Responses by the BC Freedom of Information and Privacy Association (FIPA) to questions posed by the Information Commissioner of Canada, for the consultation on needed reforms to the *Access to Information Act (ATIA)* upon the 30th anniversary of its passage.

November 2012

Theme 1: the Right of Access

a) Right of Access?

1. To whom should the right of access to information be given? Should it be expanded to include all persons or continue to be restricted to Canadian citizens and permanent residents?

FIPA Response:

The *ATIA* should be amended to permit "anyone" to file requests. The right of all people, regardless of their citizenship or location, to make access requests is the accepted international standard, included in the FOI laws of 51 nations, including the United States and the United Kingdom. But under the current *ATIA,* only citizens and landed immigrants may make requests; non-citizens have no right to file requests.

More inclusive approaches were outlined in the *Open and Shut* report of 1987, in Information Commissioner John Reid's model ATIA bill of 2005, and in Canada's first draft *ATIA* bill in 1965. The United Nations *International Covenant on Civil and Political Rights* (1976), Article 19, ratified by 35 nations, also states that: "Everyone shall have the … freedom to seek, receive and impart information."

FIPA endorsed such inclusive approaches in our submission to an *ATIA* reform plan by former information commissioner Robert Marleau in 2009, at http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_sub_to_ETHI_Committee--ATI_Act--March_2009.pdf

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b) Scope of the Act: what institutions are subject to the Act?

2. Which institutions should be subject to the right of access found in the Act?

FIPA Response:

The basic FOI regime at work in many nations, which the *ATIA* would ideally follow, is not only to list specific covered entities in schedules to the *Act*, but rather to include precise and broader criteria outlining what *kinds* of entities are covered. A mixed system that uses both definitions and listings, such as that at work in the UK, could also be considered.

To comply with this generally-accepted regime, the *ATIA* should be amended to incorporate the following terms, found in Article 19's *Model Freedom of Information Law*, 2001:

> For purposes of this Act, a public body includes any body: (a) established by or under the Constitution; (b) established by statute; (c) which forms part of any level or branch of Government; (d) owned, controlled or substantially financed by funds provided by Government or the State; or (e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.

a. How should we determine whether an institution is subject to the Act? Should it be based on a functional approach (i.e. the role of the institution) or is another approach preferable (for example, based on sources of funding)?

FIPA Response:

The criteria are noted in our recommendation above.

b. Should the Information Commissioner be consulted when changes are made to the list of institutions subject to the Act?

FIPA Response:

Yes.

c. Should the application of the Act be applicable, and to what extent, to:

i. The judicial branch of governance (courts and/or court administration)?

FIPA Response:

The *ATIA* was originally intended to cover the executive branch of government, not the legislative or judicial branches. Nonetheless, the Act should apply to the courts and/or court administration and expenses, but not in regards to legal issues, and not "a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity" (as noted in s.3 of the B.C. *FOIPP Act)*

ii. The legislative branch of governance (Parliament)?

FIPA Response:

The Act should apply to Parliament. However, this application may require the creation of an exception that acknowledges parliamentary privilege. In our view, the creation of any such exemption in the *ATIA* should be accompanied by the extension of the Act to Parliament. As Commissioner Legault noted in her recent submission to the Commons ATI, Ethics and Privacy committee, the UK has just such a system. FIPA is of the view that if the ATIA is being amended to add an exemption from release for records covered by parliamentary privilege, then the scope of the Act should be similar expanded to include Parliament.

iii. The offices of Ministers (including Secretaries of State)?

FIPA Response:

Yes. The current state of the law, as a result of the Supreme Court of Canada decision in ***Canada (Information Commissioner) v. Canada (Minister of National Defence)*** (2011 SCC 25) exempts records produced in and/or held by ministers' offices. This is not acceptable. In BC, ministers' offices are covered by the Freedom of Information and Protection of Privacy Act , and there is no reason why federal ministers' offices (and those of Secretaries of State) should not also be covered. In addition, it is outrageous that people working in ministers' offices are also above access to information law, as history has shown that these are the people most likely to interfere with a requester's information rights contrary to s.67.1 of the ATIA.

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c) What records can be obtained through an access request?

3. Is the current definition of a record sufficiently broad?

FIPA Response:

Yes. However the ATIA could be amended to require that public bodies provide electronic copies of records to applicants upon request, where the records can reasonably be reproduced in electronic form.

d) How can records be obtained?

i) the general process

4. How should access requests to institutions be made? Should they have to be in writing or could other formats including oral requests be accepted?

FIPA Response:

People should have the ability to make their ATI requests in any commonly used communications format (as is the case in most of the world). This broader requesting system could be implemented if the current requirement to send a $5 cheque with every ATI request was eliminated (If the government insists on retaining the $5 fee, requesters should at least have the option to send the funds electronically). Article 19's *Model Freedom of Information Law,* 2001 provides interesting wording that could be adopted to guarantee the rights of those suffering illiteracy or a disability that makes a written request difficult or impossible:

> 8. (3) An individual who is unable, because of illiteracy or disability, to make a written request for information pursuant to section 4(1) may make an oral request, and the official who receives an oral request shall, subject to sub-section (5), reduce it to writing, including their name and position within the body, and give a copy thereof to the person who made the request.

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ii) Fees

5. Should the Act require payment of fees for:

a. Making an access request;

b. Processing an access request;

c. Providing copies of responsive records.

FIPA Response:

[a] There should not be a fee for the exercise of information rights under the *ATIA*. In 2009, former Commissioner Robert Marleau estimated that it cost $55 to process the $5 cheque currently required. It appears that eliminating application fees would save both requesters and the government considerable sums of money.

[b] Fees should never be a barrier to access. The information that governments create belongs to the public. Taxpayers have already paid for its production, and should not have to pay once again to retrieve it.

The report of the 2002 Treasury Board *ATIA* task force found the total costs of administering the *Act* are in the order of $30 million annually or less than $1 per Canadian per year, and concluded that this is a modest cost in light of the democratic benefits, and the exposure through ATI of governmental waste and inefficiency.

The five hours of search time included with each access request for no extra charge should be increased to 10 hours, especially given current deficiencies in information management systems which in many departments cause lengthy delays. Further, the current $10 per hour search and preparation fee should not be increased. No fees should be payable if no records are found.

The B.C. *FOIPP Act* states in Sec. 75 that “(2) An applicant must not be required under subsection (1) to pay a fee for (b) time spent severing information from a record.”

“Severing” is not mentioned by name in the *ATIA* (perhaps it is presumed to be included in Sec. 11(2) on “prepare any part of it for disclosure”), but the principle of not charging for “severing or reviewing a record” should be explicitly written into the *ATIA*.

Treasury Board should be required to compile and release statistics on the number of *ATIA* requests that were abandoned after a processing fee estimate was assessed as part of its annual report on the operation of the system.

[c] Copying fees should be 1) standardized across the federal government, 2) strictly limited to reflect the fact that the public already pays for the creation and maintenance of all government information, and 3) should never exceed market rates. The first 150 pages should also be free.

The law should state that records should be made available electronically if possible and if the applicant wishes. This would eliminate the cost of unwanted photocopying. The *ATIA* regulations on fees (and other items) should be part of a regular review of the Act.

6. Should a distinction between electronic and non-electronic records be preserved in the provisions concerning fees?

FIPA Response:

Clearly the costs of providing records in these different formats will require different fees, but the choice should be given to the requester.

7. Should criteria for waiver of fees be included in the Act?

FIPA Response:

Yes, see below.

8. Should fees be legislatively waived in certain circumstances, i.e. public interest, failure to respond on time, source of the request?

FIPA Response:

Yes, and the criteria for waiving fees should include a consideration of whether the payment will cause financial hardship for the requester, as in several provincial laws. Fees should be waived if the ATI request is in the public interest (e.g., matters of safety, health, environment and consumer protection), as in British Columbia's *FOIPP Act,* noted below. The reference to relief from fees in the public interest should be mandatory (and the applicant should be allowed to appeal to the Commissioner if denied a waiver).

> 75.(5) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head's opinion, (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or (b) the record relates to a matter of public interest, including the environment or public health or safety.

Iii) Duty to assist

9. Should there be consequences when institutions that fail to meet their legislated duty to assist? If so, what form should those consequences take?

FIPA Response:

Yes.

It should be noted that the Australian state of New South Wales has such a provision in its *NSW Government Information (Public Access) Act* of 2009. Specifically, s.116 provides that:

> Offence of acting unlawfully
> An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of this Act.
> Maximum penalty: 100 penalty units.

One penalty unit apparently is about $100, and prosecutions are conducted by the Director of Public Prosecutions, so this is a significant sanction against arbitrary and unsupported actions by government officials to limit access to information.

Mexico's FOI law also includes a provision whereby officials can be penalized for 'Fraudulently classifying information that does not fulfill the characteristics indicated by this Law' (Art. 63, part IV). It also prohibits 'Intentionally providing incomplete information in response to a request for access' (Art. 63, part VI).

In Canada, Quebec's FOI law (s.158) provides that: "Every person who knowingly denies or impedes access to a document or information to which access is not to be denied under this *Act* is guilty of an offence […]"

The *ATIA*'s current $1,000 penalty for obstructing the federal Information Commissioner should be raised to $10,000 to match the penalty of interfering with access rights under s.67.1.

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iv) Responding to frivolous and vexatious requests

10. Is there a need to establish criteria to determine if a request is frivolous or vexatious? If so, what should those criteria be? Who should have the authority to determine if a request is frivolous or vexatious? What should the role of the Information Commissioner be, if any?

FIPA Response:

A requester whose requests are designed to impede the functioning of the public body rather than to elicit information should be subject to some sanction.

In the B.C. *FOIPP Act* Sec. 43, a public body must apply to the Commissioner for permission to disregard requests. The Commissioner determines whether a request is frivolous or vexatious using criteria similar to those used by the courts to determine whether litigation is frivolous or vexatious. The use of this term allows the importation of existing jurisprudence, which provides for a measure of clarity and certainty in its application (which is fortunately fairly rare).

Any such amendment should be linked to an amendment that imposes sanctions on a public body that egregiously does not carry out its duty to assist requesters.

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e) Timelines for responding to requests

11. Should any change be made to the current 30-day time period for responding to requests?

FIPA Response:

Amongst the world's FOI laws, the average request response time is two weeks. We see no reason why Canada should not adopt this global standard.

Eight nations mandate a reply within 10 days; at least 60 other FOI jurisdictions in the world prescribe shorter timelines than in Canada, and some have strong penalties for delays.

12. Should institutions be entitled to extend that 30-day time period and, if so, on what basis? Should any changes be made to the existing provision for extending time lines?

FIPA Response:

Under the *Access to Information Act*, public bodies must respond to requests within 30 days, and may extend this for another 30 without permission. But in the *ATIA*, the reply may be extended for an unspecified "reasonable period of time" – which is not the global standard. There should, then, be no extension beyond the 30 days without the permission of the requester.

13. Should there be a maximum length of time imposed on extensions?

FIPA Response:

Yes, 100 days total from the time the request is received.

14. Should time extensions beyond a certain length require authorization of the Commissioner?

FIPA Response:

Yes. In 2009, former Commissioner Robert Marleau proposed that: "That the *Access to Information Act* requires the approval of the Information Commissioner for all extensions beyond sixty days." However, FIPA was concerned that while this proposal may reduce government's ability to take extremely long periods to reply to a request, it would have the unintended consequence of instituting an automatic 60 day delay for all requests. This has been our experience in British Columbia.

15. Should there be a mechanism to ensure that institutions meet the extended deadline? Administrative consequences, access to judicial review, etc.?

FIPA Response:

We propose the current BC system as a possible model. If there is no reply within 60 working days (per s. 10 of FOIPPA), this is termed a "deemed refusal," and the applicant may send an appeal to the Office of the Information and Privacy Commissioner on the 61st day, leading to one of two outcomes: [1] a binding consent order agreeing to a new due date signed by all parties, or if either of the parties do not

agree, [2] a new Expedited Inquiry on delays, with a ruling issued within two weeks to order compliance. This has reduced delays in B.C.

2: Limitations to the Right of Access

a) Overview of the limitations to the right of access

16. Should all exemptions be discretionary?

FIPA Response:

All exemptions in the *ATIA* should be discretionary, except for Sec. 19 on privacy protection.

The risk of government officials being overly and improperly generous with access if exemptions were discretionary is an illusion, and government should be required to show concrete examples of where discretion was improperly exercised in the ATI field.

The *ATIA* should be amended to prohibit the use of any of the discretionary exemptions if the response time limits in the law are exceeded.

17. Should all exemptions be injury based?

FIPA Response:

Yes. This is the subject of broad consensus.

In fact, a politician by the name of Stephen Harper made it part of his 2006 election platform. His commitment reads as follows:

> “A Conservative government will: Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.”

The government should be eager to bring in such an amendment.

18. Should there be exemptions that are targeted at specific institutions or should all exemptions be of general application?

FIPA Response:

Exemptions should be of general application.

19. Should any category of information be excluded from the application of the Act?

FIPA Response:

No. There is no justification for exclusion. The Commissioner and the courts are perfectly capable of making determinations as to whether or not an exemption has been properly applied. Cabinet documents in other jurisdictions have not been excluded from the operations of ATI laws without serious consequences. There is no reason why the federal cabinet should be excluded.

b) Public interest override

20. Currently, certain specific exemptions contain public interest overrides. Should exemption specific public interest override provisions be replaced by a general public interest override applicable to all exemptions?

FIPA Response:

Yes.

Again, this was part of the 2006 Conservative Party of Canada election platform, but never fulfilled ("A Conservative government will: Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government").

There are only two public interest override features now in the Canadian *Access to Information Act*, both discretionary. The first is within the mandatory Sec. 20, on third party information, while the second is found within the *ATIA*'s mandatory Sec. 19, on personal information. This right is far too narrow.

21. Should "public interest" be clearly defined in the Act?

FIPA Response:

Yes.

In British Columbia, we have had a very restrictive interpretation of s. 25 of the FOIPPA, which has limited this public interest override to only the most extreme situations. In addition, there have been a number of incidents where it appears public bodies failed to release information under s.25 in the public interest, either because they took an overly restrictive view of their duty or because they were actually unaware of their duty under the law.

The BC Commissioner's office is currently investigating a number of incidents set out in a complaint filed on behalf of FIPA by the Environmental Law Clinic at the University of Victoria. That complaint can be found here:

http://fipa.bc.ca/library/Reports_and_Submissions/Section%2025%20Submission_ELC_FIPA_June2012.pdf

However, it will be necessary to amend the section to provide additional clarity on the question of what constitutes the public interest and to lower the threshold for releasing records in the public interest to avoid such cases in the future.

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c) Limitations in other statutes

A Schedule to the Act currently lists approximately 60 provisions found in other legislation that form the basis of a mandatory exemption under the Act (s. 24).

22. Should the Act incorporate, on a mandatory basis, provisions found in other legislation which restrict access to information or are the current exemptions sufficiently broad?

FIPA Response:

The current exemptions are sufficiently broad, indeed often overbroad. Section 24 should be removed; there should be no secrecy provisions in other federal statutes; the *ATIA* should be the main guarantor of the public's statutory right to access government records (beyond informal releases). The federal government should commit to bringing all laws relating to information into line with the principles underpinning the *ATIA*.

In fact, this was also proposed by the CPC in its 2006 election platform, but never enacted. Their precise wording was: "A Conservative government will: Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information."

Unchecked, the number of listed statutes could grow still further today beyond 60, a practice that former Information Commissioner John Reid has well described as "secrecy creep," while his predecessor John Grace wrote of Sec. 24: "This provision is the nasty little secret of our access legislation and it has no place at all in the law. Both urged that Sec. 24 be abolished, as did *Open and Shut*, the 1987 report by MPs' committee on Enhancing the Right to Know, and the 2006 Justice Gomery report, *Restoring Accountability.*

Sec. 24 also provides legitimacy to governments using other statutes to circumvent the quasi-constitutional nature of the *ATIA* as set out in s. 4 (1), which gives the *ATIA* primacy over other acts of parliament.

23. What process, if any, should be followed when adding new provisions to the list found in the Schedule?

FIPA Response:

There would be no such schedule if Sec. 24 is abolished, hence nothing to add.

24. Should specific criteria be established?

FIPA Response:

There would be no such criteria if Sec. 24 is abolished.

25. What role if any should the Information Commissioner play in relation to the addition of a provision to the Schedule?

FIPA Response:

This question is not applicable if Sec. 24 is abolished, as it should be.

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d) Limitations on the right of access - exemptions

i) Personal Information (s. 19)

26. Should the definition of personal information, and the exceptions to that definition, be changed?

"Personal information" in the *ATIA* is as defined in section 3 of the *Privacy Act*. It does not include the term "sexual orientation," but it should. This situation is inconsistent with human rights law and policy in Canada. "Sexual orientation" appears in the FOI laws of British Columbia, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland, the Yukon and the Northwest Territories.

We also question the current use of the term "salary range" for public officials. A number of provinces not only allow information requests about salaries, but also other forms of remuneration (bonuses, severance payments, etc.), but often post these on government websites.

27. Should the definition of personal information incorporate an invasion of privacy test? If so, should the ATIA adopt a model which involves presumptions about the kinds of personal information which are and are not likely to be invasions of privacy?

FIPA Response:

The personal information exemption in the *ATIA* should be amended to replicate B.C.'s *FOIPP Act* Sec. 22. (i.e.,"Disclosure harmful to personal privacy 22(1): The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy")

On a related matter, regarding the ATI request process, the *ATIA* should make clear that the identity of a person making a request may not be disclosed without the consent of the person unless (a) the disclosure is solely within the government institution to which the request is made; and (b) the person's identity is only disclosed to the extent that is reasonably necessary to process and answer the request.

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ii) Information from foreign, provincial, municipal or aboriginal governments (s. 14)

28. Should the exemption for foreign government information continue to be a mandatory class exemption?

FIPA Response:

No. It should be amended to be made discretionary and include both a harms test and a time limit.

29. Should the Act prescribe a specific process to seek the consent of the third party to disclose?

FIPA Response:

Yes. The process in the British Columbia *FOIPP Act* (Division 3 - Notice to Third Parties, Sections 23 and 24) provides a useful example of how this can be done.

30. In the absence of an over-arching public interest override, should this exemption be subject to a specified public-interest override?

FIPA Response:

Yes, but we would prefer that there be only one general mandatory public interest override for all *ATIA* exemptions.

iii) International Affairs, Defence and Prevention of Hostile Activities (s. 15)

31. Should the exemption protecting international affairs, defence and other national security interests be changed?

FIPA Response:

Section 15 does have a harms test, and it is discretionary. However, exercise of that discretion could change over the course of time as this country's relations with a given foreign state change. We are also not convinced of the necessity of the non-exclusive list in s.15 (1) (a-i).

This section should also be subject to the general mandatory public interest override proposed earlier.

a. If so, how? Should the exemption be subject to a time limit?

FIPA Response:

There should be a 20 year time limit for this exemption (as currently exists for cabinet records and law enforcement records).

b. Should it be subject to a specified public interest override?

FIPA Response:

There should be one general mandatory public interest override for all *ATIA* exemptions and it should apply to this section.

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iv) Business Information (economic and other interests) and notification process (ss. 20, 27 & 28)

32. Should the provisions exempting third party information from disclosure be changed?

FIPA Response:

Section 20 should be changed to discretionary, not mandatory. There should also be a time limit as in the BC law.

The Act should also specifically set out that third parties bear the onus of proof when challenging decisions by claiming records contain confidential business information.

a. Should there be an exception for third party information in contracts awarded by government institutions?

FIPA Response:

No. This information should be subjected to the general test set out in s.20.

b. Should a public interest override be made mandatory in specified circumstances?

FIPA Response:

There should be only one general mandatory public interest override for all *ATIA* exemptions.

Sec. 20(6) has a public interest override but it is only discretionary, and too narrow. It should include a general clause along the lines of "the disclosure of which is, for any other reason, clearly in the public interest." Such a clause should be mandatory and would cover unforeseen situations.

c. Should third parties who are given notice of the intention to disclose information be able to rely on exemptions other that the third party information exemption?

FIPA Response:

No. The public body's ATIP coordinator alone should apply the appropriate exemptions.

33. Are the current provisions relating to third-party notification effective? Should third parties be deemed to have given their consent if they do not respond within a specified period of time?

FIPA Response:

The current provisions relating to third-party notification are adequate, and the *ATIA* should include a deeming provision where a third party does not respond within the specified period of time.

v) Economic interest of government institutions (s. 18, 18.1)

34. Should the current exemptions protecting the commercial interests of government institutions be changed?

FIPA Response:

No. It contains both a harms test and is discretionary.

a. Should there be a distinct exemption for Crown corporations or should there be one exemption of general applicability for governmental economic interests?

FIPA Response:

There should be one exemption for governmental economic interests. Crown Corporations are owned by the government and their interests can be protected by using the current exemption.

b. Should the economic interests of government institutions be subject to a specified public interest override?

FIPA Response:

There should be only one general mandatory public interest override for all *ATIA* exemptions.

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vi) Policy or advice to the executive (including Cabinet confidences)

35. Should any changes be made to the current wording of the exclusion?

a. For example, should the time period of 20 years found in the exclusion be reduced or is it appropriate?

FIPA Response:

The intent of official advice exemptions is to protect the legitimate interest of society in allowing public servants to freely and candidly provide advice or recommendations to decision makers in government without fear of premature disclosure. However, this is supposed to protect the advice and recommendations of public servants, not to create a blanket that could be thrown over any information involved in the deliberative process.

The 20 year time limit is grossly excessive. Nova Scotia's FOIPP law permits the release of policy advice records in 5 years, and the BC and Quebec laws have a 10 year limit. Section 38 of the Quebec law says the government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

This section should also be subject to a general harms test, and checked against a comprehensive list of the records that must be disclosed. This list should apply regardless of who produced the records.

Scotland's standard, set out in s. 30 of its FOI law, requires that such release must 'prejudice substantially' the effective conduct of public affairs. We favour a similar harm test for the ATIA.

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36. Should the Act be applicable to Cabinet confidences?

FIPA Response:

Yes. In all Canadian provinces, cabinet documents are subject to release, and to review by the Commissioner in the case of a dispute between the requester and the public body.

Under Canada's current access regime, however, once the Clerk certifies that records are cabinet confidences, we completely lack a review process to challenge this certification. This system cannot help but encourage government to mischaracterize records as cabinet documents. In 1994, former Commissioner John Grace wrote that "no single provision brings the Access to Information Act into greater disrepute than section 69," which excludes cabinet documents from our federal access regime.

Ten years later, Justice Canada set out the need for change in *A Comprehensive Framework for Access to Information Reform: A Discussion Paper (*2005): "While the Government strongly believes that the Cabinet decision-making process must continue to be protected, it also recognizes that the current regime is twenty years old and needs to be modernized…The Government is considering the following changes to the Cabinet confidence regime: On the scope of protection, the Government would narrow the ambit of Cabinet confidentiality by focusing on its essence in a manner largely similar to what exists in the provinces and in most other Commonwealth countries."

However, the federal government has taken the opposite approach.

In 2001, the ATIA was amended by a portion of *Bill C-36*, the *Anti-Terrorism Act.* The *Anti-Terrorism Act* amended s. 69 of the *ATIA* to authorize the Attorney General of Canada to completely exclude security and intelligence related information received in confidence from foreign governments from the operation of the *Act*, by issuing a "certificate."

In passing this section, the Canadian parliament - alone in the world - simultaneously disempowered the Information Commissioner and the Federal Court from conducting any independent review of such a decision. The Canadian government has yet to convincingly explain why such harmful information releases could not be prevented by applying s. 15 of the *ATIA ,*which deals with 'subversive or hostile activities'. We believe this amendment has more to do with undercutting review of government decision making than potential harm to national security.

Internationally, The South African FOI law is the only other national law in the world that follows the current Canadian federal practice of excluding cabinet records.
Section 69 should also reflect the increasingly common practice of making cabinet documents public after the decisions have been taken and the matter is complete.

Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause:

> 8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [….]
>
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed.

FIPA strongly recommends that Cabinet records exclusion be made an injury-based discretionary exemption with a 10 year time limit, and be subject to review by the Commissioner.

37. Should an injury-test be incorporated into the exemption for advice in the context of government operations?

FIPA Response:

Yes.

In the FOI statute of the United Kingdom, policy advice and cabinet confidences appear in sections 35 and 36. In Sec. 36, prejudice to effective conduct of public affairs, there is a harms test.

> 36. […] (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act (a) would, or would be likely to, prejudice (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown [….]

Scotland's FOI law also contains a harms test, and its Sec. 30 (c) also has a generous general exemption clause for unforeseen developments:

> 30. Prejudice to effective conduct of public affairs. Information is exempt information if its disclosure under this Act
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> (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
>
> (b) would, or would be likely to, inhibit substantially (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation; or

> (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

There is no reason a harms test along these lines could not be incorporated into the ATIA.

a. Should s. 21 be subject to a public-interest override? Should the 20-year period time-period be modified or removed?

FIPA Response:

There should be one general mandatory public interest override for all *ATIA* exemptions. There is no reason the time period during which Cabinet confidences cannot be disclosed could not be reduced from 20 years to 10 years, as in Nova Scotia.

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vii) Solicitor-Client privilege

38. Should an exception be established for information relating to public monies spend on legal services?

FIPA Response:

Yes. The government must be accountable for its spending practices, and part of that spending includes amounts spent on legal services. This is not the same situation as, for example, during litigation where revealing that a disbursement has been incurred for a particular expert can also reveal legal strategy. Legal privilege must be protected, but all too often government applies this principle in an overly broad fashion. Oftentimes the result is that information important for accountability and public policy is withheld, when the release of such information would have no negative effect whatsoever on solicitor-client confidentiality or litigation strategy.

The lack of any time limit (conceivably even for centuries) for legal advice is simply indefensible, as noted by former Information Commissioner John Reid in 2005:

> It has been obvious over the past 22 years that the application and interpretation of section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.

In the UK law, a record cannot be withheld after 30 years under their s. 42, which deals with legal privilege. There is no reason why the *ATIA* could not have a similar provision.

39. If a government institution is the client receiving privileged legal advice, should there be circumstances under which it is encouraged or required to waive the privilege?

FIPA Response:

Yes.

The government should be encouraged to do so where there is no risk of damage to the litigation strategy. The addition of a harms test focused on litigation privilege could assist in this regard

a. Should government institutions benefit from the same scope of legal privilege as private parties?

FIPA Response:

No. Because of public bodies' need to be accountable to citizens for their actions (particularly spending), there is a competing societal good which does not exist in the private sector. This can be handled through the addition of a harms test and restricting the privilege to litigation privilege (see Q 40 for details).

40. Should there be separate exemptions for legal advice privilege and litigation privilege so that the particularities of each one can be taken into account in the design of the exemptions?

FIPA Response:

Yes. The Executive Director of the Centre for Law and Democracy, Toby Mendel, stated the rationale for this most succinctly: "Public bodies abuse the idea of solicitor-client privilege to cover all sorts of information that is not sensitive at all. For public bodies, this exception should be restricted to litigation privilege, that is, communications with lawyers that are related to actual or potential litigation. Otherwise, public bodies can throw a cloak of confidentiality over anything simply by consulting their lawyers about it."

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viii) Law enforcement, lawful investigations, audits and similar processes

41. What changes if any should be made to the exemptions relating to law enforcement and investigations?

FIPA Response:

Section 16 should include a harms test for the entire section, not just subsection (c) and (d). The 20 year limit could also be reduced to 15 years.

a. Should specific criteria be established to determine whether an entity is an "investigative body" under the Act?

FIPA Response:

Yes. A clearer and more comprehensive definition would be preferable to a listing of investigative bodies in a schedule.

42. Are institution-specific exemptions for investigations or audits conducted by agents of Parliament required?

FIPA Response:

No, there does not appear to be any particular reason for these audits to be treated differently from others.

a. Should they be injury-based?

FIPA Response:

There should be no special exemption for "institution-specific exemptions for investigations or audits conducted by agents of Parliament."

b. Should the exemptions be subject to a time limit?

FIPA Response:

There should be no special exemption for "institution-specific exemptions for investigations or audits conducted by agents of Parliament."

ix) Other issues

43. Should class-based exemptions be limited in time? If so, for how long?

FIPA Response:

There should be no class based exemptions, as promised by the CPC in its 2006 election platform. (Their precise wording was "A Conservative government will: Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption

rules.") But if there were such exemptions, then they should all have time limits.

44. Should there be specific exemptions applicable to the decision-making and other procedural aspects of administrative tribunals?

FIPA Response:

On the face of it, we are not aware of this being a major issue in the current version of the Act, so we would not be in favour of adding this exemption.

Theme 3: Oversight and Powers

a) Oversight Models

45. What changes, if any, should be made to the current oversight model established by the ATIA?

FIPA Response:

These are detailed in the replies below.

a. Should the ombudsmodel be retained?

FIPA Response:

No. We have consistently called for the Commissioner to have order-making power, most recently in our response to former Commissioner Marleau's 12 points: http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_sub_to_ETHI_Committee--ATI_Act--March_2009.pdf

b. Should the federal Information Commissioner have order-making powers?

FIPA Response:

Yes. Former Commissioner John Reid expressed the view that order-making powers would change the nature of his office. He was right, and FIPA believes this would be a positive change. By seeking the power to make orders on administrative matters such as fees and delays in 2009, former Commissioner Robert Marleau apparently accepted this change regarding the nature of his office.

FIPA recommends against taking only half measures, when clearly full order making power is what is needed. As well, the current powers of the Information Commissioner should not be further restricted in any way. In 2009, Information Commissioner Robert

Marleau said he wanted the ability to try to mediate some complaints as opposed to launching into full and costly investigations, and this is worth consideration too.

Even the 2002 report by the Treasury Board and the Department of Justice on *ATIA* reform states that:

> In the final analysis we believe that the structural model in place in most jurisdictions, a quasi-judicial body with order-making powers combined with a strong mediation function, would best achieve this [dispute resolution]. In our view, it would be the model most conducive to achieving consistent compliance and a robust culture of access. We encourage government to give serious consideration to moving to such a model in the medium-term….
>
> As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness…. It is an economical model for taxpayers and for requesters, with more than 99 per cent of all complaints being resolved without recourse to the courts.
>
> Our research indicates that in Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful. It was also the model overwhelmingly favoured by those who participated in public consultations or made submissions to the Task Force….

c. Should a hybrid-model be considered (when the Commissioner has order making power for administrative files but not for refusal files)?

FIPA Response:

As noted above, we urge the reform to include full order making power for the Commissioner.

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c) Reviews by the Oversight Body

i) Process

(1) General Process

46. Should the Commissioner have the discretion to extend the deadline for submitting a complaint to the Commissioner?

FIPA Response:

Yes. We also believe the deadline should be restored to one year (as it was set for decades before it was shortened to 60 days), and that, in extenuating circumstances, appeals should be permitted beyond the one year deadline with the permission of the Commissioner.

47. Should the Commissioner have the discretion to not investigate a complaint? If so, in what circumstances?

FIPA Response:

FIPA is of the view that such a power would only be acceptable in situations equivalent of dismissal of a "frivolous and vexatious" lawsuit, and that similar criteria should be used in these very rare circumstances.

48. Should there be a time limit to complete an investigation?

FIPA Response:

In 2009, former commissioner Robert Marleau proposed that: "That the *Access to Information Act* specify timeframes for completing administrative investigations." FIPA agrees and suggests a 90-day period as set out in s. 56(6) of the BC *FOIPP Act*.

FIPA has also appeared in the Supreme Court of Canada as an intervenor on the question of jurisdiction over investigations and reviews. Our factum can be found at: http://fipa.bc.ca/library/Legal_Submissions/FIPA_Factum_to_Supreme_Court-Jan_26_2011.PDF

49. Should requesters be able to seek judicial review without complaining to the Commissioner? If so, in what circumstances?

FIPA Response:

In 2009, former commissioner Robert Marleau proposed that: "That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals."

FIPA is of the view that the *Access to Information Act* should provide requesters with an easy to understand, informal way of getting government information. This would include the procedures for resolving disputes over the release of documents.

The Commissioner provided this recommendation as an option, and FIPA considers this a prerequisite to supporting this idea. Sophisticated or well-heeled requesters may want to push things along more quickly and may be willing and able to pay for it, and this would reduce the workload of the Commissioner's office.

However, the person not familiar with the system, who does not have money for a lawyer specializing in administrative law, will need to have an informal, administrative process available and the Commissioner should still provide that remedy. With full order making power, the Commissioner would be able to make an order for release of documents without requiring an individual to fight in court to exercise their right to information.

(2) Powers during an investigation

50. Does the provision allowing the Commissioner to review records under the control of a government institution, notwithstanding any other Act of Parliament or privilege under the law of evidence need clarification?

FIPA Response:

No.

(3) Reporting obligations

51. Should the Commissioner publish summaries of her investigative findings on a regular basis?

FIPA Response:

Yes. In 2009, former Commissioner Marleau wrote that restrictions should be loosened so he could publish more details of his investigations, contributing to a body of rulings that can serve as a guideline for the government and the public. FIPA agrees.

52. Should the Commissioner's discretion to report instances where she believes she has evidence of a commission of an offence be extended to all individuals, and not limited to officers, employees or directors of government institutions?

FIPA Response:

Yes. The current provisions for reporting such potential offences should also be clarified to reflect the creation of the office of the Director of Public Prosecutions. It seems it would be more appropriate to have the Commissioner report these instances to the DPP rather than the Attorney General or the responsible Minister.

d) Review by the Courts

53. What changes, if any, should be made to the sections relating to judicial review by the Courts (ss. 41-53)?

FIPA Response:

If the Commissioner is provided with order-making power, the role of courts on judicial review would necessarily change substantially, and would reflect a more traditional administrative law role or a review court.

a. Should the scope of judicial review be expanded to include fee assessments and other administrative matters?

FIPA Response:

Yes. This would reflect FOI laws in many Canadian provinces and in countries around the world.

e) Offences and Sanctions

54. What changes, if any, should be made to the Act's provisions on offences and sanctions?

FIPA Response:

In addition to the penalties referred to in response to Question 9, it may be useful to specify in a non-exclusive list the ways in which a requester's information rights can be interfered with and which would result in the violation of s.67.1.

55. Should monetary penalties be available in the case of destruction, concealment or falsification of records requested under the ATIA?

FIPA Response:

Yes. This would provide an important clarification of the provisions of s.67.1 which sets out penalties for interfering with access rights. This clarification should not be worded in such as was to exclude other types of interference with access rights.

f) Commissioner's mandate

56. Should the ATIA give the Commissioner an audit function?

FIPA Response:

Yes, and we advise this wording in the BC *FOIPP Act* for the *ATIA*:

> **42**(1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may
>
> (c) inform the public about this Act,

(d) receive comments from the public about the administration of this Act,

57. Should the ATIA expressly grant the Commissioner a research or educational mandate?

FIPA Response:

Yes. The *ATIA* Review Task Force report, *Access to Information: Making it Work for Canadians,* made a useful recommendation on this point: “6-5. The Task Force recommends that the *Act* be amended to recognize the role of the Information Commissioner in educating the public about the *Act* and access to government information in general.”

Section 22 of the *Canadian Human Rights Act* could provide some guidance as to how this could be accomplished.

g) Legislative Review

58. Should the ATIA have a periodic review built-in?

FIPA Response:

Yes. Former Information Commissioner Marleau had this as one of his 12 essential reforms, and FIPA strongly agrees. Parliament should be required to conduct a review of the *Access to Information Act* every five years. The current archaic law is the result of Parliament’s failure to modernize legislation on a regular basis. This is particularly true for laws in fast changing fields such as information management and rights.

a. If so, how often should the review occur?

FIPA Response:

Every five years.

Theme 4: Information Management

59. What role, if any, should the Information Commissioner have in relation to information management in government institutions?

FIPA Response:

The Commissioner should be required to be consulted about any change to information management systems which could have a significant impact on the availability of information to Canadians. This would allow the Commissioner to provide guidance to departments on measures which could be designed into new systems to improve

access to the public. Of course, the Commissioner's office would have to receive sufficient new resources to fulfill this responsibility.

a. Should information management rules and practices include consideration for the routine release of documents?

FIPA Response:

Yes.

FIPA appeared before the Commons ATI, Ethics and Privacy committee in February 2011 on the subject of open government, and made extensive comments on open government, proactive release and open data. We pointed out the importance of proactive disclosure, but also the dangers of faux transparency: http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_Sub_to_ETHI_Committee-Feb_2_2011.pdf

It is also important to remember that s.2(2) of the ATIA provides that the Act - "… is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public."

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b. Should information management rules and practices incorporate a declassification process for government records?

FIPA Response:

Yes, if there is not one already, there should be a systematic declassification schedule for each kind of record, noting when they are to be sent to the National Archive for unrestricted free public viewing, or placed on the Internet, without the need for an *ATIA* request. Agencies' record retention schedules should be posted online.

The federal government should establish a clear and comprehensive information management policy and administrative framework based on effectively fulfilling the legal requirements of the *ATIA* and the general principle of transparency as essential to democracy.

60. Should the Act include a duty to publish information?

FIPA Response:

Yes.

a. If so, what types of documents should fall within such a duty?

FIPA Response:

Under s.5 of the *Access to Information Act* the government must annually publish a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution, manuals, and a description of all classes of records under their control. This section also sets out the principle "that every person is entitled to reasonable access thereto."

Section 71.1 of the BC FOIPP Act sets states that the head of a public body may specify categories of records available without a FOI request. A similar provision could be adopted in the ATIA, or perhaps a negative obligation could be imposed, requiring heads of public bodies to list records that cannot be disclosed without a FOI request and be obliged to report on how they will make the remainder available to the public.

Because most if not all records now exist in electronic form, much more government information should be available on government websites. Under the Obama administration's Open Government Initiative, government agencies must preserve and maintain their electronic information, publish it online in "open formats" and proactively release it using modern technologies instead of waiting for FOIP requests.

Yet such publication should never be *solely* Internet-based because, even today, not all of the public had internet access or expertise, and some choose paper formats.

There should also be a mechanism to challenge the redactions made in records being proactively released by the government.

b. Does an index of records suffice or should substantive records (such as policies, guidelines, background papers) be released?

FIPA Response:

An index is essential as a bare minimum, but it should be possible to quickly gain access to the substantive records described, with one or two clicks.

61. Should proactive disclosure practices be formalized in legislation or via other, non-legislated alternatives?

FIPA Response:

These practices and the routine release of certain record types must be guaranteed in law - and ideally should be continually expanded - so that the public is not left to depend on the uncertainties of regulations, and voluntary practices that could be curtailed any day. This could be done either in a reformed ATIA or in a dedicated statute.

a. Are publication schemes the preferred solution to encourage proactive disclosure?

FIPA Response:

Yes, and guaranteed in law, not regulations or voluntary practices.

b. What level of involvement should an Information Commissioner have in the creation, approval, maintenance and review of a publication scheme?

FIPA Response:

The Commissioner should be involved in the development of a government-wide publication scheme, and should be required to review and comment on any proposal for a scheme which does not conform to the government-wide standard.

62. Should the Act include a duty to document their decision making processes?

FIPA Response:

Yes. Once again, this was part of the CPC's 2006 election platform, but never introduced. The precise wording of that commitment: "A Conservative government will: Oblige public officials to create the records necessary to document their actions and decisions."

In his 2006 report, Restoring Accountability, Justice Gomery recommended: "The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions."

a. Should this duty include a requirement to create records following an access request?

FIPA Response:

Some of this already is present in the *ATIA:*

> 5.(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

Section16 of the Quebec information law also provides a useful example of what can be done in terms of requiring proper records management: “A public body must classify its documents in such a manner as to allow their retrieval. It must set up and keep up to date a list setting forth the order of classification of the documents. The list must be sufficiently precise to facilitate the exercise of the right of access [….]”

Several other additions on the *ATIA,* and proactive publication

[1] There is another concept that needs implementation. Treasury Board guidelines mandate the completion of a Privacy Impact Assessment (PIA) for new programs or services involving personal information, and the PIA summaries are currently made public. Similarly, upon the establishment of each new program or governmental (or quasi-governmental) corporate entity, the Canadian government ideally would be legally required to produce and publish a “Transparency Impact Assessment” (TIA) - which could be as brief as one page - to explain the means by which the new project would be transparent and accountable to the public, and a pledge to maintain these standards.

In closing, we wish to quote former Information Commissioner John Reid, quoting former Commissioner John Grace on the ‘need’ for secrecy:

“After I had been confirmed as federal Information Commissioner, I met with the former Commissioner, John Grace, to get his advice. One thing he said struck me in particular; he said that in his seven years as Privacy Commissioner and eight years as Information Commissioner (a total of 15 years spent reviewing the records which government wanted to withhold from Canadians) he hadn't seen a really good secret. My experience is much the same over the first year of my term. For the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature.”

(Federal Information Commissioner John Reid, *Remarks to CNA Publishers Forum on Access to Information*, Nov. 25, 1999. http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=17)