

## ***Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP***

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Freedom of information and privacy legislation has greatly changed and altered the manner in which information has been made available at the National Archives of Canada. Because the legislation is complicated, many of those concerned with the National Archives—staff and researchers alike—have little understanding of the mechanisms involved. This article attempts to remedy this lack of knowledge by closely examining the legislation, and placing it in the context of its first decade of application at the National Archives.

The tenth anniversary of the promulgation of the *Access to Information (AIA)* and *Privacy Acts (PA)* in 1993 was marked by numerous newspaper articles, as the media explained how or why these *Acts* have or have not been a success.<sup>1</sup> For managers of federal government archives, though, and in particular for the National Archives of Canada, these *Acts* have meant more prosaic concerns than the intellectual pleasure of creating an avenue of access for the general public and media to federal government information. For government archives it has meant the creation of new Access to Information and Privacy (ATIP) offices and the diversion of funds from limited budgets to staff these offices in order to meet the regulatory obligations of the ATIP legislation.<sup>2</sup> In the words of Jean-Pierre Wallot, National Archivist of Canada:

How can we continue to apply commendable and necessary laws (such as the *Access to Information Act*, the *Privacy Act* and the *National Archives of Canada Act*) that place on the National Archives, a modest-sized institution, an enormous burden at costs that are no longer realistic given the available resources?<sup>3</sup>

Prior to the creation of this legislation, academics, journalists, bureaucrats, and politicians debated the need for protection for the public's privacy and a corresponding legislated public right of access to government information, encouraged by the passage of similar legislation in the United States<sup>4</sup> and at the provincial

level.<sup>5</sup> Most debate favoured such a course and, as a result, the federal government eventually established its own ATIP legislation.

One of the key factors in the demand for access legislation was the need to protect individuals' privacy. In 1972 a joint task force of the Departments of Communications and Justice investigated dangers to privacy posed by the new computer-driven capabilities for data-matching and information retention and concluded that some concerns did exist. They suggested that appropriate measures should be instituted to ensure no privacy crisis would develop.<sup>6</sup> The *Canadian Human Rights Act* of 1977 seemed to answer this need as it included provisions for protection of personal information,<sup>7</sup> but eventually it was considered insufficient. In 1980 the Organisation for Economic Co-operation and Development (in which Canada is a member) recommended that privacy legislation be established in all of its member nations.<sup>8</sup>

At the same time as privacy issues were being examined, the drive for access regulations was well under way. In 1967, the Cabinet approved a policy governing the transfer of government records to the National Archives, and established a methodology for providing access to those records. Six years later, in 1973, Cabinet Directive No. 46 codified this access for legitimate researchers; in 1977 this directive was amended and renamed the *Access Directive*. Under its terms, access to government documents at the National Archives was governed by a thirty-year rule. Generally documents more than thirty-years old were made available to the researchers, while access to younger documents required departmental approval. While there were a few exemptions resulting from the inherent sensitivity of some topics, the majority of the archival documents could be made available to the public.<sup>9</sup>

Unfortunately, such easy access to archival documents did not satisfy the demand for greater access to the decision-making records of the current government. In response, the government drafted Bill C-43, which was approved in June 1982 as the *Privacy (PA)* and *Access to Information Acts (AIA)*. Although there are a few sections that mention the National Archives specifically, these *Acts* were primarily intended to provide a means of access to the operational records of government held by the various government departments and institutions. Unfortunately, their application to the government records held by the National Archives, particularly the application of some of their mandatory sections, has tended to hamper, or at least slow, the quick and ready access to information that archival researchers had previously experienced.<sup>10</sup> On 1 July 1983, the ATIP legislation came into effect, and the world of the researcher at the National Archives changed radically.

Although the passage of the ATIP legislation implied that access should now be simpler than before the introduction of the *AIA* and the *PA*, this was not always the case. In creating a system of facilitating access, legislators recognized that some types of information should not be readily released. These records are deemed to be either exempt from release or excluded from coverage by ATIP, even when that information is found in the archival holdings at the National Archives.

After the passage of the ATIP legislation, government records held by the Public Archives could no longer be released under the *Access Directive's* thirty-year rule;

there no longer existed a blanket release date for any of the records, and due to the comprehensive coverage of the various exemptions and exclusions, it was not possible simply to assume that records should be open merely because of their date of creation. Instead, every time a file is requested it must be examined, if not previously released, for the presence of excluded or exempt material. One historian clearly recognized the problems for the National Archives. In an article on the proposed legislation, R. Craig Brown, a Professor of History at the University of Toronto, wrote:

If Bill C43 is to be administered according to its present clauses, then the head of every government agency, including the Dominion Archivist, would have to have every record file vetted before it could be given to a researcher. The manpower and budget required to do that is mind-boggling ... in whatever form it is finally passed, Bill C43 will greatly complicate the process of releasing information. Inevitably, a bewildering array of regulations, guidelines and procedures will issue forth in its wake. Our archival colleagues, whose primary mandate is the management of government records, will be obliged to observe them.<sup>11</sup>

When the ATIP legislation was enacted, it was intended to supplement, and not supplant, existing departmental procedures for accessing information. While the access procedures in place at the National Archives would not remain in place, documents could still be ordered without having to submit a formal application for access.<sup>12</sup> The great difference at the National Archives, as elsewhere, is that all documents must now be considered under the provisions of the ATIP legislation, whether formally or informally requested. The actual accessibility of records under this informal procedure may, however, differ from department to department. For example, one department invites scholars to apply to examine documents from files not yet declassified under an agreement that they not publish or cite information from these records without the approval of the Department (which reserves the right to examine the completed manuscript).<sup>13</sup> The fact that a scholar has cited a document obtained under such an arrangement is no guarantee that the remainder of the materials in a particular file may be released to the general public under the terms of ATIP.

On the other hand, the National Archives's informal process is geared more towards achieving an equality of access to the archival record of the federal government. The National Archives decided, upon passage of ATIP, that all records previously available for public research would remain open to researchers, and then determined to informally review as many documents as possible. Once released under the informal process, materials are available to all who might then request these records.<sup>14</sup>

Documents requested under this process are carefully examined, and materials deemed to be exempt under ATIP are severed from the files. ATIP officers at the National Archives are responsible for reviewing each file in accordance with the legislation, regulations, guidelines, and other established sources of information, just as though the files had undergone a formal request under the privacy and access acts.<sup>15</sup> In performing these actions, the ATIP officers of the National Archives have examined and released hundreds of thousands of pages at the

request of the researching public. In the 1987-1988 report of the National Archives, the Access Section, responsible for handling ATIP requests for the archival government and operational records of the National Archives, was credited with informally reviewing 500,000 pages that year, up from approximately 424,000 pages in the previous year.<sup>16</sup> By 1993, this informal review process was averaging a million pages a year.<sup>17</sup> While of course not all of this material could be released, the vast majority of the records were made publicly available.

Nonetheless, the various restrictions and procedures concerned some researchers. Shortly after its enactment, a researcher named Ken Rubin undertook a study of *AIA* which concluded that the "access procedures and tools can hinder the ability to use what is already a limited Access Act." He hoped that "access procedures should not become another self-serving bureaucratic layer that turns officials into defenders of inadequate information policies."<sup>18</sup> Three years later, the House of Commons's Standing Committee on Justice and Solicitor General examined ATIP, and agreed that the acts needed to be redrafted. The Committee recommended a large number of changes to ATIP; unfortunately, it had the power only to recommend, not to direct that the changes be carried out.<sup>19</sup>

The "exemption from disclosure" of some types of information, under provisions that Rubin and the Standing Committee felt were flawed, was intended by the *AIA* to be applied in a "limited and specific" manner.<sup>20</sup> When information described as "exemptible" is found in the record, the *AIA* allows it to be severed from the body of the original record. This makes the maximum amount of information available to the requester, and is employed widely in both formal and informal reviews.<sup>21</sup> The severing of information has nonetheless become an issue of some controversy, and the amount of information severed has been challenged by some applicants before the Federal Court. Associate Chief Justice Jerome decided in one case that severing exempt information

would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of the access it would provide.<sup>22</sup>

In another case, he decided that "disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable."<sup>23</sup> It is the task of those responsible for releasing information at the National Archives, in accordance with ATIP, to weigh Justice Jerome's findings when deciding what may be releasable. At the same time, they must also remember the purpose of ATIP: to make information available.

Appeals to the Federal Court are in accordance with the regulatory provisions established by the *Acts*. Under this legislation, responsible officials in each department to which the *Acts* apply were appointed to coordinate the response to requests made under ATIP.<sup>24</sup> (It may be a reflection of the importance given access at the National Archives that the position of Coordinator of Access to Information and Privacy for the institution has until recently been held by the Assistant National Archivist.) To ensure that the departments carry out their mandated responsibili-

ties, the offices of a Privacy Commissioner and an Information Commissioner were established to provide oversight. Their staffs are charged with investigating complaints concerning the application of the *Acts*.<sup>25</sup>

Should a Commissioner's investigators decide that a complaint is valid, they first use their powers of suasion to persuade the offending office to mend its ways. If the office in question persists in actions that the Commissioner's office deems to be in violation of the *AIA* or the *PA*, the Privacy and Information Commissioners have the right, and responsibility, to bring the matter before the Federal Court to obtain a judicial ruling on the department's actions. In the event that the Privacy or Information Commissioner agrees with the actions of a particular department, but the applicant for information continues to feel that he has a valid grievance, the applicant may take the matter before the Federal Court in order to force a thorough examination of the issue.<sup>26</sup> Matters often grieved include the amount of time taken to provide a response, the type or amount of information severed, and the cost of providing that information.

The criteria by which the plethora of exemptions may be defined are carefully described by the *Acts*. Although the *Acts*'s purpose was to make information more freely available, the many exemptions may help to create the impression that the purpose of ATIP may not be so much to provide access to information, as it is to establish broad categories under which the government can refuse public access. These exemptions can be roughly divided between those that are mandatory (**Table 1**) and those that are discretionary (**Table 2**), which is to say between those types of information that ATIP dictates *must* be removed, and the information that ATIP indicates *may* be removed if a clear danger of harm can be identified through its release.<sup>27</sup>

**Table 1**

**Mandatory Exemptions**

<u>ATIP Section</u>	<u>Description</u>
<i>AIA</i> , s. 13; <i>PA</i> , s. 19	Information received in confidence from another government
<i>AIA</i> , s. 16(3); <i>PA</i> , s. 22(2)	Information obtained by RCMP while acting as police force for a province or municipality
<i>AIA</i> , s. 19; <i>PA</i> , s. 26	Personal information (The wording of the <i>PA</i> appears discretionary, but becomes so only if the material in question may be released under special circumstances described in <i>PA</i> , s. 8)

<i>AIA</i> , s. 20	Third-party information (i.e., trade secrets, confidential fiscal or technical information, etc., supplied in confidence to government by third-party)
<i>AIA</i> , s. 24	Statutory Prohibitions (information protected in other federal legislation, such as income tax returns, identified in separate schedule)

For the National Archives one of the most important mandatory exemptions is the protection of personal information. The *PA* defines personal information quite broadly, including everything from name, age, race, and marital status, extending even to an individual's opinions (unless that opinion concerns another individual, in which case the personal information is held to "belong to" or pertain to the second individual). Only information related to individuals deceased more than twenty years, or information concerning federal public servants (where the information relates to their position, activities, or duties or to opinions expressed in the course of their employment) is not protected.<sup>28</sup>

## Table 2

### Discretionary Exemptions

<u>ATIP Section</u>	<u>Description</u>
<i>AIA</i> , s. 14; <i>PA</i> , s. 20	Information whose release could harm federal-provincial relations
<i>AIA</i> , s. 15; <i>PA</i> , s. 21	Information whose release could harm the conduct of international affairs, or the defence of Canada or our allies, or hamper the prevention, detection, or suppression of subversive activities
<i>AIA</i> , s. 16(1-2); <i>PA</i> , s. 22(1)	Information obtained by an investigative body in the course of lawful investigations, or information whose disclosure could facilitate the commission of an offence
<i>AIA</i> , s. 17; <i>PA</i> , s. 25	Information whose release could reasonably be expected to threaten the safety of individuals

<i>AIA</i> , s. 18(a,b,d)	Information whose release could harm the financial or competitive interests of the Canadian government.
<i>AIA</i> , s. 18(c)	Scientific or technical information gained through research of a government employee where disclosure could deprive that employee of priority of publication
<i>AIA</i> , s. 21	Information, less than twenty years old, whose release could hamper the operations of government
<i>AIA</i> , s. 22	Information relating to testing or auditing procedures where the disclosure would prejudice their use or results
<i>AIA</i> , s. 23; <i>PA</i> , s. 27	Information subject to solicitor-client privilege
<i>AIA</i> , s. 26	Information reasonably expected to be published by the government within ninety days of request
<i>PA</i> , s. 23	Personal information obtained by an investigative body for the purpose of determining whether to grant security clearance
<i>PA</i> , s. 24	Personal information collected in the course of individual's sentence for an offence against an Act of Parliament
<i>PA</i> , s. 28	Information related to the physical or mental health of an applicant where the examination of the information by the applicant would not be in the applicant's best interests

In both *Acts*, the only time personal information may be released by most departments is under certain carefully defined circumstances, such as to an individual's Member of Parliament so that the MP can assist the individual, or to assist in aboriginal land claims, or for statistical research where severance is impractical. At the National Archives, release of personal information is made somewhat easier by a special provision of the *PA*, which allows the National Archives, under certain conditions, to release information for research purposes.<sup>29</sup> This section was added as other provisions for releasing personal information were considered to be too restrictive for the research carried out at the National Archives. In order to ensure that this release is done in a thoughtful and carefully orchestrated manner, the

National Archives has established a series of tests, based on the reasonable expectation of harm in the release of the information, the expectations of the individual to whom the information pertains, and the degree of unwarranted invasion of privacy inherent in the release of any personal information.<sup>30</sup> Together, these tests help the National Archives apply this most crucial and difficult section of ATIP.

Aside from the varied exemptions described in **Tables 1** and **2**, some material is specifically excluded from consideration under ATIP. Its provisions do not apply to: published material; material available for purchase; library or museum material acquired or preserved for public exhibition or reference; or material placed in the National Archives, the National Gallery, the National Library, the Canadian Museum of Civilization, the Canadian Museum of Nature, or the Canadian Museum of Science and Technology, by or on behalf of bodies other than government institutions.<sup>31</sup> This means that items placed in the National Archives by bodies not identified by the legislation as government “institutions” cannot be accessed through the ATIP process, although other avenues of access may be established.<sup>32</sup> It also means that documents and papers donated to the National Archives by an individual, such as a retired minister of the Crown, cannot be accessed through *AIA*;<sup>33</sup> in such cases, access will be governed by an agreement struck between the donor and the National Archives.<sup>34</sup>

The final excluded class of information concerns those “confidences of the Queen’s Privy Council of Canada” whose disclosure could help reveal the collective decision-making process of the Canadian Cabinet system. Traditionally, this type of material has always been protected. Under the terms of the federal ATIP legislation, however, all submissions to Cabinet, decisions of Cabinet, correspondence between members of Cabinet over matters to be discussed by that body, etc., are excluded from ATIP for twenty years after any document’s creation (after which time it may be examined under ATIP). The only allowable variance involves discussion papers presented before Cabinet, where the decisions to which the papers relate are made public, or, in the event that the decisions have not been made public, the passage of four years has lessened their sensitivity. So complete is this exclusion, that even quite general references to the above topics are excluded.<sup>35</sup>

It is considered so important that this decision-making process be protected from public scrutiny that investigators from the Offices of the Privacy and Information Commissioners are not allowed to examine documents excluded under this section, and application of this exclusion can be made only with the advice of the Legal Counsel, Privy Council Office.<sup>36</sup> Under the terms of the *National Archives of Canada Act* such Cabinet Confidences can be disclosed only with the direct permission of the Clerk of the Privy Council,<sup>37</sup> and even the National Archivist requires the Clerk’s permission to access these records.<sup>38</sup>

In fact, these provisions create an interesting conundrum. Cabinet confidences are quite narrowly defined by a series of exclusions, all under a blanket section. For example, under *AIA* a submission to the Treasury Board is excluded under s. 69 generally, and specifically under s. 69(1)(a). References to such submissions are excluded under s. 69(1)(g) re 69(1)(a), meaning that the information is excluded because it refers to a memorandum or submission to Cabinet. This is where the conundrum is created.



When material is excluded under *AIA* it is the usual practice to indicate which section or sub-section of the legislation is being applied. Of course, once the ATIP officer has indicated that the information has been removed under s. 69(1)(a), that immediately signals that a submission or memorandum had been sent to Cabinet. Since that is the very information excluded under s. 69(1)(g) re 69(1)(a), the ATIP officer has, in protecting one confidence, actually created another. Under the broad coverage of s. 69(1)(g) (essentially anything referring to a Cabinet confidence is automatically also a confidence under this subsection), it is seemingly impossible to apply s. 69 without also revealing the information sub-section 69(1)(g) is intended to protect.

Once a request has been received under ATIP, applying these varying exemptions and exclusions can be difficult, particularly since all departments (especially, of course, the National Archives) hold materials that originated with other institutions. These other agencies, by their presumed experience with the topic of the papers, possess a better knowledge of the sensitivity of the documents in question. In order to obtain the benefit of this expertise, consultations with the originating departments may be the recommended course of action to ensure the proper application of ATIP. In addition to this, though, prior to applying those sections of ATIP related to defence, international relations, and national security, consultation with offices having an interest in these areas is mandatory. Thus, Foreign Affairs, National Defence, and the relevant offices responsible for security issues, are inundated by records sent to them for their advice and direction on application of these sections of the *Acts*.<sup>39</sup>

Let us look at a hypothetical case.

Let us suppose that a military plane has crashed in the Canadian Arctic. Following a lengthy search, the survivors are recovered, an inquiry is held into the circumstances of the crash, and in due course the records are sent to the National Archives.

After a period of fifteen years, one of the survivors comes to the National Archives and requests access to the records involving the crash and the following inquiry. That is when ATIP comes into play.

An examination of the records shows that there is a great deal of personal information that must be removed—personal histories of the participants [s. 19(1)], some testimony at the inquiry, and any identifying numbers. Even if the individual the information pertains to is deceased, the researcher will learn that the personal information is protected for twenty years after death. The requestor may even find that part of his own testimony may not be released to him since it contains personal information *belonging* to another individual (the requestor's own opinion concerning that individual).

In addition, the ATIP examination may have also located Cabinet confidences that are excluded from consideration under ATIP—in this case a supplementary submission to Treasury Board for additional funds to cover the costs of the search [s. 69(1)(a)]. It is also possible that there may be other types of non-releasable information found in the records of the crash inquiry, such as testimony of confidential informants [s. 16(1)], information related to military security [s. 15(1)], or

even intelligence records relating to investigations into whether the crash could have been caused by foreign or subversive agents [s. 15(1)].

Any or all of these possibilities exist and must be eliminated prior to the records being released to the applicant. Only when all of the exempt and excluded information has been severed can the researcher finally obtain his files and find out what happened in the crash.

Unfortunately, the review process can take a good deal of time. While a response must be sent to the applicant within thirty days of receipt of his/her request, the *Acts* also make provision that this time period may be extended in certain conditions, such as when it is necessary to consult with other departments (a common extension at the National Archives). If the applicant feels that this extension is excessive, or the response is overdue, she or he may then submit a complaint to the Commissioner, who will investigate the circumstances of the delay.<sup>40</sup>

ATIP offices must be careful in extending these time-limits, not only to avoid investigations, but also to avoid the appearance that the office is attempting to prevent disclosure. Unfortunately, such extensions are almost impossible to prevent when dealing with large or involved requests requiring consultations with other government departments that are themselves swamped. The resulting impression led an Ottawa satirical magazine, *Frank*, to mark the tenth anniversary of ATIP with a comic strip showing one civil servant saying to another:

Ahem. Lavois, while "Fat chance" may seem an amusing and succinct reply to a request ... most of us in the department's access and privacy office prefer "in light of this, an extension of up to 90 days is required beyond the 30 day statutory limit."<sup>41</sup>

While all federal government institutions must handle many requests for information under these *Acts*, the problems attendant in providing access are magnified for the National Archives, since, in the end, a large percentage of government records passes into its control. The range of records being examined is much wider than that commonly dealt with by other institutions and requested records often contain information requiring severance, a practice which runs partly counter to the mandate of the National Archives to facilitate access to its holdings.<sup>42</sup> Applying the *Acts* under these circumstances is not an easy exercise.

Information requested from the National Archives can be divided roughly into three categories: the personnel records of former military and civil servants (previously maintained by the Personnel Records Centre [PRC]; archival records of the various government departments (maintained by the Government Archives Division [GAD]); and operational records of the National Archives itself. The majority of the requests are for access to the personnel records, which by their nature contain little, other than personal information, that is subject to exemption.

The National Archives's holdings of other federal government records are a different matter entirely. These records contain almost every type of exemption and exclusion defined by ATIP, and often require extensive mandatory consultations with other government departments. Only the fact that there are relatively few formal requests for these records saves the National Archives ATIP system from being completely overwhelmed. For example, as of 1993 the National Archives'

Access Section alone was handling in excess of 150 *AIA* requests for records each year, primarily for the holdings of the Government Archives Division.<sup>43</sup> While this represents a sizable number of requests, in 1991-92 the National Archives as a whole received a total of 1,075 requests under the *AIA* (see **Table 3**) and a further 8,143 requests under the *PA* (see **Table 4**). Requests for the operational records of the National Archives add to the total of *AIA* requests,<sup>44</sup> but the bulk of the difference remains the many requests to access the individual personnel files held by the National Archives.

**TABLE 3****Access to Information Requests Received by the National Archives**

	Number of Requests Received	Percentage of Total Requests Received by the Federal Government	Ranking among Requests to Federal Government
1991-92*	1,075	10.4	2
1990-91*	1,088	9.8	3
1989-90*	725	7.1	3
1983-89**	1,788	6.2	3

\* Taken from: *Info Source Bulletin* 14-16 (1990-1992).

\*\* This shows aggregate requests from 1 July 1983 to 31 March 1989. Taken from: *Access to Information Act and Privacy Act Bulletin* 12 (November 1989), p.5.

An examination of the numbers shown in **Tables 3** and **4** is quite revealing. Over the last decade, the number of *AIA* and *PA* requests received by the National Archives has grown as a proportion of the requests received by the Federal government as a whole. From 1983 to 1989 the National Archives received 15.6 per cent of *PA* requests and 6.2 per cent of *AIA* requests received government-wide. By the end of the 1991-92 fiscal year, this proportion had risen to 17.8 per cent and 10.4 per cent respectively, and in both areas the National Archives had moved from third to second place among the numbers received across the government.

Of course, with all of these requests, it would be a miracle if all applicants were satisfied with the results of their requests to the National Archives. Remarkably,

the numbers of complaints received by the Offices of the Information and Privacy Commissioners have continued to be relatively low. In 1992-93, only thirteen complaints were received concerning the application of the *AIA* (see **Table 5**), while a further forty-five were received concerning requests under the *PA* (see **Table 6**). While this last series of complaints concerning the *PA* represents a sizable jump over the previous year's ten complaints, more than half of that forty-five were determined to be "Not Well-Founded."

**TABLE 4****Privacy Requests Received by the National Archives**

	Number of Requests Received	Percentage of Total Requests Received by the Federal Government	Ranking among Requests to Federal Government
1991-92*	8,143	17.8	2
1990-91*	8,490	17.5	2
1989-90*	8,773	15.8	2
1983-89**	36,561	15.6	3

\* Taken from: *Info Source Bulletin* 14-16 (1990-1992).

\*\* This shows aggregate requests from 1 July 1983 to 31 March 1989. Taken from: *Access to Information Act and Privacy Act Bulletin* No. 12 (November 1989), p.5.

A typical case determined to be "Not Well-Founded" is recounted in the 1988-89 annual report of the Privacy Commissioner. In this case, an applicant applied for access to materials concerning himself from World War II medical records held by the National Archives. When the applicant found that his records were incomplete, a complaint was submitted to the Privacy Commissioner, who instituted an investigation. As a result of this investigation, the Privacy Commissioner determined that the staff of the National Archives had done their best to locate the requested documents, but without success. Since the fault did not lie with the National Archives, the complaint was therefore determined to be "not well-founded."<sup>45</sup>

**TABLE 5****Access to Information Complaints Regarding the National Archives\***

	Justified	Discontinued	Not Justified	TOTAL
1992-93**	9		4	13
1991-92	5	2	12	19
1990-91	3		3	6
1989-90	4		5	9
1988-89	2		7	9

\* Taken from: Canada, Information Commissioner of Canada, *Annual Report Information Commissioner* (Ottawa, 1989-1993).

\*\* In 1992-93 the Information Commissioner listed complaints as Resolved, Not Resolved, Not Substantiated, and Discontinued. The Resolved are listed here as Justified, even though it is possible that some of those which were Resolved may have reflected discretionary sections of the *Access to Information Act* where the National Archives decided to release information at the request of the Information Commissioner, even though the application of the *Act*, may have been valid.

In another instance, this one described in the 1990-91 Annual Report, an individual was denied access to a portion of his military medical records on the grounds that it was not in his best interests to examine a twenty-five year old mental health assessment (see **Table 2**, *PA*, s.28). After an investigation, the Privacy Commissioner found that the National Archives had acted incorrectly in denying access to these records, and directed that they be released to the applicant. The National Archives did so.<sup>46</sup>

Complaints regarding *AIA* requests at the National Archives have similarly received examination by the Office of the Information Commissioner. In 1992-93, when four complaints were found to be "Not Justified," one of these complaints concerned a fee for photocopying the service record of a deceased soldier. The applicant, a nephew of the deceased, felt that a fee waiver should be applied for relatives seeking access to records of servicemen who died for their country. The Information Commissioner investigated, and found that the policy of the Archives

was to waive fees for requests from the immediate family, a category which did not include nephews. The Information Commissioner approved this policy and found the complaint to be unjustified.<sup>47</sup>

In another case, the Information Commissioner received a complaint that the National Archives had taken an unreasonable time extension in order to reply to a request under the *AIA*. The policy of the Archives at such times is to contact the office to be consulted, and inquire as to their workload and the amount of time estimated to complete a consultation. In this case, the Archives, in consultation with the other department, determined that a ninety-day extension was required. The Information Commissioner informed the applicant, a university professor, that the National Archives' procedure was an effective method of determining the required extension and that the complaint was unfounded.<sup>48</sup>

**TABLE 6**

**Privacy Complaints Regarding the National Archives\***

	Well-founded	Discontinued	Not Well-founded	TOTAL
1992-93	21		24	45
1991-92	3		6	9
1990-91	4	1	19	24
1989-90	1		7	8
1988-89	1		14	15

\* Taken from: Canada, Privacy Commissioner of Canada, *Annual Report Privacy Commissioner*, (Ottawa, 1989-1993).

Naturally, not all of the complaints concerning the application of the ATIP legislation at the National Archives took the form of formal complaints to the office of the relevant Commissioner. No researcher appreciates delays in obtaining information, and more than one researcher reflected this dissatisfaction in print.

Terry Pender, a reporter with *The Sudbury Star*, wrote that many of the documents he received in response to an *AIA* request were heavily censored, and his newspaper even duplicated an image of one such document to illustrate this statement. In all, Pender had received more than nine thousand pages of previously-confidential records from the former RCMP Security Service's surveillance of a Sudbury local of a mining union. Although Pender might have believed that the National Archives's ATIP office had severed too much information (from what he incorrectly identified as a "Freedom of Information" request), he was still able to write an extensive series of newspaper articles based upon the documents he received. In fact, the majority of any gaps caused by *AIA* severance were filled in by other sources at his disposal.<sup>49</sup>

Judging by his comments, Pender probably agreed with another researcher, John Bryden, who believed that the *AIA* process at the National Archives can delay research. Bryden, who wrote a history of Canadian involvement in biological and chemical warfare during World War II, complained that the *AIA* "systemizes secrecy" and gives the public only the right to request documents, not to actually receive them:

The act provides that "access" people at the archives first review the files requested, but they lack specialized knowledge. Consequently, when in doubt they withhold access pending consultation with the department concerned ... [and] an extra layer of decision-making is automatically imposed upon the retrieval of sensitive material.<sup>50</sup>

For all of the complaints, however, Bryden—while unable to obtain access to all the information he desired—was apparently able to obtain access to sufficient information to write his study.

Even the complaints help to demonstrate the need for the careful review process. Pender and Bryden, who both referred to the amount of information they were unable to examine, took material from varying sources and fitted each little piece of information together, using a "mosaic effect" to create an image that they believe illustrates the information ATIP would have exempted.

When severing information, National Archives ATIP officers must keep this "mosaic effect" in mind. Unfortunately, attempts to prevent the release of information have occasionally been unsuccessful due to the number of archives and departments who may release one record, believing they have stripped it of all sensitive information, without realizing that a duplicate of the document, severed in a slightly different manner, has been released elsewhere. This has allowed researchers to join together information, or in essence "mosaic tiles," allowing a more complete picture to emerge.<sup>51</sup> The only possible method of protecting the information in these circumstances is to err on the side of caution in the severing. However, as this usually results in an unhappy client it is probable that complaints about the activities of the government "censors" will continue.

It is the nature of government information that some of it may not be revealed without causing injury to the interests of the nation. Recognizing that fact, the ATIP legislation attempts to incorporate this concern into a mechanism for general

release of information. Obviously, there are some contradictions involved in such a procedure, particularly when applied to archival records. Nonetheless, the concerns raised by the exemptions and exclusions of the legislation are quite real, and must be considered.

In 1984, Robert Hayward, then Chief of the Access Section at the National Archives, wrote that the passage of the ATIP legislation meant that the Archives was responsible for administering access to twelve kilometres of archival records, with an additional two kilometres added annually.<sup>52</sup> With all of the records reviewed, both formally and informally, the surface of the still restricted holdings of the National Archives remains barely touched. Many more records require review and every day new requests from researchers pour in. With the passage of time, many previously withheld documents may also require re-review prior to their release. Together, the ATIP process results in a never-ending procession of files flowing into the ATIP office, to the researchers, or back to protected storage. Understanding this process is essential to the archival community, for, barring a parliamentary amendment,<sup>53</sup> the National Archives has no choice but to apply the terms of the legislation.

Despite the inherent problems, administration of the ATIP legislation has been a general success for the National Archives. The Archives has provided millions of pages to researchers, at the same time protecting the information that the legislation deems sensitive. While application of the *Access and Privacy Acts* may occasionally seem reminiscent of trying to fit a square peg into a round hole, the archival community must remember one crucial fact: eventually even the most sensitive of presently restricted records will become available to researchers. In the meantime, until that sensitivity is lessened, the ATIP process will continue as it has in the past, protecting the information that needs protecting while making the remainder available to the researching public.

### Notes

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- 1 For an example of the Media coverage surrounding the tenth anniversary of the *Acts*, see the *Ottawa Citizen* of 3 July 1993.
- 2 While the original funds for ATIP were additional to the operating budgets of the various departments, the growth in demand for information, and the corresponding growth in ATIP offices, has long-since outstripped these additional funds.
- 3 Canada, National Archives of Canada, *Annual Review of the National Archives of Canada 1991-1992* (Ottawa, 1992), p. 8.
- 4 United States, 5 *United States Code* 552.
- 5 Nova Scotia enacted the *Freedom of Information Act*, the first example of this type of legislation in the Commonwealth, in 1977. New Brunswick's *Right to Information Act* followed in 1978, and in 1981 Newfoundland & Labrador became the third province to enact ATIP legislation. Donald C. Rowat, ed., *Canada's New Access Laws: Public and Private Access to Government Documents* (Ottawa, c1983), pp. 58, 77 and 91; John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto, c1981).
- 6 National Archives of Canada, RG 19, vol. 4934, file 3710-02 FP, Privacy and Computers Task Force, *Draft Report* (Ottawa, 1972), Part V, p. 62.
- 7 Canada, *Canadian Human Rights Act* 25-26 Eliz. II, c. 33, Part IV.



- 8 Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (Paris, 1981), p. 7.
- 9 Robert J. Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18 (Summer 1984), pp. 49-50; John D. McCamus, "Preface," in *Freedom of Information: Canadian Perspectives*, pp. v-vii; Donald C. Rowat, "Introduction," in Donald C. Rowat, ed., *The Right to Know: Essays on Governmental Publicity and Public Access to Information* 2nd ed. (Ottawa, c1981), pp. v-vii. A general discussion of access to Canadian government records, prior to the promulgation of ATIP, may be found in Richard J. Bazillion's "Access to Departmental Records, Cabinet Documents, and Ministerial Papers in Canada," *American Archivist* 43, no. 2 (Spring 1980), pp. 151-60.
- 10 Mitchell Sharp, one of those who argued against the ATIP legislation, would later comment concerning its introduction:
- It hasn't brought about any revolution in access to government information. It hasn't satisfied the media ... but it has been useful to people who feel that they have been subjected to unfair and discriminatory treatment, to the legal profession which wants access to documents bearing upon the interest of clients, and to opposition MPs who diligently ask for and scrutinize the expense accounts and the travel of ministers on government aircraft. Historians are doubtful, since the operation of access has been slow and sometimes perverse.
- Mitchell Sharp, *Which Reminds Me ...; A Memoir* (Toronto, 1994), pp. 228-29.
- 11 Robert Craig Brown, "Government and Historian: A Perspective on Bill C43," *Archivaria* 13 (Winter 1981-82), pp. 121-22.
- 12 Canada, Information Commissioner of Canada, *Access to Information Act: Office Consolidation* (Ottawa, 1991), s. 2(2) (hereafter *AIA*); Canada, Privacy Commissioner of Canada, *Privacy Act: An Office Consolidation and Index* (Ottawa, 1991), s. 2 (hereafter *PA*).
- 13 Canada, External Affairs and International Trade Canada, [Pamphlet on Access Procedures, Cat. No. E2-132/93], (Ottawa, c1993).
- 14 Canada, National Archives of Canada, Government Archives Division, *Access Section Procedures for Administering Requests for Information* (Ottawa, 1992), Part I, pp. 3-4; Nancy McMahon, "Access to Information and Access to Archival Records at the National Archives," *Off the Record* 10, no. 3 (May-July 1993), p. 5.
- 15 *Access Sections Procedures* Part I, p. 5.
- 16 Canada, National Archives of Canada, *Annual Report of the National Archives of Canada 1987-1988* (Ottawa, c1988), p. 36.
- 17 McMahon, p. 5.
- 18 Ken Rubin, *Opening the Door a Crack: Barriers to Using the 1982 Canadian Access to Information Act* (Ottawa, ca1984), pp. 2 and 34.
- 19 Canada, Parliament, Standing Committee of Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy: Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information and the Privacy Act* (Ottawa, 1987), pp. 99-111.
- 20 *AIA*, s. 2(1).
- 21 *AIA*, s. 25.
- 22 *The Montana Band of Indians vs the Minister of Indian and Northern Affairs vs Wendy Smith* FCR T-1622-86, 1988.
- 23 *The Information Commissioner vs the Solicitor General* [1988] Court-3 Federal Court 551.
- 24 *AIA*, s. 73; *PA*, s. 73.
- 25 *AIA*, s. 54-67; *PA*, s. 53-68.
- 26 *AIA*, s. 41-53; *PA*, s. 41-52.
- 27 Canada, Treasury Board Secretariat, *Access to Information and Privacy* (Ottawa, nd), c. 1, 37 and c. 2, 59-60. (hereafter *Treasury Board Guidelines*). This work replaces Canada, Treasury Board Secretariat, *Interim Policy Guide: Access to Information Act and the Privacy Act* (Ottawa, 1983).
- 28 *PA*, s. 3.
- 29 *AIA*, s. 19(2); *PA*, s. 8.
- 30 Canada, Public Archives of Canada, *Guidelines for the Disclosure of Personal Information for Historical Research at the Public Archives of Canada* (Ottawa, 1985).
- 31 *AIA*, s. 68; *PA*, s. 69.
- 32 *AIA* s. 3 defines government institutions as those bodies or organizations listed in Schedule I of the *Access to Information Act*. Bodies not included in this schedule, even though they may be identified in other legislation as government institutions, may not be accessed through *AIA*. This definition is

- not the same as that for the *Privacy Act*, whose s. 3 also defines government institutions under this act by inclusion in a schedule, but whose schedule includes many bodies not included in the *AIA* schedule, such as, for example, Canada Post.
- 33 For discussions of access to privately donated papers see: Grace Maurice Hyam, "Limitations to Use: The Problem of Access to Private Manuscripts," *Archivaria* 23 (Winter 1986-87), pp. 175-178; Grace Maurice Hyam, "Access to Records and Manuscripts," *The Archivist* 13, no. 2 (March-April 1986), pp. 1-4; Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," *American Archivist* 49, no. 2 (Spring 1986), pp. 163-75; and Raymond H. Geselbracht, "The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives," *American Archivist* 49, no. 2 (Spring 1986), pp. 142-62. An area of some sensitivity is the presence of government documents among those donated by former government officials. For discussions of the issue of public papers in the hands of private individuals, see: Terry Eastwood, "The Disposition of Ministerial Papers," *Archivaria* 4 (1977), pp. 3-19; and J. Frank Cook, "'Private Papers' of Public Officials," *American Archivist* 38, no. 3 (July 1975), pp. 299-324.
  - 34 Although donors may expect their restrictions to be upheld, the courts do not always recognize their validity; for a discussion of an American challenge to donor's rights of controlling access to archival holdings, see Harold L. Miller, "Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers At the State Historical Society of Wisconsin," *American Archivist* 52 (Spring 1989), pp. 180-190.
  - 35 *AIA*, s. 69; *PA*, s. 70; *Treasury Board Guidelines*, c. 1, 24-31 and c. 2, 56-58.
  - 36 *Treasury Board Guidelines*, c. 1, 30 and c. 2, 57.
  - 37 Canada, *National Archives of Canada Act*, 35-36 Eliz. II, 1987 [revised 1991], s. 4(4).
  - 38 *National Archives of Canada Act*, s. 5(5).
  - 39 *Treasury Board Guidelines*, c. 1, 128-129 and c. 2, 51-52.
  - 40 *Treasury Board Guidelines*, c. 1, 17-18 and c. 2, 48-50.
  - 41 *Frank Magazine* (24 June 1993).
  - 42 *National Archives of Canada Act*, s.4(1).
  - 43 McMahan, p. 5.
  - 44 National Archives of Canada, *1989-1990 Annual Report National Archives of Canada* (Ottawa, c1990), p. 54. Requests for operational records of the National Archives rarely achieve the public attention, except in exceptional circumstances, such as the results of an *AIA* request for information concerning the National Archives's construction of an office for Brian Mulroney, published in the *Ottawa Citizen* of 21 March 1994.
  - 45 Canada, Privacy Commissioner of Canada, *Annual Report Privacy Commissioner 1988-89* (Ottawa, c1989), p. 29.
  - 46 Canada, Privacy Commissioner of Canada, *Annual Report Privacy Commissioner 1990-91* (Ottawa, c1991), pp. 37-38.
  - 47 Canada, Information Commissioner of Canada, *Annual Report Information Commissioner 1992-1993* (Ottawa, c1993), p. 54.
  - 48 Canada, Information Commissioner of Canada, *Annual Report Information Commissioner 1991-1992* (Ottawa, c1992), p. 44.
  - 49 *The Sudbury Star*, 11-16 November 1993. The duplicated page may be found in the 14 November issue.
  - 50 In his statement on the National Archives consulting other departments, Bryden was probably referring to the mandatory nature of some consultations. John Bryden, *Deadly Allies: Canada's Secret War 1937-1947* (Toronto, 1990), p. 258.
  - 51 In a book on signals-intelligence, Bryden explained how he took records from one department, compared them to archival records to try and fill in the gaps caused by severing under *AIA*, and between the two sources "I suddenly found myself with the 'whole story'." John Bryden, *Best Kept Secret: Canadian Secret Intelligence in the Second World War* (Toronto, c1993), pp. 331-32.
  - 52 Hayward, p. 53.
  - 53 In early 1994, the Justice Minister was approached with a request for changes to the *Access to Information Act*, in order to provide better access to government records. One of those who made this approach was a new MP with strong opinions on the - John Bryden. Of perhaps greater importance, the Information Commissioner, in his annual report, has officially recommended massive changes to the legislation. Time will tell if such requests will bear fruit: *Globe & Mail*, 9 May 1994; *Montreal Gazette*, 9 May 1994; Canada, Information Commissioner of Canada, *Annual Report Information Commissioner 1993-1994* (Ottawa, c1994).