SLIDE 1

Hello and welcome to the lecture for the fourth week of LIS 598 Information Policy in the Winter 2017 offering. This week we will begin the second module looking at government information policy, and this week we will focus primarily on Access to Information, with a bit of additional discussion on government secrecy.

SLIDE 2

As a recap of last week, we looked at trends and influences on information policy. We examined neoliberalism, which has had a major influence in a wide variety of policy areas on a global scale. We also examined international influences on information policy, the discussion around evidence based policy making, the rising importance of private ordering, and finally expanded some of the discussion from the first week on tensions and interactions among information policies.

SLIDE 3

This week we’ll begin by discussing some conceptual issues around access to information, then look at the history of the act. We’ll touch briefly on the act itself, the request system with a case example. We’ll touch on the Information Commissioner’s role and problems with act, and conclude with a discussion of access and secrecy.

SLIDE 4

I want to begin this week with a quote about the importance of information. The quote reads:

“Information is the lifeblood of a democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians cannot make informed decisions, and incompetent or corrupt governance can be hidden under a cloak of secrecy.”

I’ll pause for a minute and ask you to think by whom is this quote. [pause]. The answer may surprise you. It is not a great theorist of democracy or information – not a Thomas Jefferson or Thomas Paine. The quote comes from a 2005 editorial in the *Montreal Gazette* written in response Gomery Commission phase I report and makes a series of recommendations for improving the Access to Information Act. The author – then leader of Her Majesty’s Official Opposition – Stephen Harper.

SLIDE 5

Before looking at the Access to Information Act and system in Canada, it is first worth considering Access to information in principle. Access is a powerful by nebulous term. As noted on the slide it leads to several questions, and as we will see in the Canadian context, access is limited by both statute and in practice. In regards to the final point, it is important to note that access to government information is only one part of creating truly transparent and accountable governments. That said governments across the world, many non democratic one’s such as China also have access to information or freedom of information legislation. That bring up one further discursive point. In Canada the access system is governed by the Access to Information Act, though in many jurisdictions, including the US, access to information is governed by a Freedom of Information Act. The difference in terminology is slight, but it is worth noting that access to information is conceptually narrower than freedom of information.

SLIDE 6

Looking briefly at the history of access legislation, in the case of Sweden we can see that it is quite an old information policy. Sweden was the first country with access legislation passed in 1766. The 18th Century Swedish law didn’t produce similar legislation immediately in Britain. Anglo-American legislation was slow to follow. It took the US 200 years after the Swedish legislation to create its Freedom of Information Act. In Canada, while there was some debate in the 1960s, and provinces did begin passing access legislation before the federal government, the Federal act was not passed until 1982, coming into force the following year.

SLIDE 7

This slide provides a brief legislative history of ATI. What is particularly important here is the explicit connection between the Privacy Act and Access to Information Act. The Acts have been described as two sides of a coin, and well explore this relationship a bit more in one of the following slides.

One other point of note, the federal legislation is specifically federal in application. The provinces across Canada have their own access and privacy legislation, often combined, and usually titled Freedom of Information and Privacy Act or FOIP, though the titles do vary slightly in some jurisdictions. Next week when we look at privacy legislation, we’ll note that it is far more complicated from a legislative perspective. Here though it is sufficient to note that the federal access act deals with access to federal government information and all of the provinces have provincial legislation which governs access to not only provincial government information, but also creations of provincial governance ie municipalities, schools, hospitals, universities, etc…

SLIDE 8

The following map illustrates the passing of provincial. The key takeaway from the rainbow colouring is that in general provinces in the east passed legislation first with a few exceptions – PEI was last, and BC did beat Alberta in passing access legislation.

SLIDE 9

Returning to the ‘two sides of a coin’ discussion, the Access to Information Act and the Privacy Act are directly related in that one provides access to government information, while restricting access to personal information about individuals held by government, and in turn the other specifies how personal information must be treated and the rights individuals have in accessing information about themselves held by government. The Dagg v. Canada case indicates that at times these two Acts do come into conflict. The case dealt with an ATI request regarding employee logs for entering and leaving the workplace. The question at the heart of the case was whether the information at issue was personal information, which would then be subject to an exemption under the Access to Information Act. As indicated in Justice La Forest’s dissent, he feels the balancing between the two acts was “seamless.”

SLIDE 10

Before delving right into the act, I want to make a general comment that will recur throughout the course. In terms of looking at policy there are many points of entry, and depending on the specific topic some avenues are more fruitful than others. Legislation is obviously key, and many of the topics we will examine have one or sometimes two key pieces of legislation. In the context of Access to Information, federally there is a single act, with provincial counterparts. The privacy situation is much more complicated. For other issues copyright, telecommunications, broadcasting there also tends to be a single key act (though in the case of telecom and broadcast the Canadian Radio-television and Telecommunications Commissions Act is also quite important). In some cases we’ll delve closely into the legislation, copyright in particular, and in others we’ll avoid such an approach. What is quite important to remember is that the legislation is only one piece of the totality of a policy. There are many other elements ranging from regulations, procedures, jurisprudence, etc. With specific reference to the Access to Information Act, it is relatively clear and straightforward – in some ways you can read the act and get a reasonable grasp of how the access to information regime works. In other cases, copyright is a good example, the act isn’t terribly clear, and really only offers a very small glimpse into how copyright works in practice.

Turning then to the Act itself, I’m not going to read through the Act section by section, but I will highlight a few key elements. First section 2, which contains a purpose of the act. This is notable in that the Act has an explicit purpose or policy objective. We will see this in other Acts throughout the course – the Telecommunications Act and Broadcasting Act both have clear policy objectives spelled out in the Act. The one notable exception is the Copyright Act that doesn’t contain a clear objective or policy statement. Sections 4 through 12 deal with the process for accessing government records. With regard to right of access it is limited to Canadian citizens and permanent residents by section 4(1). Section 11 deals with fees. In this regard it is important to note that access is not free. A $5 application fee is needed. Sections 13 through 26 deal with exemptions to the Act, and we’ll look at these on the following slide. The end of the Act contains two important Schedules. The first Schedule notes all the departments and agencies that are subject to the act. It is a fairly comprehensive list. Schedule II contains the list of Acts which have specific pieces of information that cannot be disclosed though Access to Information requests. For example, section 11 of the Witness Protection Program Act that deals with indefinable information about people in witness protection. Section 44(1)(d) of the Nuclear Safety and Control Act gives the Governor in Council the right to restrict information related to nuclear safety.

SLIDE 11

Turning then to the exemptions, as indicated by the slide there are numerous exemptions. For some the breadth of exemptions creates a major problem for the act. As you can see the range is broad, but includes personal and sensitive third party information, and a lot of key information about government operations both among the federal government, lower order governments and foreign governments and Advice to the Crown and most Privy Council documents.

SLIDE 12

In terms of the function of the act, federal departments and agencies have Access to Information and Privacy or ATIP cooridnators who process requests. In cases of broad or unspecific requests ATIP officers will work with the requester to help narrow the request. As part of the reading for the week, you will be looking at the statistics produced on Access to Information Request. The statistics provide an important snapshot on the overall health of the ATIP program; however, on their own they don’t always indicate some of the major problems or challenges.

SLIDE 13

This slide, which stems from my own set of ATI requests, compares how 18 federal departments handled the same ATI request. In every case, I was seeking information about the removal of government websites as directed by the Treasury Board. The request was made the same day in all cases. The first part of the process is a acknowledgement letter (or email) from the department, which starts the clock on a ATI request. Requests are to be processed within 30 days of the acknowledgement letter unless an extension is needed. As you can see there was a bit of variance in the dates for the acknowledgement letters, and some departments issued no such letter. A handful of departments noted an extension would be required – most of 30 days, but Environment noted it would need 60 days on top of the original 30. The response date column shows when responses came in. As you cans see there was considerable variation. Justice Canada responded within 8 days of the original request and 4 days from the acknowledgement letter. Veterans Affairs and Parks Canada took three quarters of year to respond. In several cases departments took longer than the 30 days, and even with some departments granting themselves extensions, the requests still took longer. This is a common experience. Finally the amount of pages varies considerably. In this regard, I do want to note that based on the nature of the request that not every department would necessarily have the same number of pages, but given that the request dealt with a Treasury Board directive to departments, it was notable that several departments came back as having nothing.

SLIDE 14

Looking then briefly at the Information Commissioner. The Access to Information Act clearly defines the roles and duties of the Information Commissioner and their office. The current Commissioner is Suzanne Legault, and like all information commissioners she is appointed by the Governor General on the advice of Cabinet, and approved by the Senate and House of Commons for a seven year term. The Commissioner investigates complaints about requests where information is refused or where there are unreasonable fees or delays. The Commissioner can also initiate their own complains where there is reasonable grounds. Another key function is the preparation of annual reports and special reports on the Access to Information system, and these annual reports provide vital insights into the functioning of the system.

The table on slide shows a statistical snapshot of the processing of complains by the Information Commissioner. As you can see the number of complains in any given financial year is relatively consistent. What is notable though is that the volume of outstanding complaints has been rising, resulting from more complex investigations and reduced financial resources.

SLIDE 15

Canada’s Access to Information system has no shortage of challenges. As noted in the slides, the system has been largely unmodified since 1983. One notable change has been the introduction of an online form (and payment) for making requests in 2014, but other than that many longstanding issues persist. We’ll look at the issue of political interference in requests later on in the slides. This has been an area of particular concern as software that is used to process requests within departments can be used to flag requests for political scrutiny.

SLIDE 16

Over the past 15 years the Act has been revised numerous times; however, these often stem from simple names changes to departments and agencies, which then necessitate revisions to Schedule 1. Some of the more major changes include 2006 revisions which are outlined on the slides.

SLIDE 17

2007 also marked some important changes. 2006 and 2007 changes to the Federal Accountability Act resulted in 70 new institutions being covered by the Access to Information Act. However, for some of these Crown Corporations such as Via Rail and the CBC, certain business information was excluded from the Act to ensure that competitive information could be requested by private company rivals. Another notable change from 2011 was the inclusion of the Communications Security Establishment, CSE. CSE performs foreign signal intelligence, along with IT sercurty for the Government, and the inclusion of it under the Act was designed in part to provide one means of ensure greater transparency for the organization. We’ll look more at the CSE and the Canadian Intelligence Service of Canada in two weeks when we look at the issue of surveillance.

SLIDE 18

How does Canada’s access to information regime compare internationally. In the 1980s the argument could be made that Canada was an early leader (certainly nowhere near Sweden), but as noted Canada was the 8th country to pass ATI legislation. However, three decades later, our access system is showing its age. There are several comparative studies, and I want to highlight the Centre for Law and Democracy’s comparison from 2013. Using a range of factors they scored access systems from across the globe and as indicated, we underperformed against our Anglo-American peers. Our performance scored more poorly than three of the four BRIC countries. However, we do compare well with four of the G7 countries. A number of recommendations for reform are laid out in the Larsen and Walby reading for the week.

SLIDE 19

While ATI provides access to government information, there are a number of legislative and policy elements that facilitate government secrecy. The three primary pieces of legislation in this regard are the Security of Information Act, the Security of Canada Information Sharing Act, and the Canada Evidence Act, and to some extent the exemptions of the Access to Information Act and Schedule II also facilitate secrecy. The Security of Information Act, what was formally the Official Secrets Act, identifies a number of offences from disclosure of state secrets to communications with terrorists and economic espionage. The Canada Evidence Act restricts access to sensitive information in criminal and civil court proceedings. The newest of the three acts is the Security of Canada Information Sharing Act, which was a key piece of the controversial Bill C-51 passed by the previous government as part of the response to the shooting on Parliament Hill. The Act deals more with surveillance than secrecy, but I do want to touch on it in relation to the other two acts. The Information Sharing Act allows government agencies to share Canadian’s personal information, and critics argue that the broad definitions around activities that undermine the security of Canada and the low thresholds allowing sharing greatly enhance capacities for surveillance. If you remember back to the first week and the ministerial mandate letters, review of C-51 was one of the key responsibilities given to both the Public Safety and Justice ministers.

SLIDE 20

Looking then at the Access to Information Act, I pasted the first part of section 15 from the Act here. I’ll note that there are additional subsections a through i that provide greater detail. Section 15 is seen by many critics of the Access regime to be overly broad. This sentiment is reflected by the Information Commissioner that notes section 15 (and many other exemption sections as well) are often interpreted by departments in an overly broad manner when processing ATI requests.

SLIDE 21

One notable example of the broad application of section 15 occurred as part of a 2007 ATI request to National Defence. As the slide notes, the request sought information about the grooming items of Canadian held detainees in Afghanistan. The Information Commissioner became involved and ultimately the list of personal items was released. This case was in sharp contrast to a 2007 ATI request received by the Department of Foreign Affairs and International trade that sought access to information about the use of torture in Afghanistan. Again section 15 was invoked; however, in this case the Information Commissioner was satisfied that redacted documents, not discussing specific instances of torture, were in compliance with section 15 of the Act. The case ultimately was herd by the Federal Court. Professor Amir Attaran, the applicant in the case, argued that section 2 (b) of the Charter of Rights and Freedoms established a charter right to government information against which section 15 of the Access to Information Act must be considered; however, the court, relying on precedents from previous Federal Court of Appeals decisions, concluded this was not the case stating in paragraph 64

 that [s. 2](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec2_smooth)(b) of the [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)does not encompass a general right to access any information held by government institutions.  The Federal Court of Appeal jurisprudence is clear that access to information does not, in general, fall within the purview of [s. 2](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec2_smooth)(b).

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Another notable case, this time involving the Section 17 exemption in the Access to Information Act dealt with a request made to the Canadian Revenue Agency, CRA, about a staff orientation video. The video included a number of CRA staff in Batman costumes. In response to the ATI request, CRA argued that the video could not be released because disclosure of the video could threaten the safety of individuals. As the Information Commissioner noted in their annual report, section 17 was not intended to be used to exclude embarrassing information, and as a result the requester eventually got to view the video, albeit with the faces of CRA staff members blurred.

SLIDE 23

While the previous two slides have demonstrated cases where exemptions have been interpreted in an overly broad manner, one more troublesome problem is the apparent rise in cases of political interference in ATI requests. As indicated on the slide there are specific provisions in the Act, section 67.1 specifically, that aim to prevent meddling with access requests. However, over the past few years there have been several well documented cases of interference. I’ll note two on the following two slides.

SLIDE 24

The first example comes from a 2009 request by Dean Beeby. Although Public Works and Government Services responded to his request and deemed it complete (nothing withheld), he felt that something was missing. This can be a very challenging thing to do. If one has redacted documents, or there is a clear indication that certain exemptions were applied, a requester has a sense of what is missing. Beeby’s case is different since, on appearance, it would seem as though he received a complete record. However, since he was unsatisfied he filed a second ATI request for the documents relating to his first request. As indicated the investigation elevated from the Information Commissioner to the House Standing Committee on Access to Information. In this case Sebastien Togneri, who was a ministerial aide to Chirstian Paradis, was found to be actively directing staff at Public Works and Government Services to suppress documents. Tongeri eventually quit as a result, though he become re -embroiled in political controversy in the 2011 election campaign when he was found to working for the Conservatives in the Edmonton-Strathcona riding.

SLIDE 25

Another case of political interference was documented by Ann Rees, and her own experience with a ATI request dealing with softwood lumber. Similar to the Beeby case, Rees was able to make an ATI request for the documents, specifically the software log, from her first request to find out that it was handled by the then Director of Issues Management from the Prime Minister’s Office, Jenni Byrne (who would eventually go on to manage the 2015 Conservative Election campaign). Rees concludes by noting that resistance to ATI is political and partisan, but not a single party issue, and one that every governing party has been implicated on since the act was passed. Rees and Beeby also highlight one important aspect of the Access to Information System – that is importance of using subsequent ATI requests to investigate potential interference with original requests by requesting the transaction logs and related documents from a request.

As the final point notes, the issue of political interference is not lost on the Information Commissioner. In regards to the 2014 special report, which centered on interference in Public Works and Government Services including the Beeby case, the Commissioner notes, “I found a pattern of improper involvement by a small group of ministerial staff members at Public Works and Government Services Canada.” Going on to note “These staffers inserted themselves in various ways into a process that was designed to be carried out in an objective manner by public servants. Consequently, the rights conferred under the Act were compromised.”

SLIDE 26

The last point for this week’s lecture brings everything full circle. It deals with the case Canada v. Canada which was pursued by the Information Commissioner against National Defence. The details are somewhat complicated, centering around whether the Prime Minister’s Office, PMO, and Ministerial Offices are part of the government institutions they support, and thus whether they can be subject to the Access to Information Act. What is interesting about this case, is not some much the legal details, but how roles changed over time. The case originates from an ATI request made by the Reform Party seeking documents from the Chretien government. However, by the time it had worked its way through the courts the Reform Party had been merged with the Progressive Conservatives and was now the Governing Party. Despite being the originators of the request many years ago, the Government in 2011 was a staunch defendant of executive secrecy now that it was in office. Thus one of the fundamental challenges – opposition parties love to call for ATI reform, for example Harpers letter at beginning of the lecture; however once in government, the impetus to reform is greatly blunted.

SLIDE 27

What then has the Liberal government done since taking power? ATI reform was a key priority given the Treasury Board President Scott Brison. The Government has made two small reforms. Eliminating some additional fees and requiring use of user friendly formats. The larger review is still a year away in 2018, and it remains to be seen whether there will be more of the minor tinkering with the system or a complete overhaul.

SLIDE 28

For this week I’ve included a mix of questions, reflections and some hands on activity. Feel free to use any one or more of these as a starting point for this week’s discussion.

SLIDE 29

Next week, we’ll look at the other side of the access coin – privacy. In that regard please read Schwab and the Privacy Commissioner. Finally a reminder that your Information Policy and Information Workplaces paper is due by Feb 6 at 23:55 Mountain Standard Time.