

Articles

In Search of the Chill: Access to Information and Record-Keeping in the Government of Canada

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RÉSUMÉ Le débat autour de la *Loi sur l'accès à l'information (LAI)* a surtout porté sur le manque de volonté du gouvernement de respecter la loi et son esprit. Alors que les rapports du Commissaire à l'information ont mis en relief des infractions comme des délais dans les réponses aux demandes ou encore une application trop large des exceptions accordées par la loi, d'autres ont allégué qu'une telle loi avait renforcé la résistance du gouvernement à être scruté par le biais de ses documents. Plus encore, les révélations des médias sur les enquêtes concernant la destruction possible de documents, tels que les journaux de guerre relatifs à l'implication du Canada en Somalie ou les transcriptions du Comité canadien du sang, ont été présentées comme illustration d'un grand mépris pour les documents gouvernementaux. À la lumière de ces incidents, on a soulevé des questions concernant l'altération des documents et la pratique d'éviter de documenter les décisions et les délibérations. Quel fut vraiment l'impact de la *LAI* sur la gestion des documents du gouvernement du Canada? Jusqu'à quel point a-t-on omis de créer des documents à la suite de l'adoption de la loi en 1983? Cet article se lance en territoire inconnu en examinant une série de documents créés par quelques ministères tant avant qu'après la promulgation de la loi avec l'intention de lever le voile sur l'impact de la *LAI* sur la gestion des documents au sein du gouvernement fédéral.

ABSTRACT Debate over the *Access to Information Act (ATIA)* has centred on the government's seeming unwillingness to comply with the law and its intention. While the Information Commissioner's reports have highlighted breaches such as delays in responding to requests, or the overly broad application of the *Act's* exemptions, others have argued that such legislation has only reinforced the government's reluctance to be scrutinized via its records. Further, media reports on the investigations into the possible destruction of records, such as the war diaries relating to Canada's involvement in Somalia and the transcripts of the Canadian Blood Committee, have been used as evidence to support the opinion that there is a blatant disregard for the public record. In light of these incidents, questions have been raised concerning the alteration of records and the practice of not recording decisions or deliberations. What has been the impact of the *ATIA* on record-keeping in the Government of Canada? To what extent have records not been created as a result of the passing of the *ATIA* in 1983? This paper ventures into unknown territory by examining a range of records created

by a number of departments both before and after the promulgation of the *Act*, with the intention of shedding light on the impact of *ATIA* on record-keeping in the federal government.

Introduction

There is little doubt that the *Access to Information Act (ATIA)* has had a profound impact on Canadian society and, more importantly, on federal public officials since its promulgation in 1983. Unfortunately, the impact on the latter group has often been negative. Several information commissioners' reports, federal task forces, and media accounts have documented attempts by federal politicians and bureaucrats to thwart the spirit of the legislation, if not the very *Act* itself.¹ The types of these shady dealings are fairly well known – institutions delaying their responses to requests or, in other instances, using very broad interpretations of the exemptions and exclusion clauses of the legislation to deny applicants access to records. Such instances in which these techniques are used are well documented,² and the fact that they are still frequently employed by public officials raises serious concerns for Canadian society.

Recently, however, another form of obfuscation has begun to receive attention from access to information advocates and bureaucrats; namely, the practice of altering records or, in more egregious instances, not documenting decisions or deliberations at all. A recent and important article by Jay Gilbert notes such activities, among others, in the federal government.³ Gilbert does an admirable job in detailing the culture of secrecy that persists in the Canadian bureaucracy, and provides valuable insights into how delays and broad interpretations of the exemptions and exclusions in the legislation have helped maintain that culture in Canada. He also notes that another form of response to the legislation “is to significantly change record-keeping practices through

1 Certain high profile contraventions of the *Act* that were highlighted by the media initially influenced our assumptions concerning the impact of the legislation on government record-keeping. In particular, the alteration and destruction of documents during the Somalia Commission Inquiry and the decision of the Canadian Blood Committee to destroy audio-tapes and verbatim transcripts of the Committee in 1989, to cite two examples, received extensive media coverage.

2 See, for example, Alasdair Roberts, “Administrative Discretion and the Access to Information Act: An ‘Internal Law’ on Open Government?” *Canadian Public Administration / Administration publique du Canada* 45, no. 2 (Summer / Été), pp. 175–194. See also Daniel German, “Access and Privacy Legislation and the National Archives, 1983–1993: A Decade of ATIP,” *Archivaria* 39 (Spring 1995), pp. 196–213.

3 Jay Gilbert, “Access Denied: The *Access to Information Act* and Its Effect on Public Records Creators,” *Archivaria* 49 (Spring 2000), pp. 84–123. The reluctance to document high-level decisions and recommendations was also touched upon briefly by Kenneth Kernaghan, “Freedom of Information in Canada” in Kenneth Kernaghan (ed.), *Public Administration in Canada: Selected Readings*, 5th ed. (Toronto, 1985), p. 382.

limiting both the creation and content of records.”⁴ More will be said of Gilbert’s work and the assertions of others in this regard later but, for the moment, it bears mentioning that this claim has received enough attention in recent years and was deemed serious enough to have been addressed by the recent Task Force appointed by the federal government to study possible changes to the *Act*.

The information commissioners have, for several years, called for legislation that would compel public servants to create records of deliberations and decisions.⁵ In many instances, the Commissioners have noted the lack of documentation relating to deliberations and decisions, and that this is seen as a major impediment to the proper functioning of the *ATIA*.⁶ This criticism came to the fore in the Commissioner’s 2000–2001 *Annual Report* which addressed at length record-keeping in the federal government. A subtle shift occurred on the subject, however; rather than ascribing the lack of documentation to sinister motives, the problem was now seen as part of a larger records management problem. Decisions are not being recorded because federal institutions lack the proper records management infrastructure to do so. That said, there were some questionable practices: “In potentially contentious and controversial situations, officials sometimes weigh the need for a clear record of what was said and done against the prospect that the file will be accessible to others and accountability for its contents demanded.”⁷ To remedy the situation, the Commissioner repeated his call for legislation requiring that appropriate records be created by public officials.⁸ Thus, although the situation might not have been as serious as previously thought, and that it might be partially remedied by improved records management, the Commissioner nevertheless wished to have safeguards in place to ensure that proper records are created and maintained in the federal government.

As can be seen in Gilbert’s article and numerous speeches and reports of information commissioners, there are references to the alarming practice of not creating records in order to avoid adhering to *ATI* legislation. What is largely absent from these accounts, however, is proof that such behaviour is routinely exhibited by public officials. A typical passage by the Information Commissioner will serve as an example. In a recent speech, the Commissioner noted that:

Every day in our work, we find instances where information is not acceptably managed; records are not created when they should be; records are not properly indexed,

4 *Ibid.*, p. 102.

5 See, for example, *Annual Report: Information Commissioner 1998–1999*. (Ottawa, 1999), p. 98.

6 See, for example, the Commissioner’s *Annual Report* for 1993–1994, pp. 9–10, and the *Report* for 1997–1998, p. 7.

7 Commissioner’s *Annual Report* for 2000–2001, p. 27.

8 *Ibid.*, pp. 29–30.

filed or included in departmental record-keeping systems; records are not being retained and are not disposed of in accordance with approved schedules.⁹

What is absent from this account is any direct proof – these statements are made, and frequently so, without any evidence to support them.¹⁰ There is little doubt that these tactics are employed, but what is needed is confirmation that they are as widespread as is often implied or stated. Simply put, the lack of study in this area, given the importance of it according to the critics, is striking, and might lead to inaccurate conclusions.¹¹

The recent Access to Information Review Task Force laid the groundwork for the present study.¹² Responding to the concern over the tactic of inadequately recording government information and decisions the Task Force requested that staff at the National Archives (NA) study the problem. In particular, the Task Force invited staff of the NA to explore the extent to which such claims were accurate. Members of the Task Force believed that the NA was in an ideal position to do this. It held records from both before and after the passing of the legislation, so comparisons could be made between pre- and post-1983 records (the *Act* was promulgated in 1983). In April 2001, the study was completed and the final report was forwarded to the Privy Council Office. The report was subsequently submitted to the Access to Information Review Task Force, and was included in the Task Force's final report, *Access to Information: Making it Work for Canadians*, as one of twenty-nine commissioned research reports.¹³ The NA is in a unique position to examine federal govern-

9 "Information Commissioner of Canada, Remarks to Joint ARMA/RMI Meeting," available at <www.inform.gc.ca/speeches>, p. 4.

10 The above speech is a rare exception, as the Commissioner does note that the Auditor General of Canada had some concerns with records related to procurement by officials in Public Works and Government Services Canada. *Ibid.*, p. 2.

11 There has been a recent emergence of literature that addresses records creation from a post-modernist perspective. See, for example, Terry Cook, "Archival Science and Postmodernism: New Formulations for Old Concepts," *Archival Science* 1 (2001), pp. 3–24. Postmodern considerations, however, are absent from the present study, as it focuses on practical aspects of records creation and records-keeping, rather than theoretical considerations of why records are created in the form that they take. Such considerations undoubtedly will be the subject of future studies.

12 On 21 August 2000, Justice Minister Anne McLellan and Treasury Board President Lucienne Robillard announced the establishment of the Access to Information Review Task Force, with a mandate to review both the legislative and administrative issues relative to access to information.

13 NA staff devoted significant resources to this project. The members of the Government Records Branch (GRB) Steering Committee were Richard Brown, Paul Sabourin, Bob MacIntosh, Paul Marsden, Kerry Badgley, Chari Marple, and Candace Loewen. The archivists who participated in the study were Catherine Bailey, Margaret Dixon, Chari Marple, Tim Cook, Paulette Dozois, Brian Beaven, and Kerry Badgley. The final report submitted to the Privy Council Office (PCO) was primarily prepared by Chari Marple. Candace Loewen coordinated the project.

ment records in this manner because after the expiration of a retention period when records are no longer active for an institution's operational purposes, they are disposed of according to NA authorities. These authorities are based on the appraisal of departmental functions and the identification of records having national historic significance. While only a small percentage of records are deemed archival, these records capture the highest level of decision making and the most significant functions within the government. They document the interaction between the citizen and the state, and provide evidence by which government can be held accountable for its decisions.

Upon receiving the report from the NA, the Task Force concluded, in part because of the NA study, that there was no evidence that *ATI* legislation had an impact on public servants' creation or management of information.¹⁴ That said, the Task Force did note that public officials "should be aware that they have a duty to create and manage records of policy decisions and operational activities ... and to dispose of records properly at the end of their operational usefulness."¹⁵ More to the point, the Task Force recommended that "standards be established for the documentation of the business of government."¹⁶ Interestingly, the recommendation is for *standards*, not requirements. Thus, although admitting that there is an information management deficit in the federal government, the problem could be remedied or significantly improved by the articulation of standards rather than by regulations or law. In other words, the problem identified by Gilbert was not as widespread or as serious as he might have thought it was.

In order to determine how the Task Force reached these conclusions, the details of the NA study and its methodology need to be mentioned.

Hypothesis

From the start, it was understood that archivists were well placed to make observations on record-keeping. Some of the seasoned archivists had seen the records of specific departments over a number of years during both the pre- and post-*ATI* legislation period, yet none had a sense of what we would find by examining a number of departments using the same criteria. From the anecdotal evidence of the media, the absence of studies addressing record-keeping issues, and our knowledge of the Health Canada experience, we hypothesized that the legislation did have a negative impact on record-keeping. That is, information was not being preserved either because of unauthorized destruction, the creator was not recording the same level of detail, or because of changes in records classification and record-keeping practices.

14 Access to Information Review Task Force, *Access to Information: Making it Work for Canadians. Report of the Access to Information Review Task Force* (Ottawa, 2002), p. 142.

15 *Ibid.*, p. 146.

16 *Ibid.*, p. 148, recommendation 9-4.

Methodology

A Government Records Branch (GRB) Steering Committee set the parameters for the study. A number of factors were recognized – for example, the impact of technology, the lack of documentation standards, departmental downsizing, and records creation as individual human behaviour which is difficult to measure or determine as motivated by *ATI* legislation. This specific study is significant because only archival records were examined. If evidence exists in records which were not transferred to the National Archives, it could not be discovered. The study looked at the results of record-keeping practices as found in the residue of archival records. Other types of evidence and access issues were not examined.

As a first step, the information commissioners' reports from 1983 to 1999 were systematically reviewed because these reports contain the commissioners' evaluation on how well the Government of Canada has complied with the legislation's requirements. Record-keeping issues identified through these reports included: unauthorized destruction of records; the decision to stop creating certain kinds of records; the transient nature of electronic records; and problems with physical access to records.

To be as consistent and comprehensive as possible in our measuring of record-keeping, five criteria were established. The first criteria was the quantity of records, that is, measuring changes in the volume of records. Second was the scope, including the source and comprehensiveness of the documentation. Third was the content/narrative which referred to the sequence of events or procedures documented by records. Fourth was the sense of corporate control as it pertained to efforts by the institution to bring records under control. And the fifth criteria gave the archivists the opportunity to discuss any other observations that were relevant to record-keeping.

The goal of this study was to obtain results which would be as quantifiable and objective as possible. In order to compare our results, records were chosen with common characteristics which included: the program remains relatively stable over time; the mandate of the institution (or committee or program) has not changed substantially; legislation (other than *ATIA*) has not had an impact on the conduct of business; records are easily accessible; and technology had little impact. The records investigated met the above characteristics. Records were examined from a range of government institutions and in a variety of forms: although most of the records were textual, some electronic and audio records were also included.¹⁷ Archivists conducted comparisons between records created before and after the promulgation of the *Act*.

17 Records consulted included Public Works (RG 11), Transport (RG 12), Fisheries and Oceans (RG 23), Foreign Affairs and International Trade (RG 25), Health (RG 29), Public Service Commission (RG 32), Treasury Board (RG 55), and Environment (RG 108).

Due to limited time and human resources, it was not possible to include records from all government institutions. In total, archivists examined a sample of archival records from seven different areas of government to determine the impact of the *ATIA* on record-keeping. It was obvious that the records of Health Canada should be included in the study because of the controversy and the NA's knowledge of the records. In addition to Health Canada records, other records, under the control of the NA, from Central Agencies, Transport Canada, Public Works, the Federal-Provincial Atlantic Fisheries Committee, the Canadian Environmental Advisory Council, and the Department of Foreign Affairs and International Trade also were selected for examination.

The review of the records of Health Canada deviated from the study's methodology for analyzing records, yet they were included because of the high profile incidents concerning Narcotic Control Case Files (1980) and the Canadian Blood Committee (1989). An elaboration of the department's actions concerning these records was deemed an important inclusion to this study. Narcotic Control Case files from the former Bureau of Dangerous Drugs of the Department of National Health and Welfare were improperly disposed of in 1980. While the NA authority allowed Health and Welfare to destroy cannabis files, hard drug files including heroine, cocaine, and LSD were also being shredded. The department declared that it would continue this practice in violation of the NA authority as the then Minister of Health and Welfare publically stated the files would be destroyed. Since this event took place prior to the passage of the *ATIA*, it was not a response to the *Act*. However, the incident may be considered evidence of the cavalier attitude towards records disposition present in the federal government at the time the *Act* was being discussed and implemented. In this case, records were destroyed by the creating agency when senior management determined they were no longer of importance regardless of the value assigned by the NA.

The Canadian Blood Committee was formed in 1981 to deal with the policies, issues, and problems concerning blood and blood products in Canada. The committee was composed of representatives of federal, provincial, and territorial ministers of health. Health and Welfare Canada provided a secretariat for the Committee from the time of its inception until 1991 when the Committee was replaced by a private organization, the Canadian Blood Agency.

In 1995, certain records of decision of the Canadian Blood Committee were entered as evidence at the hearings of the Commission of Inquiry on the Blood System in Canada (also known as the Krever Inquiry). These records stated that in its meetings on 16 May 1989, the Canadian Blood Committee had unanimously decided to destroy retroactively all audio recordings of proceedings of their executive meetings, along with transcripts of these recordings, to avoid the possibility that these items might be made available through a request under the *ATIA*. While the RCMP investigation concluded it was unable to ascertain whether the destruction of these records was done with

criminal intent, it appears that in this case the disposition of records was in response to the *ATIA*.

While this action was especially troubling from an archival standpoint, as it concerned the disposition of records and the value of the public record, the Health Canada experience caused archivists to worry that increasingly information and privacy legislation would have a detrimental affect on the fullness of the record for posterity – that such legislation could have a “chilling effect” on records creation and record-keeping. Did *Access* legislation in fact have a chilling effect on record-keeping since it was introduced in Canada federally in 1983?

Findings

Another deviation in our study was the inclusion of the Central Agencies’ records. This part of the study deviated not only in its selection of records but also in its results. Instead of looking at a series of records,¹⁸ this particular examination covered all of the operational registry files of four central agencies: Treasury Board Secretariat (TBS) (primarily); the Public Service Commission (PSC); the Office of the Commissioner of Official Languages (OCOL); and the Public Service Staff Relations Board (PSSRB). Central agencies do not have a direct impact on citizens; nevertheless, they are subject to the *ATI* legislation and therefore represent a legitimate element in the study.

The Central Agencies’ results were in contrast to the Health Canada narrative, in as much as the records quality and records-keeping practices appeared to have improved in spite of the passage of the *ATI* legislation. Although portions of TBS and PSC records are protected by blanket exclusions under the *ATI* legislation, it is the functions and activities of the central agencies that explain why there has been a positive change. The nature of the central agency mandate forces their policy files to be relatively rich no matter how officers or departmental management may react to *ATIA*. There is a huge incentive to make sure the registry reflects the review process; it is a practical operational requirement for TBS to have a detailed, reliable, and accurate corporate memory and to pass over the records to the NA for an even longer-term corporate memory for both itself and the Government of Canada. In addition to adherence to mandate, changing philosophies of governance also have had a positive impact. Since 1978, the bar of program evaluation criteria has been successively raised, in particular by the impact of modern notions of “comp-trollership” and “values based governance” as reflected in the revised expen-

18 In selecting records for examination, archivists identified records in the pre- and post-1983 period from the same series or file classification block within their department’s record-keeping system. The Central Agencies’ portion of this study identified overall trends and changes in the records generally.

diture management system circa 1995. The result is not only greater delegation of authority to deputy heads but also greater accountability of meaningful measures of program effectiveness in relation to results against stated goals. The archival and records implication of these developments are tremendous. The central agency record in the form of departmental case files is greatly enhanced out of forces completely independent of *ATIA*.

Although the results of the examination of the Central Agencies' records did not support the original hypothesis, neither did the analysis of the records selected for examination from other government institutions. For example, the results from the examination of the minutes of the Federal-Provincial Atlantic Fisheries Committee and the minutes of the Canadian Environmental Advisory Council could not substantiate that the *ATI* legislation had a negative impact on government record-keeping.

The Federal-Provincial Atlantic Fisheries Committee (FPAFC) was established in the late 1950s and consisted of federal and provincial deputy ministers who met to discuss Atlantic fisheries issues and develop common approaches to these concerns. From an examination of the FPAFC minutes which were selected randomly from the 1960–1992 period, it was found that the length and the comprehensiveness of the minutes did vary, as the minutes of the 1980s and 1990s are considerably shorter than those taken in the 1960s and 1970s. However, it was concluded that changes in the length and comprehensiveness of the minutes had more to do with administrative requirements and the style of the minute takers than to the enactment of *ATI* legislation. There was no direct evidence to suggest that the *Act* was the key or even a significant factor resulting in the changes to the contents of the minutes.

The Canadian Environmental Advisory Committee (CEAC) was established in 1972. Under its original terms of reference, its purposes were to: advise the minister of the environment on the state of the environment and threats to it; establish priorities for action on the part of the federal government; and measure the effectiveness of the Department of the Environment in restoring, preserving, and enhancing the quality of the environment. These functions, it bears mentioning, remained constant over time. The CEAC was funded by Environment Canada, and members were appointed by the minister for terms not exceeding three years. Minutes were selected covering the period 1972–1992. Shortly after the CEAC was established, it was recorded that the minutes should be short, without specific references to individuals by name, unless they so requested and that the duplication of minutes by members be discouraged. From the start, there were clear guidelines regarding how minutes should be recorded. The results of the examination of the records found that there were fluctuations in the length of the minutes, and indeed some of these fluctuations occurred around the time that the *ATI* legislation was enacted. As well, post-1985 minutes were found, in the main, to be shorter than the minutes taken in previous years. That said, there was no direct

evidence to suggest that the *Act* was the key or even a significant factor resulting in the changes to the contents of the minutes. The group concluded that changes in the length and comprehensiveness of the CEAC minutes, as with the FPAFC minutes, had more to do with administrative requirements and the style of the minute takers than to the enactment of *ATI* legislation.

Records of three departments which reflect perhaps the more routine aspects of government operations were also examined in the study. Included were Transport Canada, the Department of Public Works, and the Department of Foreign Affairs and International Trade. Although the findings of the examinations of their records are elaborated further in this article, let it be pointed out here, that none of the results of these investigations could support the original hypothesis. Other factors, including prescribed procedures consistent over time, legislated mandate, and variations in individual case histories, were cited as affecting record-keeping rather than the impact of the *ATI* legislation.

The records selected from Transport Canada and Public Works pertained to the actual day-to-day operations for a particular function identified through a subject classification code that remained stable over the pre- and post-*ATI* legislation period. In some cases, both headquarters and regional offices records were examined which added a regional dimension to the investigation. The sample of records included original and microfilmed copies of textual records.

Files for twenty-four different civil aircraft, from 1969 to 1987, were selected from Transport Canada's central registry system which contains registration files for thousands of aircraft. These files document the life history of specific aircraft registered in Canada and record the aircraft's registration, airworthiness, ownership, inspections, maintenance, modifications, accident reports, and general operational history. The quantity of information varied from aircraft to aircraft. In general, more information was filed during the initial stage of registration and airworthiness certification process, during changes to ownership or leasing agreements, and when aircraft required major repairs or overhaul. Files were created in compliance with the *Aeronautics Act*¹⁹ which specifies that Transport Canada is required to keep and preserve records and documents relating to aeronautic services. Specially, this includes records for all civil aircraft registered and providing services in Canada. Record-keeping is a tool used to ensure aircraft airworthiness and compliance with Transport Canada's policies and safety standards, and as such plays an important role in safeguarding public safety. During the period in which the selected files were created, there were no changes introduced to the department's record-keeping system. These files were created by the Aircraft Registration and Leasing Division of Transport Canada.

In Transport Canada, there are two sets of records kept for each aircraft, one created at headquarters and the other created in the region in which the aircraft

19 R.S. 1985, c.A-2, General Registry Powers, 4.9(s).

operated. Included in this selection were files from headquarters (Ottawa) and the regions (the West, Pacific, Ontario, and Quebec), all from the same series-subject classification code file block 5008. Much of the actual work in the issuing of aircraft and leasing documents and operating certificates is done in the regional offices. The regional offices are authorized to cancel the registration of aircraft, while headquarters completes the process and then notifies the regional office of the deregistration from the Canadian Civil Aircraft Registry.

In comparing the files created in the various regional offices, there was little difference in the quantity or type of records generated. However, there was a difference in the quantity and level of detail found in the headquarters versus the regional files. Headquarters files document a basic level of the life history of an individual aircraft registered in Canada, whereas the regional files contained much more detail. Headquarters files illustrated its central coordinating role for civil registration. The regional files reflected the role of the regional offices in dealing directly with owners/operators to ensure that they adhered to Transport Canada's regulations and standards for safety.²⁰ Further, there was no difference in the quantity or type of information found in these files for the period pre and post the *Access* legislation. Differences, such as the sensitivity level of information found in these files, can be attributed to the particular life history of the aircraft.

Transport Canada's civil aircraft registration files were created, maintained, and preserved as part of the department's legislated mandate. The quality and the quantity of material found in the files were affected by two factors. First, the life history of the particular aircraft determined if additional records, such as accident reports and major overhaul reports, were included along with the basic information documenting the registration and airworthiness certification process. Second, where these files were created affected the amount of information they contained. This difference can be attributed to the respective roles played by headquarters and the regional offices in documenting aeronautic services.

Public Works' files for seven out of the many hundreds of projects which had been undertaken in different parts of Canada were selected for examination. Projects included a wharf in Quebec, the Alaska Highway, the Skyway Bridge in Ontario, Banff National Park, an oil terminal in Newfoundland, a public building in Quebec, and the Mackenzie Highway.²¹ Files were created

20 Through its appraisal process, the NA had determined that the records which best document the interaction between the citizen and the state, and the ability of Transport Canada to carry out its mandate, are to be found in the regional offices. In particular, the regional civil aircraft registration files under the 5008 classification code are identified for transfer to the NA under Authority 99/008.

21 Twenty three files, dating from 1967 to 1988, were examined from a total of 175 files which had been created for these seven projects. Both general and specific files were reviewed which spanned the pre and post *Access* legislation period.

in the course of fulfilling the Department of Public Works' responsibility for "the construction, maintenance, and repair of public works and federal real property."²² The department created, collected, and received information relevant to its responsibility for public buildings, marine, or river works throughout Canada. Files included for example, original specifications and plans, as well as information on contracts awarded for each project. Files were selected from the same series/subject classification file block 4350.

During the period in which the selected files were created, there were no changes introduced to the department's record-keeping system. These files were created by the Architectural and Engineering Branch of Public Works and maintained in a Central Registry System in Ottawa. As well, there were several independent regional and district offices which came under the control of the central administration and used the same primary classification codes. Only central registry files were selected for this study.

Although these case files documented progress for a variety of public works projects, there were some similarities in the kinds of records placed on file. For example, most files contained ongoing reports and evaluations of the work in progress. And throughout these files, sensitive information was found that could have embarrassed the department. For instance, the Banff National Parks files contained a memorandum on a departmental decision to push ahead with the project's phase I because an environmental assessment was pending which could impede the implementation of phase II.

Some inconsistencies were also noticed in comparing these files. For example, during the planning and evaluation phases of each project one might expect to find certain kinds of reports. As part of the planning phase only a few files contained inspection reports which identified problems and recommendations prior to beginning a project and in the post-project phase there were only a few evaluation reports. As well, project files did not always contain original drawings, plans and blueprints, full disclosure of the actual cost of the project, or copies of bids submitted for contracts.

It was apparent from correspondence and memoranda found in these files that information which should have been forwarded to headquarters for filing may have been scattered throughout the regions and districts. For example, for the same project handwritten notes in the Banff National Park files indicated that some reports and drawings were retained in the "bridge office," and tel-exes between Ottawa and Edmonton indicated that the western region office had some drawings and specifications which Ottawa had requested for its central registry. In general, it is difficult to determine if the variations in the quantity and quality of the records found in these particular files were intentional or accidental.

22 This is specified in the legislation that created the Department of Public Works.

The headquarters Public Works project files were created in the course of supervising each project under its jurisdiction. It was in the department's best interests to maintain complete files in headquarters because they were important sources of information for briefing the Minister of Public Works. The main factor affecting the quantity and quality of materials found in these files was not the passage of the *Access* legislation but the fragmented nature of the department's filing system. Although headquarters maintained a central registry, essential records, such as the only copy of plans and blueprints, could be found in the regional and district offices.

The Department of Foreign Affairs and International Trade (DFAIT) portion of our study examined the records created by the department during Prime Minister Trudeau's visit to Moscow in 1971 (a pre-*ATIA* sample) and Prime Minister Mulroney's visit to Moscow in 1993 (a post-*ATIA* sample).

Prime Minister Trudeau was scheduled to visit Moscow in the fall of 1970 but the onset of the FLQ Crisis in October 1970 cancelled this initiative. It was rescheduled for May of 1971. Trudeau was the first high-level western political leader to visit the U.S.S.R. since the invasion of Czechoslovakia in 1968. The purpose of his visit was to examine east-west tensions in the post-invasion climate; to advance trade relations, reunification of families, and human rights; to pursue sports diplomacy, especially relevant with the advent of hockey games; and to increase co-operation on northern development issues. The talks between Trudeau and Brezhnev, Kosygin, and Gromyko were successful and both sides seemed pleased with the results. Most importantly, a protocol was signed between Canada and the Soviet Union stating that the two countries would meet on a more systematic basis.

Prime Minister Mulroney went to Moscow, Paris, England, and Germany in May of 1993. The trip was characterized as his "farewell tour" as Mulroney had announced his retirement from politics in February of that year. The visit in 1993 had several purposes. Discussions with President Yeltsin centered on the safety of Canadian peacekeepers in Yugoslavia, humanitarian and technical assistance for Russia, trade and investment, and defense conversion. In addition, at the time of the visit, Yeltsin was experiencing domestic difficulties and it was hoped that a visit from a western leader would bolster both his regime and reforms. A number of agreements were signed between the two countries on the occasion of this visit. These included agreements on economic cooperation, fiscal evasions, environmental protection, foreign investment protection, and civil aviation.

At the beginning of this study a number of possible approaches were considered in order to determine the effect of the *ATI* legislation on the records created by DFAIT. Among the possibilities was an analysis over time of the some of the interdepartmental committees chaired by DFAIT. An examination of their minutes might reveal if *ATI* had an effect on what was written down during these meetings. Another idea was to study Canada's relationship with a par-

ticular country starting before the legislation and ending sometime in the mid-1990s. It was proposed to examine the nature of this file over time in order to see if there were any changes to the recorded information after the implementation of *ATI*. It was decided to examine the files from two separate but similar events before and after the legislation: Prime Minister Trudeau's trip to Moscow in 1971 and Prime Minister Mulroney's trip to Moscow in 1993.

The Department of Foreign Affairs and International Trade has one large registry system for the records created at headquarters in Ottawa and throughout the world. Dispatches from the posts are routinely sent to Ottawa to be placed on the appropriate central file. For this study the same files were examined for each trip. The registry has a specific file for the visit of any person of political importance. The title includes the name of the person and the country to which they traveled. Included in this file are the arrangements for the trip, discussions of the reasons for it, and policy documents relating to all aspects of the visit. In addition, the main diplomatic policy files for Russia²³ for both time periods were examined. These files include general material relating to Canadian external policy and political relations between Canada and Russia, an assessment of Canada's policy, any speeches regarding it, material relating to trends in global, international, or national affairs, briefing notes, or any other material relating to Canada's relations with Russia. These files of the 20 Block of the central registry are the heart of Canada's diplomatic relationship with any particular country. The briefing books created for the prime ministers and their staff were also reviewed.

The results of the study focus on a number of criteria. These include the quantity of the files, their scope and content, and the amount of corporate control over these records. Because the exact same files were reviewed for each visit, it was easy to determine the differences, if any, in the quantity of the records created. Results indicated in some cases that the number of files were identical. When the numbers differed the larger number of files was from Mulroney's visit. However, in most cases there was only one additional file. The briefing books were almost identical in size.

The scope of the records was found to be exactly the same as well. On a file covering the actual visit, the same type of material shows up in both sets of records. The writer from a post will detail material found in that country's newspapers regarding the lead-up to the visit, the visit, and anything written about the accomplishments or failures of that trip. These précis offer a detailed summary and commentary on the views held by the host country. Also included are detailed notes on any conversations held between the political leaders, ministers, or diplomats regarding bilateral or international events. The notes on these conversations are quite detailed and offer opinions and com-

23 For accuracy, we have used "Soviet Union" to refer to Trudeau's visit, and "Russia" to refer to Mulroney's trip.

ments on the situation. For both of these visits, the Canadian ambassadors to Russia were seasoned diplomats with much experience in their field. In the case of Trudeau's visit, the ambassador, R.A.D. Ford, had been posted in the Soviet Union a number of times after the Second World War and had been ambassador there since 1964. For Mulroney's visit, the ambassador, Jeremy Kinsman, was another seasoned diplomat. In both cases any notes, dispatches or correspondence by either of them was detailed and complete. Prior to a visit, notes are made on the salient points Canada wants to discuss along with possible answers from the other side. These are completed usually by the foreign service officers at the post and at headquarters as well. They document what we hope to accomplish and where the problems might lie. Again for both of these visits, this type of information was found in the files and in each case the level of detail was the same. These files also contain material relating to the effect of the visit on Canada's or Russia's relationship with other countries. Again, the same type and depth of information can be found in each set of files.

It was interesting to note that though the visits were twenty-two years apart, many of the same issues were discussed. This was easily determined as material relating to both visits were held in the same registry system. Therefore, the results indicated similar material filed in exactly the same manner for each visit. As stated earlier, Trudeau was the first western leader to visit Moscow since the invasion of Czechoslovakia in 1968. Issues discussed included family reunification, human and political rights issues, trade, east-west relations, nuclear disarmament, the upcoming hockey games, economic co-operation on gas pipelines, atomic power, and pulp and paper mills. There are, in addition, records relating to the similar situation Canada and the Soviet Union faced as northern nations. Discussions on this topic included pollution, pipelines, economic co-operation, indigenous peoples, and transportation. Improved bilateral relations was the goal of the visit and the signing of the Protocol on Consultations was the highlight of the trip. The records detailing these accomplishments are rich in content and depth of analysis.

During Mulroney's visit many of these same issues were discussed, although since the Cold War had ended there was quite naturally some difference in the content of the discussions. While one of the reasons for Trudeau's visit was to promote a thaw in east-west relations, Mulroney's visit had as one of its purposes the propping up of the increasingly troubled government of Boris Yeltsin. The files are filled with material relating to the unstable Russian domestic scene. They document discussions on financing the social safety net, structural reform of the economy and military conversion, financing small businesses, the stabilization of the ruble, and Russia's foreign debt. Also included is material on the Canadian Polar Commission and the Conference on the Protection of the Environment in the Arctic. Increased trade was discussed in detail as many Canadian businesses were expanding into Russia.

The records document the discussions at various levels about Canadian peacekeepers stationed in Yugoslavia. A particular point concerned the possibility of Russia's intervention with the Serbian army on Canada's behalf. An item of interest discovered in completing the research for this study was the fact that in 1993 there was a secure telephone link between Ottawa and Moscow. There was no such link in 1971. High level and complete information on many topics were in the files for the 1993 visit, despite the existence of a secure telephone.

As stated previously the records for these two visits are in the same registry system. The rules and procedures for sending material to Ottawa from Moscow and vice versa were the same. There was the same level of corporate control for the two visits.

There are a number of other observations that can be made about these two visits. The Department of Foreign Affairs and International Trade hosts a school for new foreign service recruits called the Foreign Service Institute. This Institute trains the new employees in the art of diplomacy. At the beginning of this study the Institute was called to see if they had any guidelines, standards, or outlines on what a foreign service officer should write in a dispatch, memo, briefing book, or any of other diplomatic notes. Copies of all of these training materials were obtained. Upon examining them, it was obvious that even though the *ATI* legislation exists, foreign service officers have definite guidelines for what information must be captured in order to complete their work. In conversation with the assistant at the institute it was discovered that these guidelines have not radically changed over time. Certain salient points are needed in order for a country to conduct a foreign policy and they cannot be eliminated from the files. The institute does not consider the *ATI* legislation to have any effect on the records that must be created.

In confirming the results of this study, E.R. (Ted) Johnston, former ATIP coordinator for DFAIT and a retired foreign service officer was interviewed. Mr. Johnston was in charge of the ATIP Division for about five years in the 1990s and always exhibited a keen interest in history and records. Due to his close working relationship with the National Archives and the Information Management team he was interviewed for his views on the subject of the study. In the course of the conversation he confirmed what the study found. He does not believe that there is any real change in the amount or type of information that can be found in the files created by DFAIT since *ATI*. He remembers people speaking of the "chill" that was to come after the implementation of the legislation and he does not believe it has happened. Mr. Johnston also said that he was currently undertaking a contract for the department concerning East Timor. He was in the process of looking at records throughout the 1990s and he was finding the same depth of information as he had with earlier files.

Conclusion

The central question to be answered, then, is why did the present study not square with what Gilbert and others have argued? In other words, why did we not find what we expected to find?

Some conclusions are clearly supported by the preceding study. However, it bears stressing that this study is preliminary. It adopted an approach to measure the claims of others that *ATI* legislation has had a marked impact on records-keeping in the federal government.²⁴ As well, the sample size was relatively small, and the members undertaking the study were under tight deadlines to complete their work. Thus, additional work is necessary in order to make a study of this nature statistically significant. Moreover, it is difficult, if not impossible, to make simple cause-effect statements when dealing with such a complex issue. After all, there are several factors at play in determining how records are created, such as technology (including the emergence of computers during the period under consideration), downsizing (there were fewer public servants left to create the records after the program review exercise of the early to mid 1990s), and administrative changes (perhaps requiring the making of either more or less records to serve operational needs). Finally, it bears mentioning that the NA is a federal institution which has the potential to create a bias in such an in-house exercise.²⁵ With these caveats in mind, one obvious question remains: how can it be that this study is at such variance with the claims made by Gilbert and successive information commissioners?

Several possible explanations emerge. First, one has to take into account the very real fact that many bureaucrats do not create records with the *ATIA* at the forefront of their minds. Their first task is to undertake the work assigned to them. Only then may they worry about records management and accessibility issues. In fact, it might be the case that some are not concerned about access at all, given that another branch of their institution is mandated to address it. As well, it is likely that some do not worry about accessibility, because some records are stored in their desk drawer or hard drive. Although from a corporate and from a records management perspective this is a serious issue to be sure, it is not one to which nefarious motives can always be ascribed.

24 More anecdotal evidence comes from a series of interviews that were conducted with access to information and privacy officers at the NA. Every day these officers review records that were created before and after the promulgation of access to information legislation. Uniformly their response was that they were not surprised at the results of our study. Many believe that the culture of secrecy inbred in all civil services is characterized by a belief that somehow the officers and the sensitive records they create will be protected by the power of the government.

25 Although the possibility of a bias exists, given that the NA is part of the federal government, we believe that the approach taken in gathering data for this study minimized the possibility of favouring the federal institutions under consideration.

In addition, the culture of secrecy referred to is nothing new, something that is rarely mentioned in most works regarding *ATI* – it existed long before *ATI* legislation was put in place. Thus, if this culture had any impact on records creation and record-keeping, it would be reflected in the records long before the passing of the *ATIA*, and the *Act* would have had little, if any, impact on such practices. No matter how secret records might be marked, there is always a possibility that they will be made public, and records created prior to 1983 were also vulnerable to the same fate. There is no doubt that the culture of secrecy is strong and pervasive and, given this, it is unlikely that the mere passing of the *ATIA* had any impact on that culture. Are records of deliberations more or less frank than before? Is there more or less secrecy discernable in the construction of their opinions? Our preliminary answer to these questions is no.

Yet, a culture of secrecy notwithstanding, records manage to get created. For many public officials, the principle of accountability remains important; officials still have to answer to Parliament and the Canadian public for the substance of their decisions. In other words, the records need to be created to accomplish day-to-day business. In the some of the cases cited above, detailed records were needed for matters such as diplomacy. Regardless of *ATI* concerns, the records had to be created, and they had to be detailed. Thus, there would be little to gain and much to lose from not creating full and detailed records. And recent examples confirm that senior officials come under considerably more fire if public money is spent and there is no accountability of that spending. In fact, it might be argued that non-elected officials might actually like to have a record of their recommendations, particularly when elected officials disregard it. Thus, in many instances, there is no choice but to create the records.²⁶

Another aspect to be addressed, especially in light of the records that were consulted of this study, is our contention that many of the public servants whose records are deemed archival have a sense of their importance in the governance of Canada, and of their own historical importance. They recognize that their records will be kept in perpetuity and, as a result, are often careful to preserve records of their decisions. High-ranking officials want to leave a legacy and are generally proud of their decisions and their ability to make them. Thus, it would make no sense for them to make important decisions and then to have no record of their actions, or to alter the substance of their decisions or deliberations.

Tied in with the previous reason is the considerable experience of officials

26 Many of the records that the NA acquires are ones that might be brought up in court cases, Parliament, or in newspapers. Senior civil servants know (or least most of them know) that they could be in deeper trouble if public money is spent and there is no accountability of that spending.

with the *Public Records Act (PRA)* that governed access to records prior to the passing of *ATI* legislation. The *PRA* included a thirty-year rule that made most records public after thirty years. Many public officials believe that rule is a principle that works in conjunction with *ATI* legislation. At the same time they recognized that certain types of records would be protected. *ATIA* actually protects certain records explicitly such as those related to national security, federal-provincial relations, information received in confidence from other governments, etc. Knowing that these types of records might never be released might bestow upon some public officials a sense that their records are protected from public scrutiny.

Moreover, for many public officials, there may well be the belief that the records are either not sensitive (and therefore can be made public) or that the material is so sensitive that one of the several exemption provisions will ensure that it remains out of the public eye. Again, in these instances, any concerns over records creation are minimal.

None of us is naive enough to believe that sometimes records are not altered or in some instances not created at all. To suggest, however, that this behaviour is frequent or even commonplace, or that this sort of problem ranks up with delays in producing records, denials that the records exist, and even destruction of records might be raising alarms unnecessarily. At any rate, until further research is done in this area, with empirical studies, we can not know the extent of this problem with any degree of certainty. With this essay, we hope to start the process, and that we have identified key issues for further study.

