan experiment with DAOs has provided some evidence of why an erosion of openness might cause concern. In his latest report, the Auditor General of Alberta expressed concern that the government's own

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[13] Government Organization Act, S.A. 1994, c. G-8.5; Environmental Protection and Enhancement Act, S.A. 1994, c. E-13.3. The Environmental Protection and Enhancement Amendment Act (S.A. 1997, c. 9) expands the Minister of Environmental Protection's authority to delegate many environmental regulatory functions to "delegated authorities."

"limited monitoring" of DAOs was not "sufficient to provide . . . reasonable assurance that delegated entities are carrying out their delegated duties to appropriate standards." In one case -- that of the Alberta Boilers Safety Association -- the Auditor General suggested that inadequate oversight could result in a risk to public safety (Alberta, Auditor General, 1997, 156-59).[14]

3.2.2 PUBLIC-PRIVATE PARTNERSHIPS

The decision by governments to "steer, not row" has also produced a new interest in contracting-out of activities to private, for-profit enterprises. Contracting-out is hardly new. However, recent efforts are distinguished by the scale of the activity that is being transferred to contractors and the fact that it often involves work once thought to be the exclusive preserve of government departments. These large contracts -- frequently described as "public-private partnerships" -- are expected to encourage efficiency and innovation in the delivery of services, and relieve government of the need to increase its own indebtedness to fund major projects. But they may also pose a significant threat to governmental openness.

One Canadian advocacy group suggests that the growth of such partnerships has been so rapid that it marks a "minor revolution" in Canadian government (Canadian Council for Public Private Partnerships, 1997). Firms or consortia have been contracted to build and operate schools in Nova Scotia, to redesign and operate the medicare system in New Brunswick, and overhaul the welfare system in New Brunswick and Ontario. Nova Scotia, New Brunswick, and Alberta have actively considered contracting with businesses to build and operate correctional facilities. New Brunswick and Ontario have also contracted-out the redesign of

[14] The British Columbian government is also considering transfer of regulatory functions to industry-run associations (British Columbia, Ministry of Municipal Affairs, 1997).

parts of their justice systems; similar projects were considered in British Columbia and Nova Scotia (Baar, 1997). Several governments have contracted with firms to build and operate transportation facilities. The federal government's contract with Strait Crossing Development Incorporated to build and operate the Confederation Bridge, which links Prince Edward Island and Nova Scotia, is a significant recent example of the trend.

The effect of these efforts to transfer functions to private sector partners is to remove a large class of records that relate to the production of public services from the ambit of freedom of information laws. Two arguments are usually made in defense of this policy. The first is that government is not primarily interested in the manner in which services are produced, but rather the quality of the service itself. Government, it is argued, can inspect the outputs of the, and does not need to know how those outputs were produced. The second argument relies on the assumption that firms constantly confront the risk of losing government business to more efficient competitors. A major reason for wanting open access to records -- to judge whether funds are being used prudently -- is thought to evaporate, because firms face stronger incentives to manage prudently than do conventional government bureaucracies.

Both of these arguments are contestable. In some instances, for example, it is difficult to judge the quality of a service without having access to information about the manner in which that service was produced. This is certainly the case in many "soft" services (such as education and correctional services) and may even be the case in harder services, such as road-building. The argument that firms will be disciplined by competition assumes that there *are* competitors and that governments are prepared to be ruthless in seeking remedies against contractors whose work is inadequate. In the case of large, capital-intensive projects, there may only be a limited pool of competitors, and weak incentives for firms to pursue

efficiencies in the hope of obtaining repeat business. Furthermore, a government may find it embarrassing to seek remedies for poor performance, particularly if the decision to contract-out was controversial in the first place.

In other words, there may be good reasons for wanting to maintain access to records that relate to the production of services by contractors. At the very least, it should be possible to obtain broad access to government-held records that relate to its relationship with contractors, so that external audiences can be sure that governments are fulfilling their responsibility to monitor contractors closely and seek remedies for inadequate performance.

The provisions in Canadian FOI laws that govern access to such records vary substantially. In many jurisdictions, government officials are required to withhold information supplied by contractors if two conditions are met: the information is confidential in character, and disclosure would cause significant harm to the contractor. This approach is consistent with a general rule endorsed by many FOI advocates: restrictions on disclosure are only justified when disclosure can be shown to cause some harm.

But several jurisdictions do not follow this approach. Under four Canadian FOI laws – the federal law, as well those of Quebec, Manitoba, and Saskatchewan – governments are required to withhold confidential information without regard to any possible harm. American courts, interpreting the provision in U.S. federal law that served as a model for these laws, have held that it should only be relied upon where disclosure of information would cause "substantial competitive harm" (Adler, 1997, 88). But Canadian courts have chosen not to interpret Canadian law in the same way (See McNairn and Woodbury, 1997, 4-6.1). The result is a very broad restriction on access to information provided by contractors.

An illustration of the noxious effect which this broad approach can have is provided by a case that arose after the Saskatchewan government announced its

intention to allow the transfer of activities from public to private medical laboratories. As controversy over the policy grew, the Saskatchewan General Employees' Union made a FOI request to the Regina Health District Board for a copy of its contract with a private laboratory. After three months' delay, the Board refused to release any part of the contract, saying that the "most compelling reason" for its decision was the provision in Saskatchewan law which exempts confidential information. The Board observed:

> Most of the clauses of the agreement consist of an exchange of information relating to the affairs and operations of the parties, which information was explicitly supplied in confidence by each party. The agreement itself contains a broad confidentiality clause prohibiting dissemination of the contents of the agreement by any of the parties (Regina Health District Board, 1995).

What is troublesome about the Board's response -- aside from its slowness -- was its failure to stipulate whether any harm would be done in releasing the contract, whose contents were obviously relevant to the public debate over privatization of laboratory services. However, Manitoba law does not require that any harm be anticipated: it is enough to show that the information was confidential in character. (The union subsequently complained to the provincial information commissioner, but the complaint was never resolved.)

The approach taken in other Canadian FOI laws, which requires proof that disclosure will cause harm, is clearly preferable. However, even these laws can be improved by clarifying how the confidential character of business-supplied information is to be determined. The restrictions on disclosure in these laws often apply to information which is "supplied, explicitly or implicitly, in confidence" -- language that gives governments and contractors room to undermine access simply by agreeing that information will be regarded as confidential. In a recent decision

by Nova Scotia's review officer, for example, information was found to be confidential simply because the contractor "expected confidentiality and the public body promised it" (Nova Scotia, Review Officer, 1997, 9). Better laws would clarify that the information must be generally regarded within the industry as confidential in character, and that mutual assurances by parties who may have a shared interest in secrecy cannot be enough to establish confidentiality (See McNairn and Woodbury, 1997, 4-5; Onyshko, 1993, 125-130).

The disclosure of information relating to contracts may also be slowed by statutory rules that give contractors the right to protest disclosure decisions. Under most Canadian FOI laws, public institutions are required to notify any third party when they are considering the disclosure of information in which the third party may have an interest. The third party is given an opportunity to make arguments against disclosure and may, if the public institution disagrees with its arguments, appeal the decision to the information commissioner or ombudsman. The information that is the subject of the request is not disclosed unless the appeal is resolved in the public institution's favour. (The exception to this practice is New Brunswick, whose FOI law contains no third party notice or appeal procedures.)

The effect of these provisions can be to substantially delay the release of information. In Ontario, for example, institutions are ordinarily required to respond to requests in 30 days. However, an institution may also decide, on the thirtieth day, that third party notice is required. The third party would then have three weeks to respond; the institution, another week to consider the response; and the third party, thirty days to appeal. There is no requirement that the Information Commissioner rule on the appeal within a specified period of time.

Firms may have an interest in exercising these appeal rights even if their arguments against disclosure are weak ones -- as a recent Nova Scotia case shows.

In June 1996, several individuals requested copies of a contract which the Nova Scotia government had made with the Atlantic Highway Corporation (AHC) to build and operate a toll highway. (The project has been described as the first large public-private partnership undertaken in Canada.) The government agreed to release the contract, but was obliged to give third party notice to AHC. AHC protested the decision, first to the government, then to the province's FOI review officer. The government and the review officer agreed that AHC's protest was baseless. AHC then exercised its right under the Nova Scotia law to appeal to the Supreme Court of Nova Scotia. In February 1997 the Court also ruled that AHC's complaints were groundless.

AHC had lost the case, but it also delayed public release of the contract for eight months, during which time its parent firm, Canadian Highways International Corporation, had been negotiating a similar contract with the province of New Brunswick (Nova Scotia, Supreme Court, 1997). (The contract to build New Brunswick's new Fredericton-Moncton toll highway was recently awarded to a competitor, the Maritime Road Development Corporation.)

A similar problem arose in Ontario after the provincial government contracted with Real/Data Ontario (RDO), a consortium of twenty-five firms, to computerize the province's land titles information. Shortly after the contract was finalized in February 1991, several requests were made to the Ontario Ministry of Consumer and Commercial Relations for disclosure of contract information. Requesters argued that the information was essential to determine whether the contract was sound and RDO was meeting its obligations. However, RDO exercised its third party rights to block disclosure. The provincial information commissioner eventually found in September 1993 that RDO's argument was baseless (Order P-532). Nevertheless, RDO had succeeded in delaying disclosure

for almost two years, including the months in which the soundness of the contract had been most vigorously debated.[15]

Shortly after the adoption of the federal FOI law, Professor Hudson Janisch expressed reservations about the third party rules which it incorporated. Professor Janisch observed:

> The danger is the prospect of well-financed third-party interventions against disclosure, coupled with a natural inclination on the part of government to treat business data as being provided only on a confidential basis, that will deprive the public of information essential for an independent evaluation of the policies adopted by government (Janisch, 1982, 547).

Recent experience substantiates this fear, and may justify a reappraisal of existing third party procedures. Strong rules to protect the business interests may be appropriate when the information held by government has been collected involuntarily as part of a regulatory function. However, the case for strong rules is weakened when information has been provided voluntarily during the negotiation or execution of a contract.

A better approach in these circumstances may be to eliminate the right to notice and appeal. The mandatory exemption for certain kinds of confidential information would be retained, and public bodies would retain the right to ask contractors for their views about any proposed disclosure. But contractors would have no legal right to challenge the exercise of discretion of the public bodies about the application of such an exemption.[16]

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[15] Several months earlier, in April 1993, some frustrated legislators introduced a bill to override the provincial FOI law and force disclosure of the RDO contract. The bill died after first reading (Ontario, Hansard, 29 April 1993, 375-380).

[16] In egregious cases of abuse of discretion, contractors would retain a right of appeal to the courts.

This approach, although more severe than most Canadian laws, is still more liberal than American law, which makes no provision for third party notice and appeal at all (Adler, 1997, 92-102).[17] A 1990 New Brunswick government review of its FOI law, which contains no provisions for third party notice and appeal, argued that such provisions were time-consuming and unnecessary. Informal consultations with third parties were thought to provide sufficient protection against harm (New Brunswick, 1990, 117-119). (However, a more recent New Brunswick discussion paper reverses this view and recommends adoption of third-party procedures similar to those now in use in other jurisdictions (New Brunswick, 1998, 15-18).)

3.2.3 SPECIAL PURPOSE AGENCIES

Canadian governments are also experimenting with the transfer of functions out of government departments into new special purpose bodies. This is a more moderate attempt to separate "steering" and "rowing" within government: while the new bodies are still wholly-owned by government, they are usually expected to operate at arm's-length from it, and are often exempted from many of the rules that usually constrain government departments. The expectation is that these new bodies – which may be agencies, crown corporations, or boards – will become more efficient and innovative.

However, this sort of restructuring may also challenge the effectiveness of FOI laws, in two ways. In some cases, these new bodies may be completely exempted from FOI laws. More often, these new bodies are still covered by FOI

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[17] One expert, commenting on a proposed FOI bill that preceded the federal act but contained similar provisions for third party notice, also noted the possibility that businesses might use "protracted and expensive litigation" as an instrument for deterring the release of records (McCamus, 1981, 292). In 1992, the federal Information Commissioner found that a large majority of federal FOI court cases were initiated by businesses exercising their third party rights. McCamus notes that the federal law gives businesses more protection against the release of information than is given to individuals.

laws. But there is evidence from experience with similar reforms in Canada and internationally that compliance may deteriorate as the conventional public service is fragmented into an array of special purpose bodies. New agencies that are told to operate on a "business-like" basis may have particularly strong reservations about complying with openness requirements that are not imposed on privately-owned commercial enterprises.

The federal government began a limited experiment with special purpose agencies in 1990, when it began transforming some parts of the federal public service into "special operating agencies" (SOAs). The SOA plan was modeled on a British reform that moved central government activities into more than one hundred new agencies, but the Canadian plan never affected more than a small proportion of the federal bureaucracy. In 1993, however, the federal government's interest in special purpose agencies revived. Since that time, the federal Auditor General observes, there has been an "unprecedented movement of activities -- many of which are key public services -- away from federal government departments" (Canada, Auditor General, 1997). The Liberal government has consolidated food inspection activities formerly undertaken by several government departments into the new Canadian Food Inspection Agency (Canadian Food Inspection Agency Act, S.C. 1997, c. 6). It has announced its intention to transfer responsibility for the administration of federal tax laws to a new Canada Customs and Revenue Agency. A bill introduced in the current Parliament will give responsibility for management of national parks to a new Canadian Parks Agency.[18] The federal Department of Human Resources Development is also considering the possibility of transferring some functions to a new independent agency (See Bakvis, 1997, 163-164). Responsibility for management of Canada Pension Plan

[18] Canadian Parks Agency Act, Bill C-29, 36th Parl., 1st Sess. The bill has received first reading in the House of Commons.

investments will shortly be moved to a new crown corporation, the Canada Pension Plan Investment Board.[19]

Other governments have undertaken similar initiatives. The Manitoba government, for example, has established sixteen special operating agencies and says that it is considering fifty other candidates for SOA status (Manitoba, SOA Financing Authority, 1997, 9-10). Ontario's recent Capital Investment Plan Act allowed the provincial government to transfer responsibility for infrastructure investments to three new crown corporations (S.O. 1993, c. 23); similarly, British Columbia's Build B.C. Act transferred responsibility for spending on highways to a new Transportation Financing Authority (R.S.B.C. 1996, c. 40). British Columbia's Ministry of Municipal Affairs has also proposed the transfer of provincial safety services to a new Safety Authority which would operate at arm's-length from government (British Columbia, Ministry of Municipal Affairs, 1997). Since 1994, the Quebec government has also allowed municipal governments to transfer activities to publicly-owned companies.

In many cases, these new agencies are covered by FOI laws, although practice is not consistent. For example, the federal government has agreed that the new food inspection agency, revenue agency, and parks agency will remain subject to FOI requirements. On the other hand, the new Canada Pension Plan Investment Board will not be covered by the federal FOI law.

The Ontario and British Columbia laws establishing crown corporations to manage infrastructure investment provided no assurances that the new corporations would be covered by FOI law. In both cases, Cabinet retained the discretion to impose FOI requirements on the new agencies. The Ontario government decided to include its corporations under the FOI law, but the British Columbia government did not. A representative of the Transportation Financing

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[19] Canada Pension Plan Investment Board Act, S.C. 1997, c. 40.

Authority says that it has complied with FOI requirements informally since its establishment in 1993. However, the province's Information Commissioner has no jurisdiction to hear complaints about requests to the Authority.

The situation in Quebec regarding the treatment of new special purpose agencies is also confused. In 1997 the National Assembly passed a law which established that certain new municipally-owned companies would remain subject to the provincial FOI law (S.Q. 1997, c. 41). However, other provincial and municipal bodies have succeeded in creating subordinate agencies that are not covered by FOI law. The Court of Quebec recently ruled that Nouveler Incorporated, a wholly-owned subsidiary of Hydro Quebec, was not subject to Quebec's FOI law, even though Hydro Quebec is itself subject to the law (See Quebec, Commission d'accès à l'information, 1997, 77-78). This decision has already been relied upon by Hydro Quebec and Loto Quebec to block access to records held by other wholly-owned subsidiaries (Quebec, Commission d'accès à l'information, 1997, 78; Quebec, National Assembly, October 28, 1997).

In another decision, the Court of Quebec determined that a corporation established by the City of LaSalle to promote economic development was not subject to FOI law. The Commission d'accès à l'information estimates that one hundred similar corporations may rely on this decision to escape the FOI law, even though they are effectively controlled by municipal governments, which are subject to the law (1997, 79-84).

In a recent report, the Commission argues that the proliferation of special agencies like those established by Hydro Quebec and the City of LaSalle constitutes one of the major threats to the effectiveness of Quebec's FOI law (1997, 75). The concern has been echoed by the Confédération des syndicats nationaux and the Fédération professionnelle des journalistes du Québec (Quebec, National Assembly, October 7 and 8, 1997).

Even in those instances where new agencies are covered by FOI law, there is reason to worry about the protection of access rights. These reforms are often driven by official frustration with the laws and regulations that constrain action within conventional government departments. New agencies, it is thought, will be unencumbered with "red tape," and thus able to work more effectively. The disdain for red tape may become ingrained in agency culture, and erode the willingness to comply with those laws and regulations that still apply to the agency.

This is not a problem that is peculiar to FOI requirements: compliance with all sorts of central directives, including rules on financial management and human resource management, may also deteriorate. The willingness to comply may be undermined even further when the new agency is expected to operate on a "business-like" basis, by charging fees for services, and perhaps competing against private suppliers for the right to provide services. New agencies may argue that FOI laws -- like other laws and regulations applied to the conventional public service -- impose a burden on agencies that unfairly "tilts the playing field" in favour of their private sector competitors.

Experience from other jurisdictions that have experimented with similar reforms illustrates the potential difficulty. Since 1988, the British government has transferred most of its workforce to over one hundred agencies. A 1994 evaluation of the reform expressed concern about the "considerable cultural gap" that had arisen between agencies and the remaining part of central government. Government officials suggested that some agencies had become "little fortresses . . . [who believed] they should have any flexibility required by their management" (Trosa, 1994, 6). At the same time, the heads of these new agencies complained that "accountability demands" from central government imposed a heavy burden on many agencies (Price Waterhouse, 1993, 6).

Similar but more muted concerns have been expressed in relation to New Zealand's experiment with agencies (Boston et al, 1996, 222-223). In the United States, an attempt to adopt reforms on the British model was hampered when an participating agency was found to have violated federal laws and regulations in its pursuit of business from other government departments (United States, General Accounting Office, 1996).

Although the Canadian government's early experiment with special operating agencies (SOA)s was limited, it also provided evidence that compliance with a variety of laws and policies -- including FOI requirements -- could be weakened. A 1994 review of the SOA initiative noted the danger that these agencies could become "independent fiefdoms, operating in response to their own agenda rather than the public interest" (Wright, 1994, 15). One SOA -- the Canada Communications Group -- became the subject of controversy when it was found to have ignored government rules on financial management in its attempt to secure contracts to provide services to other government departments. An internal report observed that the Canada Communications Group was headed by an "aggressively entrepreneurial" executive who was "continuously testing the limits of budget-making and personnel policy"(Roberts, 1996, 188-189).

The problem of non-compliance was not limited to rules about financial management. Officials say that some proposed SOAs, including the Canada Communications Group, also argued that they should be exempted from the federal FOI law. No SOA was ever exempted from the law. However, users and officials agree that compliance with the Act deteriorated after some bureaus moved to SOA status.[20]

[20] The problem of SOA misbehaviour is discussed in a general way in (Wright, 1994, 15).

3.3 LOOKING FOR NEW REVENUES

A third theme that is common to many of the restructuring efforts being undertaken by Canadian governments is the need to find new sources of revenue to pay for government operations. This has influenced governments' approach to the distribution of information in two ways. First, governments are making limited attempts to package and sell government-held information that is thought to have market value. In some cases, this has undermined access rights, since information may not be covered by FOI laws if it is available for sale, regardless of its price. Second, governments are expressing more interest in raising the fees that are charged for processing FOI requests. Fee increases that seem modest to governments may make it difficult for many citizens to exercise access rights established by FOI laws.

3.3.1 SELLING GOVERNMENT INFORMATION

The pressure of budgetary restraint has caused many public institutions to become more aggressive in searching for assets under their control that may be converted into sources of revenue. Government-held information is one of those assets. In the last fifteen years, public institutions have recognized that information can be packaged and sold, and that the prices charged for that information can be substantial, since government may be a monopoly supplier.

"Government information is becoming a commodity to be exploited," says an academic observer, who sees a consistent shift in federal policy away from the view that information should be regarded as a "public resource," that should be widely disseminated at low cost, and toward the view that information should be regarded as a "corporate resource," that can be used to generate revenue (Nilsen, 1993, 1994). The same trend is evident at the provincial level. For example, a 1995 Ontario government policy directs provincial institutions to make "basic

information" available to the public free or charge or at a reasonable price, but otherwise requires institutions to treat government information as a "valuable asset" and charge market rates for its use (Ontario, Management Board Secretariat, 1995).

The commodification of government information poses a threat to access rights that was unanticipated when many FOI laws were drafted. Information that is available for sale may no longer be accessible under FOI laws, even if the price charged for that information puts it beyond the reach of many citizens. Information commissioners have expressed concern about the trend but have little power to do anything about it.

An illustration of the challenge posed by this trend is illustrated in a recent British Columbia case. In 1994, the Western Canada Wilderness Committee, an environmental advocacy group, submitted an FOI request to the provincial Ministry of Environment, Lands and Parks which asked for computer data used by the Ministry to produce terrain and resource inventory maps for the entire province. The Ministry refused the request, telling the Committee that the data requested was already available for purchase. The Committee protested that it could not afford the thirty thousand dollar fee which the government charged for the data in question, and that the Ministry's decision denied it access to digital maps that had become the "standard reference point in land use planning" in British Columbia (British Columbia, Office of the Information and Privacy Commissioner, Order 91, March 1996). The Committee asked the provincial Information Commissioner to issue an order compelling the Ministry to release the information.

The Ministry strongly resisted the appeal on two grounds. British Columbia's FOI law allows institutions to deny requests if information is already "available for purchase by the public" (s. 20(1)(a)), or if it is "financial,

commercial, scientific and technical information" that has "monetary value" (s. 17(1)(b)). The Ministry conceded that it gave the map data to other government departments at reduced cost and that it sometimes released the information at no charge to university researchers or to prospective clients for promotional purposes. But it refused to set special prices for groups who assert an inability to pay, arguing that this would "destroy the government's ability to sell information, and eliminate this revenue source for the government" (Order 91).

Although troubled by the Ministry's position, the Information Commissioner gave no relief to the Wilderness Committee. There was no doubt, in his view, that the requested information fell within both exemptions claimed by the Ministry. The provincial legislature had not given him the discretion to decide whether the prices charged by the Ministry were reasonable. On the other hand, the Commissioner argued, the legislature may not have anticipated that a public institution -- which was, in this case, also a monopolist -- would have been so aggressive in its pursuit of revenues through the sale of information. The government's policy, he suggested, might erode the quality of public debate over land-use issues (Order 91).

In a series of cases, Ontario's Information Commissioner has shared this concern about the commercialization of information distribution. The Ontario Commissioner's rulings have not been so definitive, but they do illustrate the difficulty of accommodating this new trend under existing FOI law.

The Ontario Commissioner first dealt with the question in a 1993 case which arose after an individual asked the Ontario Securities Commission for a list of registered securities dealers. The Securities Commission had already sold the right to distribute this information to a private firm, MicroMedia. It denied the request on the basis of section 22 of Ontario's FOI law, which exempts information that is "currently available to the public." The requester appealed to

the Information Commissioner, who ruled that the contract had "the very real potential to inhibit the public's right of access," and ordered the Securities Commission to release the information. The Commissioner observed:

> [T]he issue raised goes to the heart of Ontario's access to information legislation. . . . [T]he government is actively looking at the information it holds as a potential source of non-tax revenue generation. In itself, I see nothing wrong with this approach. In the 90's, information is increasingly being seen, by government and the private sector alike, as a commodity. However, a very real question arises: How will the government's new initiatives maintain and balance the rights of the public to access information for which it has already paid, with the desire to find new sources of revenue?

The Commissioner's decision may have been the right one, but is not clear that it was correctly reasoned. The rationale for the decision appeared to hinge on the fact that the actual distribution of information was being undertaken by a private, rather than a public, body. But this fact ought to be immaterial. On the other hand, the Commissioner paid no attention to facts regarding the actual accessibility of the information given to MicroMedia -- including, most notably, its price (Ontario, Information and Privacy Commissioner, Order P-496, July 1993).

A later decision took a less favourable view of section 22 of the Ontario FOI law, although the interpretation may not be so restrictive as that adopted by the British Columbia commissioner. A journalist had made a request to the Ontario Ministry of Finance for a computer tape containing property assessments for a municipality in Ottawa-Carleton region. The Ministry refused the request, telling the journalist that the tape was already "available to the public" at a price of $1,700. The journalist appealed to Ontario's Information Commissioner. In this case, the Commissioner upheld the Ministry's decision, arguing that the tape was

available "through a regularized system of access." The decision may have turned on the Commissioner's judgement that the price being charged in this case was reasonable, although the Commissioner did not say this directly (Ontario, Information and Privacy Commissioner, Order P-1316, December 1996).

In a contemporaneous case, Ontario's Ministry of Consumer and Commercial Relations relied on another section of the provincial FOI law to withhold information that it intended to sell to the public. The Ministry had decided to set up a new database containing information collected from businesses who had registered with the Ministry, and then to sell the right to use the database. A firm which had previously collected this data from the Ministry at low cost and reprocessed it for sale filed an FOI request for information held in the Ministry's new database. The Ministry's defense turned primarily on the argument that release of the information would prejudice its economic interests, and that it therefore fell under the exemption described in section 18 of the Ontario FOI law. A similar argument was used successfully in the British Columbia case. The Ontario Commissioner's ruling also suggested that the section could be used to withhold much of the information sought by the requester (Ontario, Information and Privacy Commissioner, Order P-1281, October 1996; see also Order P-1114, February 1996).

The federal Information Commissioner has expressed concern about the threat which commodification may pose to access rights, and proposed a legislative remedy to address the problem. He has suggested that the section of federal law which exempts information that is "available for purchase by the public" should be amended to exempt only that information which "reasonably priced and reasonably accessible" (Canada, Information Commissioner, 1994, 38). A government study is critical of the recommendation, suggesting that it would "severely limit the

government's ability to recover fees . . . and provide value-added information and research services" (Canada, Treasury Board Secretariat, 1996).

However, it is not clear that the proposed amendment would have this effect, as the Ontario and British Columbia cases show. A complete legislative remedy might also require some limitation on governments' ability to rely on "economic interests" exemptions (such as section 18 of the federal FOI law) to refuse requests for marketable information.

3.3.2 NEW EMPHASIS ON COST-RECOVERY

The imposition of fees for services under freedom of information laws is not a new practice. In general, the practice is to levy a small charge -- often five dollars -- for each FOI request. Many jurisdictions provide a few hours of staff time for search and preparation of documents at no charge; after that, an hourly rate of roughly thirty dollars is levied. (The most generous jurisdictions, Quebec and New Brunswick, do not charge any fee for search or preparation services.) Charges for photocopying, data processing, and other minor administrative expenses are also permitted. Most legislation also gives institutions the discretion to waive charges in any particular case.

Although it very difficult to establish the full cost of administering FOI laws in any jurisdiction, it is widely agreed that the cost substantially exceeds the revenue collected from FOI applicants. A recent federal government study concluded that the cost of administering its FOI law was about twenty-two million dollars, excluding the budget of the independent Information Commissioner. The average request was thought to generate costs of about $2,250 (Canada, Treasury Board Secretariat, 1996b, 1). This estimate is generally agreed to be unreliable, both by public officials, who consider it far too low, and by the Information Commissioner, who believes it to be greatly exaggerated (See Canada, Information

Commissioner, 1996, 16-18). In any case, the estimate substantially exceeds the revenue generated through user fees. Although there is some evidence that departments have recently become more aggressive in collecting fees, the government collected only $177,000 in revenue in 1997, or about fifteen dollars per request (Canada, 1997, 109). The total revenue collected from users in other jurisdictions is similarly modest.

The federal government study is itself an evidence of increasing sensitivity within government to the cost of administering the federal FOI law, and interest in the possibility of recouping costs through fees. This is driven, in part, by the Liberal government's desire to reduce federal expenditures and balance the budget. However, it is also influenced by an older and broader policy, adopted by the Conservative government in the late 1980s, which directed departments to pursue opportunities to improve cost-recovery through user fees.[21] The study suggested several policy changes aimed at "reducing net costs to the Crown," including an increased application fee, broader definitions of chargeable costs, less generous treatment of "commercial" requesters, and stronger incentives for departments to recover costs from users (Treasury Board Secretariat, 1996b).

The federal government had anticipated that revisions to fee arrangements would be considered as part of a broader review of the federal law that had been publicly announced by the Minister of Justice in 1994. That review has apparently been abandoned. However, the continuing interest in tighter cost-recovery may be evident in a current bill to amend the Access to Information Act introduced by Liberal M.P. John Bryden. The bill would allow departments to charge "the actual cost of preparation and reproduction plus ten percent" for individuals who make regular FOI requests. (On the other hand, it would allow other users to be charged

only for the cost of reproducing material (Canada, House of Commons, 1997, s. 11).)

Ontario has already amended its legislation to increase cost-recovery from users of its FOI laws. The Savings and Restructuring Act (S.O. 1995, c.1, sched. K) introduced a new application fee for FOI requests and a fee for individuals who wished to make complaints to the provincial Information Commissioner. It eliminated the right to two free hours of staff time for general records searches, and broadened the range of costs that could be charged back to clients. A provision that prohibited institutions from charging individuals for costs associated with requests for personal information was also eliminated,

Pressure to improve cost-recovery through fees in evident in other jurisdictions as well. When the Alberta FOI law came into force in 1995, the government levied the highest application fee in the country -- twenty-five dollars -- and denied users any free search time (Alta. Reg. 200/95). Government officials in New Brunswick have expressed concern about the cost of administering their law (Meagher, 1996). A recent discussion paper proposes amendments to the Act that will allow the government to set new fees "based on partial cost-recovery" (New Brunswick, 1998, 9). The government of Manitoba is reviewing its fee schedule, with the expectation that the new schedule may be put in place when the province's new FOI law is proclaimed.

British Columbia's government has also signalled an interest in increasing FOI charges. In March 1997, Deputy Premier Dan Miller suggested that fees should be raised to offset the cost of administering the province's FOI law, calling the current fee schedule "an explicit subsidy to major media conglomerates" that used the law (Beatty, 1997). The government agency that oversees administration

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[21] Since 1986, federal departments have been obliged to submit user fee revenue plans to Treasury Board Secretariat. Federal policy on user fees was established in 1989 in the Secretariat's

of the law later told a legislative committee that the cost of compliance for the provincial government alone was probably twenty million dollars. One government member of the committee has already concluded that "it is very difficult to justify an expenditure of that amount and that little revenue. . . . [T]here has to be some adjustment along those lines" (British Columbia, Legislative Assembly, November 19, 1997).

The premise underlying calls for improved cost-recovery -- that FOI users are consuming an unreasonable amount of government resources -- needs to be closely examined. For example, it is clear that a substantial proportion of costs associated with the administration of FOI laws are associated with weaknesses in methods of records management, or are driven by government's own demand for services from the FOI system. The federal study found that one-third of total FOI costs related to staff time spent in determining whether material should be withheld from requesters (Canada, Treasury Board Secretariat, 1996b, sec. 2.1).

In a sense, ministers and public servants are also clients of the FOI system: the service which they demand is a careful review of requested records. There is evidence that the costs associated with FOI laws may be driven significantly by excessive demand for review services on the part of officials. The federal Information Commissioner has commented repeatedly on the "cumbersome approval processes" that are used by institutions to minimize the risk of embarrassment (Canada, Information Commissioner 1996, 13). One observer describes the review process within the federal Department of National Defence:

> The litany of bad news exposed by frequent access requesters over the years has made political staff so "gun-shy" that three times a week senior military officers and staff from the Minister's office now sit for hours at a time going over each file in detail, in an effort to determine

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Policy on External User Charges.

> what elements of the request might become the next target of opportunity for media. . . . [T]his can add weeks to the process (Boudreau, 1997, 25).

No user fee that is imposed on requesters will be effective in regulating demand for review services by public officials.

There is an another sense in which the total cost of FOI laws is driven by government action. In many cases public officials divert requests for information that once would have been handled informally into the FOI system, where the cost of responding to requests becomes more obvious. Public servants may have good reasons for doing this. FOI systems rationalize processes for responding to information requests, and relieve public servants of the need to exercise discretion about the release of information. Proponents of FOI laws had hoped that laws would not be used in this way, but it is clear that they have been disappointed. An official in the British Columbia agency responsible for administration of its FOI law recently explained its response to informal requests:

> Frequently we get an informal request. It's a phone call, it's an e-mail -- whatever. If this is not for information that is routinely released or routinely available, we will then ask that person to formalize it in a written request. That can be a letter saying: "I'm exercising my rights under FIPPA to make this request" (British Columbia, Legislative Assembly, November 19, 1997).

Some significant part of the cost of administering FOI laws is, in other words, attributable to the decision of public officials to divert non-routine requests into the FOI system.

Experience also suggests that fee increases that seem modest to FOI administrators may have a substantial impact on requesters. In Ontario, total requests under the provincial and municipal FOI laws dropped by twenty-one

percent between 1995 and 1996. Most of this drop can be attributed to the tougher cost recovery policies introduced by the government in January 1996. During the same period, appeals to the provincial Information Commissioner dropped by forty-three percent. Revenue collected from users increased by only ninety-three thousand dollars, and still accounts for a very small fraction of total government costs. Of course, more substantial savings would have been realized because institutions had been relieved of the obligation to respond to several thousand requests.[22]

The Ontario experience suggests that changes in fee policy should not be regarded as problem of "cost-recovery" at all. It is clear that the revenue increases that would be obtained through fee changes are negligible, and that any fee change that attempted to achieve full cost-recovery would make FOI laws almost completely useless. Fee increases are a method of cost-*avoidance*: they produce savings mainly by deterring large numbers of citizens from exercising their access rights.

A sense of proportion is also useful when thinking about the costs of administering FOI laws. The federal study suggests that total costs approximate twenty-two million dollars -- a significant amount, but still substantially less than other information management costs willingly accepted by the federal government. In 1997, the government spent $350 million for procurement of advertising services, publishing and printing services, and public relations and public affairs services (Canada, Receiver General, 1997, Table 3a). The difference is that all of *this* activity is tightly controlled by federal institutions, who determine precisely when and how information will be disseminated. The aspect of FOI law which

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[22] A comparison of Ontario and Alberta FOI usage may also illustrate the effect of fee changes. Albertans, who face a twenty-five dollar application fee, are half as likely to make an FOI request to their provincial government as Ontarians, who face a five dollar fee. There are many reasons to be wary of such a comparison. Alberta has a newer law and citizens may not yet be familiar with it.

exasperates officials may not be the cost of its administration but the fact that the law denies them control over the terms under which government information will be released.[23]

4. PROTECTING OPENNESS IN A RESTRUCTURED PUBLIC SECTOR

FOI laws are important instruments for promoting the accountability of public institutions and improving public debate on policy choices. But governments are understandably ambivalent about FOI laws. This ambivalence has often been reflected in an unwillingness to extend laws to cover the whole range of important public institutions, or the whole range of important documents; and in the tendency of government officials to stretch legislative requirements to protect departmental or government interests.

The recent wave of government restructuring has exacerbated these long-standing weaknesses in Canadian FOI laws. Downsizing has aggravated problems of delay and undermined the idea of timely access. The search for more effective ways of delivering services has resulted in the transfer of important public functions to bodies that lie outside the scope of FOI laws. The transfer of work to new special purpose agencies threatens to aggravate problems of non-compliance. The idea of "cost-recovery" has been used to justify the imposition of new barriers to the exercise of access rights.

However, there are steps that be taken to protect access rights in a restructured public sector. The new approach must recognize that in a restructured public service, public functions will be undertaken by a variety of institutions, which may be publicly- or privately-owned. The new approach must also recognize that challenge of maintaining consistent compliance will be

[23] In 1977, the government estimated that the cost of administering a new FOI law would be about $11 million, or roughly $25 million in current dollars (Canada, Secretary of State, 1977, 26-

increased as old governmental structures – which bundled many activities into a few large departments – are broken into many smaller agencies. A new strategy for protecting access rights must be built to fit a more heterogeneous and fragmented public sector.

In December 1997 Britain's Labour government, responding to a promise made by Prime Minister Tony Blair during the last election, released a discussion paper on a proposed new FOI law. The government's proposals have been crafted to fit the realities of the British public sector, which was dramatically transformed by the previous Conservative governments. In some respects, the British proposals can serve as a basis for renovating Canadian FOI laws to meet the realities of a restructured public sector.

However, the white paper does not provide a complete solution. A new approach to the enforcement of FOI laws may be needed, under which information commissioners and ombudsmen place more emphasis on measuring and reporting on institutional compliance, and have the authority to negotiate with institutions that systematically abuse FOI requirements.

4.1 FOI LAWS MUST COVER A WIDER RANGE OF ORGANIZATIONS

In a restructured public sector, important public functions will be performed by a wider variety of institutions than in the past. Some will be undertaken by conventional departments, funded by appropriations. Other functions will be performed by special purpose bodies, which may sometimes operate in a "business-like" or "commercialized" way. Other functions may be performed by user-managed not-for-profit corporations, or by privately-owned for-profit contractors.

One of the main challenges for proponents of openness will be devising rules for deciding which of these organizations should be subject to FOI requirements,

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and which should not. There is probably no simple answer. However, the dominant approach in many Canadian jurisdictions – which tends to limit the scope of FOI laws to traditional departments – is likely to be increasingly inadequate.

The British proposals do a much better job of accounting for the fact that public services are now delivered in many different ways. The new British law will cover all core government organizations – including local government, which is still excluded under several Canadian FOI laws. The new British law will also go much further:

- It makes clear that publicly-owned special purpose agencies will be covered by the new law.
- Nationalized industries and publicly-owned corporations are also to be covered, including publicly-owned broadcasters such as the BBC (United Kingdom, 1997, para. 2.2). By contrast, many federal crown corporations, including the CBC, are not covered by the federal FOI law.
- Private organizations that carry out statutory functions -- organizations comparable to Nav Canada, Alberta's new Racing Corporation, or Ontario's "administrative authorities" – will also be covered by the new British law.
- So, too, will privatized utilities -- perhaps including water, electric, gas, bus and rail companies (United Kingdom, para. 2.2; Campaign for Freedom of Information, 1998, s. 2).

The white paper does not explicitly identify the criteria that are used in determining which organizations will be covered by the new FOI law. But it seems clear that the aim is to include organizations that are responsible for major

government expenditures, or which exercise regulatory functions, or which have natural or statutory monopolies.

Contractors. The British proposals for the treatment of contractors will also ensure that openness is not jeopardized when for-profit private enterprises become more actively involved in the delivery of public services:

- The British plan will require public institutions to include terms in contracts that will establish access rights for records held by contractors that related to the production of the contracted services. This is not standard practice in any Canadian jurisdiction.
- The British law will not permit the withholding of commercial confidential information provided to public bodies unless there is evidence that disclosure would cause substantial harm. By contrast, several Canadian jurisdictions require the withholding of commercial information even there is no evidence that disclosure would cause harm.
- The British government may also be leaning against the adoption of statutory provisions like those in most Canadian laws that give contractors the right to receive notice, and launch appeals, when government proposes to release business information.[24]

"Commercial confidentiality," the white paper observes, "must not be used as a cloak to deny the public's right to know" (para. 3.11). This is especially true where businesses voluntarily enter into large-scale, long-term contracts to deliver public services. Transparency should be regarded as an important component of the service that contractors are expected to provide.

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[24] The white paper invites comments about the need for third party procedures in general (see para. 5.19) but also promises third party procedures with respect to personal information (see para. 4.8). The government's uncertainty must therefore be focussed on procedures for businesses or other organizations which provide information to government.

4.2 NARROW, HARM-BASED RESTRICTIONS ON DISCLOSURE

The British plan will apply FOI requirements to a broad range of institutions performing public functions. It also applies a second principle that is essential to an effective FOI law: simple and narrow rules about the kinds of information that officials are justified in withholding from the public.

The government's approach is to avoid a long list of exemptions so that the law is simple to understand, and to discourage departments from "trawling" for reasons for non-disclosure (para 3.3). The white paper also makes clear that documents should only be withheld where disclosure would actually cause harm. Furthermore, the threshold for withholding information is to be a high one: institutions must generally show that release will cause *substantial* harm (para. 3.7).

Observers have criticized the white paper for loosening this standard of substantial harm for some classes of records. The new law will allow institutions to withhold records relating to decision-making and policy advice when disclosure is expected to cause "simple harm," rather than "substantial harm" (para. 3.12; Campaign for Freedom of Information, 1998, 20-24). However, this is still a narrower exemption than is established in Canadian laws, which usually allow institutions to withhold records relating to decision-making and policy advice without any finding that disclosure would cause harm (See McNairn and Woodbury, 1997, ss. 3.5 and 3.6).

There is another respect in which the British law may establish much broader access rights than Canadian laws. Canadian laws establish a right of access to *records* -- that is, information that is captured in physical or electronic form. However, the British plan proposes a right of access to records *and* information (para. 2.10). The white paper is unclear about the implications of this definition of the right of access, but one analysis suggests that it might allow requesters to

obtain information that is known to officials but not recorded (Campaign for Freedom of Information, 1998, 3). This may be useful in cases where it is believed that officials have not produced records in an attempt to thwart FOI requests.

4.3 STRENGTHENING THE COMMISSIONER'S POWERS

Effective mechanisms for enforcing access rights will be essential in a restructured public service. Consistency in compliance may be eroded as public functions are distributed a broader range of organizations. Changes in public service culture may also aggravate the problem of adversarialism. Even in publicly-owned bodies, officials may become less tolerant of centrally-imposed regulations, and more likely to assert a right of privacy comparable to that enjoyed by organizations in the private sector.

The order power. One element of an effective enforcement mechanism is the availability of a commissioner who can hear complaints and order the disclosure of records when the complaint is justified. The recent British discussion paper on FOI argues that the order power is "an essential guarantee of the Commissioner's role in ensuring that public authorities fulfill their duties under the Act" (United Kingdom, 1997, para. 5.12). It provides citizens with an affordable and relatively timely remedy for specific cases of official non-compliance. The knowledge that this remedy is available may increase confidence in an FOI law, and encourage more frequent exercise of access rights. As we noted earlier (see section 2.3), only four Canadian jurisdictions – Quebec, Ontario, British Columbia, and Alberta -- give this power to their information commissioners, and the order power in Quebec is undermined by statutory provisions that make it easy for public institutions to appeal the access commission's decisions in court.

Reviewing fee and price schedules. The growing emphasis on cost-recovery may create new barriers to access, as governments increase fees for processing FOI

requests, and exploit opportunities to package and sell information. The British plan includes innovative proposals designed to ensure that fees and prices do not create unreasonable barriers to access.

Britain's new information commissioner will have broader authority than is provided in any Canadian jurisdiction to deal with fees for processing FOI requests. Like his or her Canadian counterparts, the British commissioner will have the authority to lower fees in individual cases, or waive fees in individual cases if it is in the public interest to do so. But the British commissioner will also have the authority to adjust "charging systems" -- the whole fee schedule applied by any public institution to FOI requests (para. 2.34).

This power will be drafted to exclude the right to review charging systems for commodified information – that is, information that is prepared for sale by government. Under many laws, commodified information is excluded from FOI laws, regardless of the price that is charged for that information. However, the white paper appears to give the British commissioner the authority to deal with individual cases where prices for commodified information create unjustified barriers to access. In such circumstances, the Commissioner could decide that such information is not "reasonably available" to the public, and therefore still accessible through the usual FOI procedures (See United Kingdom, 1997, paras 2.38 and 2.26).

4.4 A NEW ROLE: PERFORMANCE MONITORING

Although the British plan has many strengths, it also has one substantial weakness, which is shared to varying degrees by all Canadian FOI laws. No Canadian FOI system does an effective job of collecting and reporting the data that is needed to make judgements about the working of the FOI system as a whole. A stronger system of performance monitoring would be an economical and effective

method of ensuring compliance with FOI requirements in a restructured public sector.

The need for adequate arrangements for data collection and reporting was evidenced during the recent five-year review of Quebec's FOI law. The review, based on a report by the province's Commission d'accès à l'information (CAI) and undertaken by a committee of the National Assembly, focussed heavily on the role of the CAI as an adjudicative body, the appropriateness of procedures for appeals to the courts about the CAI's decisions, and the appropriateness of recent court decisions about the scope of the law.

These are important issues, but they directly affect only a small proportion of the thousands of FOI requests that are made in Quebec every year. Questions that related directly to the handling of the vast majority of requests -- who made requests, the kind of requests they made, the time taken to process requests, the exemptions applied by officials, the rate of appeal, the likelihood that requesters would make an appeal when they had grounds to do so -- all went largely unexplored. There was a good reason for this: there was no data available to begin answering these questions. Neither the CAI nor the provincial government has the responsibility for consolidating and reporting data on the operation of the FOI law. The last estimate of annual FOI requests was made seven years ago (See SOM 1992).

Quebec is an extreme case, but every jurisdiction shares weaknesses in data collection and reporting. In some cases, basic data about the operation of FOI laws -- such as the number of requests filed in a year -- is not collected at all. In most jurisdictions, this data is collected for provincial government institutions alone, even if other public bodies (such as municipalities) are also covered by the law. In some jurisdictions, important information is not collected for provincial

government requests either. For example, none of the Atlantic provinces collect data on the time taken to process requests to provincial institutions.

In some cases, data is collected but not adequately reported. For example, British Columbia's Information, Science and Technology Agency maintains a "request tracking system" that tabulates important data about requests to the provincial government, but does not publicly report the data. The author was advised by ISTA to file an FOI request to obtain these statistics.

In the two jurisdictions where reporting practices are most advanced -- Ontario and Canada – the collected data is not analyzed carefully. In neither jurisdiction is the data used to identify trends in the processing of requests, or patterns of non-compliance.

Data collection, analysis, and reporting is generally deficient because there is no one institution that has the authority to do the work *and* an interest in doing it well. Under current laws, information commissioners and ombudsmen are regarded primarily as impartial referees in disputes between citizens and public officials. Their work begins when a complaint is filed and consists of properly resolving the specific complaint. (Similarly, the British discussion paper observes that the commissioner's "primary role [is] to investigate complaints . . . [and] resolve cases" (United Kingdom, 1997, para. 5.10).) Commissioners and ombudsmen do not regard their primary role as one of ensuring the health of the FOI system as a whole. Consequently they do not attempt to collect and interpret the data that would be needed to assess the system as a whole. In most cases, it is a government department that is given responsibility for collecting this data. But government departments have few incentives to be aggressive in identifying and publicly reporting on patterns of official non-compliance.

An important step toward protecting access rights consists of improving performance reporting practices in each jurisdiction. To do this, the role of the

information commissioner or ombudsman must be recast. The work of these independent arbiters may still consist largely of resolving complaints, but their responsibility must be regarded as one of protecting the health of the FOI system as a whole. Commissioners and ombudsmen should assert more directly their interest in monitoring the administrative processes that are used to manage and dispose of the vast majority of FOI requests.

This reorientation of perspective does not, by itself, require a statutory change. Nor does it imply a significant increase in resource requirements. Commissioners and ombudsmen do not necessarily need to collect and process large amounts of data themselves. All that is needed is the ability to require public institutions to provide specified statistics about their processing of FOI requests.

If statutory language were to be adopted, it might require heads of public institutions to submit reports containing information in a form to be determined by the commissioner or ombudsman (See, for example, section 34 of Ontario's provincial FOI law). Even in jurisdictions where FOI laws cover a large range of public bodies, reporting requirements may not be excessively burdensome. A 1991 survey of public bodies covered by Quebec's FOI law found that almost eighty percent had not received any FOI request in the preceding year (SOM, 1992, 69).

This new approach would require commissioners and ombudsmen to put more emphasis in their own annual reports on performance information that does not relate directly to processing of appeals within their own office.[25] The reports produced by the Ontario Information and Privacy Commissioner represent a step in the right direction. However the Ontario report does little to explore trends in compliance over time, or variations in compliance between institutions. Nor does

[25] Institutional reports could also be made directly available to the public at through the World Wide Web. The database established for the federal Lobbyist Registration Act may provide a model. See http://strategis.ic.gc.ca/lobbyist.

it attempt to identify evidence of systematic non-compliance by specific institutions.

Powers already given to commissioners and ombudsmen can be used to support this new emphasis on performance monitoring. If necessary, investigation powers can be used to determine the accuracy of institutional reports. Similarly, these powers can be used to determine whether statistics commonly used to measure compliance -- such as complaint rates -- are appropriate measures. Research can be commissioned to determine how compliance measures are affected by variations in the type of request or requester. Such research does not need to be elaborate and commissioners and ombudsmen could easily collaborate in sponsoring such projects.

Commissioners and ombudsmen recognize that their authority is largely based on the capacity to shame institutions that do not respect access rights and flatter those that do. The federal commissioner, who does not have the power to order disclosure of records, has relied heavily on the "bully pulpit" to improve compliance among federal institutions. But the commissioner's approach -- which relies heavily on the recitation of FOI "horror stories" --- has clearly had limited effectiveness. Part of the difficulty may be the fact that repetition has dulled the horrific character of these stories.

Another difficulty, however, may be that it is too easy for officials to dismiss stories as anomalous cases. What is needed is better evidence to establish that these stories are not anomalous. A more systematic approach to performance monitoring would allow the commissioners and ombudsmen to do this. It will encourage consistency in compliance within a fragmented and diverse public sector.

Remedies for systematic non-compliance. It may also be desirable to give commissioners stronger remedies against institutions which are found to be

systematically undermining access rights, whether through delay, abuse of exemptions, or excessive fee estimates.

A model may be provided by the federal Employment Equity Act (S.C. 1995, c. 44), which allows the Canadian Human Rights Commission to negotiate written undertakings with federal institutions which fail to meet employment equity goals, and to issue directions where such undertakings cannot be obtained. In cases where institutions have a long pattern of substantial non-compliance, this sort of enforcement mechanism would be more effective -- and probably less costly to administer -- than one that depended solely on the investigation and resolution of individual complaints.

4.5 WANTED: LEADERSHIP

Statutory revisions and changes in regulatory strategies will strengthen access rights. But no law -- however well-crafted -- will be effective in protecting access rights against a government that is determined to restrict them. The strongest guarantor of access rights is a political executive that is willing to respect them.

The current governments of Canada, the United States, and the United Kingdom have many similarities, including this one: all were elected on a promise to improve openness in government. These promises were made as part of an effort to restore popular faith in governments that were thought to have become remote and unresponsive.

In the United States and the United Kingdom, governments have delivered on their promises by strengthening FOI rights. “Information is power,” Prime Minister Blair argued before the last general election:

> Any government's attitude about sharing information with the people says a great deal about how it views power itself and how it views the relationship between itself and the people who elected it (Blair, 1996).

The adoption of a strong FOI law – designed to replace a weaker administrative code introduced by the previous Conservative government – has become one of the top priorities for Blair's Labour government.

Following the 1992 election, the Clinton administration also took steps to reinvigorate the U.S. Freedom of Information Act. Shortly after his inauguration, President Clinton issued a memorandum that directed federal departments and agencies to "renew their commitment to the Freedom of Information Act, its underlying principles, and its sound administration" (Clinton, 1993). Attorney General Janet Reno warned federal officials that the Justice Department would defend other departments and agencies in FOI cases only where there was clear evidence that disclosure would cause harm (United States, Department of Justice, 1993). FOI users commended the administration for reducing backlogs of FOI files.

The Chretien government also promised improved openness in government, but its record on FOI has been far less impressive. The delegation of British officials who visited Ottawa in the Fall of 1997 to study the federal FOI law were clearly not impressed by what they saw. Their report observes:

> Overseas experience shows that statutory provisions need to be championed within government itself if openness is to become part of the official culture rather than an irksome imposition. We believe that this sort of culture change has taken place in some countries -- *the USA and New Zealand are examples* (United Kingdom, 1997, para. 7.1; emphasis added).

The omission of Canada from the list of exemplars is hardly surprising. The Somalia and Blood Committee scandals may have struck the British delegation, as they have struck some Canadian observers, as symptoms of a broader disregard for access rights within the federal government. The delegation would have known of the federal Information Commissioner's growing frustration over problems of non-compliance, and the government's own failure to follow through on a 1994 promise to review the law (Calamai, 1994).

When Canada adopted its FOI law in 1982, it – and a handful of provinces – were breaking new ground. But time has passed, and some Canadian laws have been shown to have serious deficiencies. Other governments – including some Canadian provinces – have adopted better laws and designed better systems for protecting access rights in practice. We will not "get government right" – to use the Chretien government's own phrase for public service reform – until our FOI systems are built to accommodate the realities of a restructured public sector.

5. TABLES

TABLE 1: FREEDOM OF INFORMATION LAWS IN CANADA

Jurisdiction	**Adopted†**	**Title of current law**
Nova Scotia	1977	Freedom of Information and Protection of Privacy Act
New Brunswick	1978	Right to Information Act
Newfoundland	1981	Freedom of Information Act
Quebec	1982	An act respecting access to documents held by public bodies and the protection of personal information
Canada	1982	Access to Information Act
Manitoba	1985	Freedom of Information Act††
Ontario	1987	Freedom of Information and Protection of Privacy Act
Ontario	1990	Municipal Freedom of Information and Protection of Privacy Act
Saskatchewan	1991	Freedom of Information and Protection of Privacy Act
Saskatchewan	1991	Local Authority Freedom of Information and Protection of Privacy Act
British Columbia	1992	Freedom of Information and Protection of Privacy Act
Alberta	1994	Freedom of Information and Protection of Privacy Act
Northwest Territories	1994	Access to Information and Protection of Privacy Act
Yukon	1996	Access to Information and Protection of Privacy Act

† Year in which the jurisdiction's first FOI law was passed. The first law may have been replaced.

††A new law, the Freedom of Information and Protection of Privacy Act, has been passed by the Manitoba Legislative Assembly but is not yet proclaimed.

TABLE 2: GAPS IN COVERAGE

Institutions covered by FOI laws. Manitoba has recently adopted an expanded FOI laws, but this new law has not yet been proclaimed. Alberta and the Northwest Territories will expand their laws in 1998-99.

Jurisdiction	**Prov. Gov't. departments**	**Municipalities**	**School boards**
Newfoundland	Yes	No	No
New Brunswick	Yes	No	Yes
Nova Scotia	Yes	No	No
P.E.I.†	No	No	No
Ontario	Yes	Yes	Yes
Quebec	Yes	Yes	Yes
Manitoba	Yes	Not proclaimed	Not proclaimed
Saskatchewan	Yes	Yes	Yes
Alberta	Yes	October 1999	January 1999
British Columbia	Yes	Yes	Yes
N.W.T.	Yes	No	Summer 1998
Yukon Territory	Yes	No	Yes

Jurisdiction	**Health care institutions**	**Colleges and universities**	**Self-governing professions**
Newfoundland	Yes	Yes	No
New Brunswick	Yes	No	No
Nova Scotia	No	No	No
P.E.I.†	No	No	No
Ontario	No	Not universities	No
Quebec	Yes	Yes	No
Manitoba	Not proclaimed	Not proclaimed	No
Saskatchewan	Yes	Yes	No
Alberta	October 1998	September 1998	No
British Columbia	Yes	Yes	Yes
N.W.T.	Summer 1998	Summer 1998	No
Yukon Territory	No	No	No

† Prince Edward Island does not have a freedom of information law.

TABLE 3: DISPOSITION OF REQUESTS BY PUBLIC BODIES

Most recent data. Ranked in order of rate of full disclosure. For provinces, the data generally includes requests received by provincial institutions only. Data for municipal institutions is also included for Ontario.

Jurisdiction	% Full	% Partial	% Denied	% Other†
New Brunswick	76%	7%	16%	2%
Manitoba	58%	18%	10%	14%
Saskatchewan	58%	12%	18%	12%
Nova Scotia	47%	22%	7%	34%
Ontario -- Municipal	46%	26%	22%	6%
Ontario -- Provincial	46%	17%	22%	15%
Canada	34%	35%	4%	27%
Alberta	31%	44%	6%	19%
British Columbia	21%	52%	10%	17%
Newfoundland	n/a	n/a	n/a	n/a
Quebec	n/a	n/a	n/a	n/a

† Includes: no records exist, abandonment by applicant, treated informally.

TABLE 4: DIFFERENCES IN PROCESSING OF GENERAL AND PERSONAL RECORDS REQUESTS

For those jurisdictions which distinguish between general records requests and personal records requests in their reporting of performance data. The following jurisdictions make no such distinction in their reporting: Newfoundland, Nova Scotia, New Brunswick, and Manitoba. Quebec does not collect data centrally for either type of request.

Jurisdiction	Difference in disclosure rates†	Difference in processing time††
Canada†††	+18%	+1%
Ontario -- Provincial	+9%	+2%
Ontario -- Municipal	-18%	+6%
Saskatchewan	-5%	+1%
Alberta	+1%	+38%
British Columbia	+14%	-30%

† Proportion of personal records requests fully or partly disclosed, less proportion of general records requests fully or partly disclosed.

†† Proportion of personal requests receiving a response within 30 days, less the proportion of general records requests receiving a response within 30 days.

††† Comparison of data for requests under the Access to Information Act and requests under the Privacy Act.

TABLE 5: ENFORCEMENT OF FOI LAWS

This table identifies the official responsible for reviewing the decisions of institutions regarding access requests. In jurisdictions where the official has no order power, appeals to courts are permitted, although the discretion given to courts to overturn decisions is sometimes limited. In Newfoundland, the only remedy is an appeal directly to court.

Jurisdiction	**Independent arbiter**	**Order power**
Newfoundland	None	n/a
New Brunswick	Ombudsman	No
Nova Scotia	Review officer	No
Ontario	Information and Privacy Commissioner	Yes
Quebec	Commission d'accès à l'information	Yes
Manitoba	Ombudsman	No
Saskatchewan	Information Commissioner	No
Alberta	Information and Privacy Commissioner	Yes
British Columbia	Information and Privacy Commissioner	Yes
Northwest Territories	Information and Privacy Commissioner	No
Yukon Territory	Information and Privacy Commissioner	No

TABLE 6: USE OF FOI LAWS, BY JURISDICTION

Jurisdictions are ranked by rate of usage. For all provinces except Quebec, the data includes requests received by provincial institutions alone. Data for municipal institutions is included separately for Ontario.

Quebec does not track the number of requests received by either the provincial government or other public bodies on an annual basis. The figure in this table is an estimate based on a 1991 study (Quebec, Commission d'accès à l'information, 1991, 9). It includes requests received by all public bodies that are subject to the Quebec FOI law. A later study using a different method (SOM, 1992) found a much higher rate of usage, but for interjurisdictional comparisons the 1991 study may be preferable.

Jurisdiction	Number of requests	Requests per 100,000 of population	Requests for general records per 100,000	Requests for personal records per 100,000
Quebec	38,300	690	276	414
British Columbia	5,275	142	77	65
Ontario -- Municipal	11,528	107	62	45
Ontario -- Provincial	9,620	89	74	15
Manitoba	712	64	52	12
Nova Scotia	485	53	n/a	n/a
Alberta	1,270	47	16	31
Canada	12,476	43	43	0†
Saskatchewan	334	34	27	7
New Brunswick	199	27	n/a	n/a
Newfoundland	115	21	7	14

† Requests for personal information would be made under the federal Privacy Act.

TABLE 7: RATES OF APPEAL BY JURISDICTION

(A) IN JURISDICTIONS WHERE INDEPENDENT ARBITER HAS ORDER POWER

Jurisdiction	Year	Appealable requests†	Number of appeals††	Rate of appeal
Quebec		n/a	n/a	n/a
Ontario†††	95-96	5,124	752	14.7%
Alberta	96-97	853	106	12.4%
B.C.	96-97	3,676	448	12.2%

(B) IN JURISDICTIONS WHERE INDEPENDENT ARBITER DOES NOT HAVE ORDER POWER

Jurisdiction	Year	Appealable requests†	Number of appeals††	Rate of appeal
Canada	96-97	8,380	591	7.1%
New Brunswick	96-97	45	3	6.7%
Nova Scotia	1996	115	84	73.0%
Manitoba	1996	264	50	19.0%
Saskatchewan	95-96	140	22	15.7%

† "Appealable requests" is the total number of requests received by institutions, less requests that were abandoned, withdrawn, or which resulted in complete disclosure of records.

†† Number of appeals received by the independent arbiter in the same year.

††† Data for Ontario is from 1995-96. In 1996, the provincial government introduced a fee for appeals which dramatically affected appeal rates.

TABLE 8: DISPOSITION OF APPEALS BY REVIEW OFFICIALS

Most recent annual data.

(A) IN JURISDICTIONS WHERE REVIEW OFFICIAL HAS ORDER POWER

Jurisdiction	No. of appeals closed	% closed in mediation	% closed by order	Of orders, % upholding public body
Quebec	n/a	n/a	n/a	n/a†
Ontario	1,078	58%	42%	49%
Alberta	28	43%	57%	n/a††
B.C.	623	91%	9%	70%

† Data not reported by the Commission d'accès à l'information.

†† Data not reported by the Office of the Information and Privacy Commissioner.

(B) IN JURISDICTIONS WHERE REVIEW OFFICIAL DOES NOT HAVE ORDER POWER

Jurisdiction	No. of appeals closed	% outcomes upholding public body
Canada	614	43%
New Brunswick	3	67%
Nova Scotia	86	32%
Manitoba	38	80%
Saskatchewan†	11	18%

† Includes requests for review under both Saskatchewan FOI laws.

TABLE 9: TIME FOR PROCESSING FOI REQUESTS

Most recent data available. Jurisdictions ranked by response time. For provinces, the data generally includes requests received by provincial institutions only. Data for municipal institutions is also included for Ontario.

Jurisdiction	0-30 days	31-60 days	61+ days
Manitoba	90%	9%	1%
Ontario -- Municipal	90%	7%	3%
Saskatchewan	86%	13%	1%
Alberta	74%	18%	8%
Canada	48%	19%	33%
Ontario -- Provincial	39%	24%	37%
British Columbia	32%	19%	49%
Newfoundland	n/a	n/a	n/a
New Brunswick	n/a	n/a	n/a
Nova Scotia	n/a	n/a	n/a
Quebec	n/a	n/a	n/a

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