THE NATURE AND VALUE OF ACCESS TO INFORMATION LAWS IN CANADA AND THE EU: IDEALS, PRACTICES AND PERSPECTIVES.

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Abstract

This research aims to address the rhetorical claims about transparency and access to information (ATI) by asking questions like: Why they are important, and if they are, are they worth of constitutional protection? The study engages in a doctrinal research with two dimensions, a conceptual and a normative one. The conceptual dimension includes the understanding of the meaning, perceptions, dynamics, tensions and values assigned to transparency and ATI. This dimension is explored through the study of two main jurisdictions (Canada and the EU) and two case studies (Ontario and Albania). The normative dimension in concerned with how the conceptual grounds shape the legal status and protection of ATI, and provides a framework that enables the recognition of ATI as a constitutional right. My analysis focuses on the users of the ATI process, and their practices.

The conceptual dimension views transparency and access rights as political and societal constructs. They heavily depend on the political system at place, and their analysis should not start from expectations based on ideals, but potentials. The societal approach focuses on the public space and looks at transparency and ATI as having multiple functions. The thesis provides a set of standards against which the main rhetorical claims about transparency and the actual practice of ATI can be measured.

The normative dimension takes a human rights perspective that focuses on the substance and the form. From a substance approach ATI rights are considered necessary and important in Canada. From a form approach Canada has a gap on how rights transform into positive law and penetrate the constitutional structure. This thesis offers a bridge to reconcile the substance and form approach. My argument points to a fundamental dichotomy of a human rights-based approach as found in the difference between an instrumentalist and an intrinsic approach. It argues that the right of ATI deserves recognition from both approaches. However, the thesis argues for the value of the intrinsic approach because it lends itself to a discussion of rights that have the potential to generate and shape ideas, create knowledge and enable engagement and participation.

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PART I

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CHAPTER 1: INTRODUCTION AND DISSERTATION OVERVIEW

1.1 Introduction

In the literature, there is a conceptual and definitional muddle with respect to transparency and its relationship with access to information (ATI). From a legal perspective transparency manifests itself as a general principle of law and ATI as a right which enables disclosure of government information to individuals and groups on the basis of request. Viewed in a simplified way, there is clearly a principle-right relationship between transparency and ATI. However, the nature and the dynamics of this relationship are informed by many legal, political, social, historical and cultural factors.

This research aims to address the rhetorical claims about transparency and ATI by asking questions like: Why they are important, and if they are, are they worth of constitutional protection? To answer these questions this study engages in a doctrinal research with two dimensions, a conceptual and a normative one. The conceptual dimension includes the understanding of the meaning, perceptions, dynamics, tensions and values assigned to transparency and ATI. To better understand what the terminology means and how the transparency-ATI relationship develops conceptually and materializes in practice, this research studied the situation in two main jurisdictions (Canada and the EU) and two case studies (Ontario and Albania). The normative dimension in concerned with how the conceptual grounds shape the legal status and protection of the two variables, and provides a framework that enables the recognition of access to information as a constitutional right. My analysis emphasizes the legal, political, and institutional framework in each case, and focuses on the users of the ATI process, and their practices.

The conceptual dimension views transparency and access rights as political and societal constructs. From a political perspective this research demonstrates that transparency heavily depends on the political system at place and its weaknesses are structural – transparency is a recent introduction to most political systems that were not designed to be transparent from the inception. The analysis of transparency should not start from expectations based on ideals, but potentials that address the information and power asymmetry.

The societal approach focuses on the public space and looks at transparency and access as having three functions. First, they bring issues to the public's attention. Second, they enhance public's education, social learning, rational thinking, and political and social consciousness. Third, they strengthen the idea of citizenship (especially in the EU). The thesis provides a set of standards (using theories of Pateman and Habermas) against which the main rhetorical claims about transparency and the actual practice of ATI can be measured.

The normative dimension is concerned with how the law is and how it ought to be. Transparency often becomes a political tool, which in absence of pressure from civil society, will stretch its applications to the extreme edges of its legal meaning, or will distort its system of access rights by subjugating them to political will. The way transparency is perceived by the government will dictate how it is engrained in the legal system of a country, and how access rights are protected and implemented, in part through ATI. The normative dimension takes a human rights perspective that focuses on the substance and the form which are distinct but also dependent to one another. The substance approach deals with what rights are necessary and important. There is a general agreement that ATI is an important right. The form approach deals with how can rights transform into positive law and penetrate the constitutional structure. This is where the Canadian experience lacks activism and success. This thesis offers a bridge to close the gap between the substance and form approach. My argument points to a fundamental dichotomy of a human rights-based approach as evidenced in the literature and in the practices in various jurisdictions – as found in the difference between an instrumentalist and an intrinsic approach. It argues that the right of ATI deserves recognition from both approaches. However, the thesis argues for the value of the intrinsic approach because it lends itself to a discussion of rights that comes closest to meeting the standards it has outlined. The value of an intrinsic

approach (as explained by the Habermas's discourse theory of law) lies with the potential of access rights to generate and shape ideas, create knowledge and enable engagement and participation, thereby meeting the standards identified above. This approach allows for overcoming limitations of an instrumental recognition.

This research allows for an enrichment of the two dimensions it studied, conceptual and normative. The thesis offers a definition and a conceptual framework that differentiates between transparency and ATI. An essential part of this conceptual framework is a typology of information access/delivery that helps explain the behavior of the actors involved in access to information processes. In addition, the thesis offers models of transparency for each of the jurisdictions in study, ones that are based on the value assigned to transparency processes.

Finally, an analysis of the grounds for and limitations of a rights-based approach is offered, both in general and in terms of the various jurisdictions studied. Using the EU as an example of how access rights have evolved over time and granted constitutional status, the thesis proposes a recognition of such status in Canada. This recognition could be achieved through courts as a venue to avoid at a certain extent the political and procedural hindrances. While courts are not immune from political interference, they are in a much better position to make decisions that are independent, innovative and reformative. The involvement of the courts would allow for an interpretative stretching of access rights on the basis of their value and the place they deserve in the constitutional structure.

1.2 Description and Dissertation Overview

1.2.1 Description

This research started as an investigation of the access rights that Canadians have in relation to their government, mainly the federal government in this case. In trying to make sense of the legal framework, I found myself immersed into a rich and diverse body of literature on ATI that was closely related to transparency. Although there is some level of agreement in the literature that transparency is important for the functioning of every democratic society, the terminology that is used to describe the term is complex, if not frustrating. I noticed a conceptual muddle

surrounding the notion of transparency. It was described variously as a process, as a principle, as a goal, and so on. The difficulty in conceptualization made this research challenging, but at the same time worth pursuing in an attempt to close the gap in the existing literature.

From a legal perspective, transparency is better understood as a general principle, which is expressed in practice through access to information laws, among other things. Canada passed an *Access to Information Act* (*ATIA*) in 1982, and many other countries in the world have done so as well. These laws protect a right to access to information by individuals on information held by their governments. When I compared the federal Canadian right to ATI with the same rights in several other jurisdictions, I noticed differences. Hence, I decided to engage in a comparative exercise, which could help explain these differences. I chose the European Union (EU) as a jurisdiction for comparison because it represents interesting patterns of how transparency and access to information have developed. I explain the reason for this choice in section 1.3 below. I chose the Canadian federal level because that is the most problematic jurisdiction in Canada, where the ATI law is in immediate need for reform, according to the literature. In addition, studying all provinces would have been a difficult undertaking considering the limited time and resources available for the completion of this thesis. Needless to say, there are political, legal and institutional differences between the EU and Canada, but my comparison was apt because they also share similarities.

The comparison between Canada and the EU offers interesting insights since they are complex multilevel governance systems where authority is dispersed between different levels of government - local, regional, provincial, national and supranational - as well as across spheres and sectors including markets, and citizens. Both Canada and the EU, share some features of federalism, where federalism has to be understood as a system which ensures a large measure of self-rule for the constituent units. With a bit of attention in the political systems, one can find similarity in the practices and conceptions of transparency and ATI rules in Canada and the EU. As Hix argues "from the point of view of comparative politics, there are many things the EU shares with other multi-level polities."[1] In the EU, member states jointly decide the common

[1] Simon Hix, *The political system of the European Union, 2nd ed* (London: Palgrave MacMillan Press Ltd, 2005) at 574 [Hix, "The political system of the EU"].

purposes of the Union. In Canada, with some important exceptions where the government of Canada alone gets to define the common purposes of the federation, the same practice prevails with the provinces.

In addition, in both jurisdictions the need for more transparency and ATI has originated from the idea of a weak Parliament and democratic deficit. According to Birkinshaw "Transparency …. gained popular appeal within the European Community from the early 1990s when it was seen as a useful device to combat claims of democratic deficit and complexity in the operations of the EC."[2] Both Canada and the EU are political systems with a very strong executive branch which undermines legitimacy and popular vote. As such, in both Canada and the EU, transparency has developed as a necessity to control the government and its bureaucracy and protect the citizens from misuse of government power. Héritier argues that "transparency and access to information play a straightforward supportive role. They function as a prerequisite for exercising popular control over government activities."[3]

The European Parliament has not been a strong legislature. Hix states that at the EU level "Legislative power is shared between two institutions: the legislative meetings of the Council and the EP."[4] Although the role of the European Parliament has increased with the introduction of the so-called co-decision procedure, its role is still shadowed by that of the Council. In Canada, the Westminster parliamentary system fuses the executive and legislature. In practice, executives dominate parliaments and get them to do their bidding. The only time executives may have to bargain with Canadian parliaments and accept a compromise on their legislative proposals is in the event of a minority government. This is the reason Roberts argues that "The urge to regulate the flow of information may be stronger in a governmental system such as Canada's, in which authority is already more highly concentrated within the executive branch."[5]

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[2] Patrick Birkinshaw, "Freedom of Information and Openness: Fundamental Human Rights?" (2006) 58:1 Administrative Law Review 177 at 189 [Birkinshaw, "FOI and Openness"].
[3] Adrienne Héritier, "Composite democracy in Europe: the role of transparency and access to information" (2003) 10:5 Journal of European Public Policy 814 at 824 [Héritier, "Composite democracy in Europe"].
[4] Hix, "The political system of the EU", supra note 1 at 582.
[5] Alasdair Roberts, "Administrative discretion and the Access to Information Act: An "internal law" on open government?" (2002) 45:2 Canadian Public Administration 175 at 179 [Roberts, "Administrative discretion and ATIA].

I also looked at the situation in Albania (a country where I was a lawyer, and which is a candidate country for membership in the EU) and in Ontario, with a more friendly access regime, just to bet some perspective on the main comparison I was making. The research on the legal framework in the two jurisdictions showed striking differences on how transparency and access to information were viewed and protected. As a result, I decided to pay further attention to why these differences existed, and factors to which they could be attributed.

1.2.2 Collection of data

I study transparency and access to information in Canada and the EU using two lenses, an institutional and a user perspective. The institutional lens looks at four types of institutions, the government (giving political directions), public administration (managing the everyday administration of ATI system), oversight institutions (advocating for the right of ATI), and courts (impartial decision-makers). Each of these types of institutions informs how access to information is perceived by different actors and how their mindsets shapes the environment in which ATI operates and the responses to public demands.

One of the main challenges on the institutional study is the role of bureaucratic discretion on transparency and ATI. One of the central problems with the access laws is that many important exemptions are discretionary. This means that the government 'may' disclose the information that falls under such exemptions, but does not have to. In theory, this permits more disclosure than mandatory exemptions, but the problem lies with who exercises the discretion to disclose. Dealing with discretion will be a challenge in my research, and its study has limitations. To address this challenge I will try to address questions like: What are the implications of a statutory right being shaped through the exercise of administrative discretion and what can be a solution to this problem? How can the ATI law work better in practice? Does this require a change of the statutory law or even this intervention is not enough considering the inherited culture of bureaucracy? To give answers to these questions I designed a questionnaire addressed to some of the Access to Information and Privacy (ATIP) Coordinators in Canada and the main institutions at the EU.

In addition, I inspect the oversight institutions on ATI which include the Information Commissioner/Ombudsman[6] and the Courts. This dissertation compares the oversight institutions in both jurisdictions and analyzes their role and influence in the ATI regime. It looks at their status, competences, mandate and enforcement power to highlight the similarities and differences among them. I complement the questionnaire used for the Information Coordinators with exploratory interviews with some public officials from the Information Commissioners. These interviews were conducted throughout a period of six months, from March to August 2015. The purpose of the interviews was to understand the process in which ATI requests are made and handled, the attitudes of the actors involved and the challenges they are confronted with. All the participants were asked about the value of ATI and their approach to promote that value.

Furthermore, I look at how the courts interpret transparency and ATI provisions. I use case law as a method to understand the approach of the courts focusing on the main cases from the Supreme Court of Canada and the Court of Justice of the EU. I also look at the contribution of the Federal Court of Appeal and the European Court of Human Rights on transparency and ATI. The case law offers an advantage on research because many court decisions are published, hence it is very convenient to track them systematically.

From a user's perspective, I examine how ATI users have adopted and benefited from its provisions in their activities. I have chosen NGOs and media/journalists amongst many users such as businesses, political parties, academics and individuals. My choice was based on two reasons: first, a study of a wider user group was practically impossible for lack of funding, time and other resources. Second, these are the groups of users who most work with ATI to protect public interests, in many cases advancing human rights. I chose both groups since in many cases organizations of journalists are considered to be NGOs, and many journalists also work for NGOs. As such, in many cases it is hard to make a distinction between the two groups. The role of the media in shaping transparency and access to information has close attention in my thesis. There are claims that the information requested by the media may be used not in the interest of

[6] Note that the federal institution in Canada with oversight on Access to Information Act is the Information Commissioner, in Ontario is the Information Commissioner and Privacy of Ontario, in the EU is the European Ombudsman, and in Albania is the Commissioner of the Right to Information and the Protection of Personal Data.

the citizens, but that of mass media and interest groups. This could undermine the public interest if it results in the latter exerting disproportional influence through selective use of governmental material. In addition, I keep in mind that not all NGOs serve the public interest because some of them are captured by political or business interests. This is a weakness I consider when I draw conclusions based on the information and data gathered from NGOs and media.

This research employs qualitative (historical, legislative and case-law analysis, survey, interviews,) and quantitative methods (data drawn from the Treasury Board Secretariat [TBS] and Office of Information Commissioner [OIC] websites). I provide a preliminary historical overview of the development of the access to information legislation in both Canada and in the EU. This allows me to better understand what caused this development and what the consequences were. Drawing on the insights of historical development, my dissertation aims to explain why the ATI legislation was passed at a particular point in time and why it took the particular form it did. The two case studies are introduced shortly for comparison. Furthermore, this research makes an analysis of the ATI legislative framework in Canada and the EU. It particularly focuses on the implications that derive from the place ATI acts hold in the hierarchy of the legal framework and means by which it is implemented and becomes obligatory. I investigate how and why Canada, the EU and the two cases studies have adopted their models. I also examine their achievements, challenges, problems and their solutions. The Canadian and the EU model are put in front of each other and are compared in search of differences and similarities and the rationale for them. This comparison helps me to draw important conclusions for my research.

My field qualitative methodology consists of two tools: questionnaires and interviews. The questionnaire was sent via emails to 113 Access to Information and Privacy coordinators in Canada. The questionnaires were sent in May with responses coming back throughout a period of two months. All email contacts are provided by the Treasury Board Secretariat of Canada in its website, together with the names and other contact information for these coordinators. There are 260 institutions listed at the Treasury Board Secretariat webpage. I sent the questionnaire to

113[7], out of 260 contacts and made the choice based on the importance of the institutions. It was very easy to access the contacts since they were all contained in one webpage and listed in alphabetical order. Several reminders were sent via email waiting for a response. I had some communication with some of them, and could really notice the frustration of completing the questionnaire. Only a handful of coordinators showed interest in the research and only four of them actually completed the questionnaire. My expectation was that I would get the response of at least a quarter of the number (about thirty). However, the results were far more disappointing than expected. Of course, this result is very limited to draw conclusions from. However, the frustration showed by the ATIP coordinators was a sign of a centralized system that is politically steered.

For the EU, the questionnaires were sent in June with responses coming back throughout a period of two months. The questionnaire was the same as that sent in Canada. It was sent via email to the three main EU institutions, the Parliament, the Commission and the Council, and I only got completed questionnaires from two of them. Although several reminders were sent to the EU Parliament I never had any response. I am not sure if the mail ever reached the EP, but I assume the email was correct. I also sent the questionnaire via email to 23 out of the 40 EU central agencies. This number choice was made on the email contacts I could find. It was very difficult to find the contacts of the departments at the EU institutions, including the three main ones (although it took less time to find their contact). The contacts could not be found in one webpage as in Canada - they were scattered. It took me some time to track the contacts of the offices or persons charged with handling access to documents (ATD) requests. The emails were sent in July with answers coming till the end of August. The response rate was better than Canada, but nonetheless low. Only 7 out of 26 responded. However, I had more communication with people at the EU, and they seemed interested in the research. A handful of them wrote to request time extensions due to lack of people because of the holiday season (August). However, even with an extension to the first week of September, no one responded after August.

[7] Note that the numbers of ATIP Coordinators is smaller than 260, which is the number of the institutions since in many cases one coordinator covers more than one institution.

The second tool of data collection are the interviews. I conducted a total of seventeen interviews. Letters of invitation were sent to each of the persons who agreed to be interviewed in advance, before the interview date. Informed consent was obtained by either signing the letter or by email confirmation. Interviews were semi-structured, with an interview guide to ensure that certain topics were covered. I chose this structure of interview because it was important that I asked every interviewee about their approach to the value of transparency and ATI. Also, I asked them to bring examples from their work that demonstrated this approach, especially focusing on human rights. I had four interviews with people working at the Office of the Information Commissioner and Privacy in Ontario, two interviews with people at the Office of the Information Commissioner of Canada, one interview at the Information Commissioner and Protection of Personal Data in Albania. These people volunteered to be interviewed after I sent a formal request to their respective institutions. In addition, I had seven interviews with people from NGOs and media in Canada (two of which are also academics) and three interviews in Europe (two of which in Albania). These participants were chosen based of their significant contribution or that of the organizations they worked for in the field of transparency. I have sent requests to five more NGOs in Europe, but was not able to finalize an interview with them. I had an excellent experience, especially with some of the interviewees, who found my research very interesting, gave me their insights on the topic and even inspired me in furthering my arguments for a human right claim on ATI. There were no financial incentives for any of the interviewees.

The qualitative research methods are very useful in identifying dominant themes occurring repeatedly in the ATI environment. However, they do not provide a full picture of what happens on the ground. Therefore, I use triangulation as a method of validating my findings because multiple sources shed different light on the same phenomenon. To complement my qualitative research I used data from the Treasury Board Secretariat website which contains plenty of information over the years regarding the implementation of *ATIA,* such as the categories of requesters with respective numbers of requests, including their percentages compared to the total number, the number of requests made to each institution, the numbers completed and rejected, the cost of processing requests and the money paid from requesters. Questions like: how many requests were fully accepted, processed and replied by the specific institution and if they were they handled on time (within 30 days legal limit); how many of the requests were delayed

(beyond 30 days) and for how much time; what are the reasons for the delay (did the institution give any reason or not); how many requests were accepted; how many were totally denied and on what grounds – got answers from analyzing the Treasury Board Secretariat data. Moreover, this data gives some information about the economic impact of the ATI regime, such as how much it costs to the institution to handle information requests, and how much revenue the institution collects from the information requests fees. Of course, I always considered the limitation of the data on revealing the truth about the ATI administration. Access of that data was a good start and was validated employing other methods.

In addition, the Office of the Information Commissioner produces statistical reports which were used to assess government performance. They were a valuable source especially when compared to other data using triangulation.

Further research evidenced that transparency and ATI have a close relationship, each affecting the other in meaningful ways, depending on the value assigned to each of them. The approach towards transparency and ATI is grounded on the perceptions of these variables as social and political constructs. To understand the approach taken in each of the jurisdictions I examined how transparency and ATI developed historically, how they were played politically, how they were managed administratively, how they were used practically, how they were supervised institutionally and how they were interpreted and protected judicially.

My main concern while doing the research has been on examining how the value assigned to ATI informed and prescribed its level of legal protection and status. For example, the EU recognizes ATI as a constitutional right, while Canada is still far from granting such status. Hence, my preoccupation was to provide a framework that enables the recognition of a constitutional status of ATI in Canada. In order to do so, I employed two theories of democracy, the deliberative theory by Habermas and the participation theory of Pateman. They provide standards against which the rhetoric of transparency and ATI can be measured.

While transparency has many meanings, trying to make sense of its practical value, I approached the term from the perspective offered by Rawlins. He provides a more complete

description, one that captures best an understanding of transparency not just as an information provision, but also introduces a public discourse aspect related to information as knowledge that affects reasoning and the capacity to react in response to that knowledge. Rawlins stated that "Transparency is the deliberate attempt to make available all legally releasable information – whether positive or negative in nature – in a manner that is accurate, timely, balanced and unequivocal, for the purpose of enhancing the reasoning ability of publics and holding organizations accountable for their actions, policies, and practices."[8] This definition reflects a more inclusive approach on transparency, one that is good-willed and not accidental, one that considers limitations, but only allows for restraints outlined in law, one that does not selectively releases only "good" but also "negative" information, one that is simple and prompt, one that considers all interests in play, one that is made of a clear objective to transmit knowledge for the enrichment of understanding public issues. This definition and the theories that I employ for this research, provided a solid conceptual foundation that allowed me to advance human rights claims.

Although transparency is often equated with ATI, the two concepts are very much distinguished – the latter is regarded much narrowly, and the former has a much wider meaning. Transparency as a principle is realized by a number of legal instruments, with ATI being one of them. For this research I referred to ATI as "access by individuals as a presumptive right to information held by public authorities"[9], as described by Birkinshaw. This definition distinguishes ATI as an individual right which is positive in nature. This means that it is the duty of the public authorities to make this right possible by securing the ATI required. .

Democratic participation has been thinned to the point that most citizens exercise their presumed sovereignty only through periodic elections of representatives, and thus have extremely limited input into other political processes. This fact stands as an irony of our modern times considering that "political participation is the lifeblood of democratic regimes."[10] To revive the democratic principles, I found it useful to rediscover the notions of a participatory

[8] Brad Rawlins, "Give the emperor a mirror. Toward developing a stakeholder measurement of organizational transparency" (2009) 21:1 Journal of Public Relations Research 71 at 75 [Rawlins, "Give the emperor a mirror"].
[9] Birkinshaw, "FOI and Openness", supra note 2 at 188.
[10] Gianfranco Pasquino, *Prima lezione di scienza politica*. (Roma: Laterza, 2008) [Pasquino, "*Prima lezione*"].

political system, like the one offered by Pateman in her participatory democratic theory. In addition, for the participatory democracy to be present a vigorous public discourse must take place in the public domain which acts as precursory of participation and leads to it. This process is facilitated by providing public ATI. In this context, the public discourse theory developed by Habermas helped me explain the process of participation as an active engagement of citizens. The participatory democratic theory and the public discourse theory served as a theoretical background of this dissertation and helped in advancing the human right claims for ATI.

My work fits into the ongoing conversation about the significance of transparency and ATI. My contribution lies in helping to fill a gap in the literature by examining the importance of access laws on human rights and as human rights. In developing my argument, I build upon the work of scholars such as Birkinshaw and Roberts to argue that ATI is a fundamental human right intrinsically and instrumentally. Birkinshaw defined ATI as an individual presumptive right[11], while Roberts suggested that it is logical to claim "that access right is better understood as a corollary of basic political participation rights."[12] I thus make a claim for the recognition of ATI as a fundamental right by looking at the value it upholds in a modern democracy and by drawing a connection between information and knowledge. I argue that this relationship creates better capacities, opportunities and venues for the citizens to exercise their social, economic and political rights. I envisage ATI as being in the centre of a triangle in which knowledge, power and control are its vertices. In this typology information can increase knowledge; knowledge can create opportunities to have more power, and power, if exercised properly, could translate to more control.

The shift to the recognition of ATI as a human right has deeper roots in changing notions of the importance of information in society and the very concept of democracy as an ongoing participation in decision-making. Certainly, looking at transparency and ATI from this perspective, means that they have the potential to bind governments and empower citizens. ATI about government rules, decisions, and activities empowers citizens, enables journalists, and as a

[11] Birkinshaw, "FOI and Openness", supra note 2.
[12] Alasdair Roberts, "Structural Pluralism and the Right to Know" (2001) 51 University of Toronto Law Journal 243 at 262 [Roberts, "Structural Pluralism"].

result, constrains politicians, and exposes corruption. Yet for precisely these reasons, ATI is considered to be highly political, and therefore, highly contentious. It poses substantial costs for political actors - it impedes their capability to keep secrets, to mystify, to profit from the control of private information, and above all to use public office for private gain. What transparency ATI do is make information a matter of public domain.

There is growing appreciation of the need to view any ATI law from the perspective of the anticipated user. The literature is fresh and abundant to support the argument of ATI as a human right. Indeed, we are well beyond the point at which it can disputed that a properly defined right of ATI is essential to good governance. The time has passed that one could downgrade access rights reform to the taciturn exile of further study. The time is ripe to move forward towards the recognition of ATI as a human right.

1.2.3 Research questions

The purpose of this research is twofold: first, to provide some clarity to the conceptualization and practicability of transparency and ATI, and second, to provide a framework for the recognition of ATI as a fundamental human right. The research was guided by several questions. The main question is: What is the nature and value of transparency and access to information in Canada and the European Union from a human right perspective?

To understand the real value of transparency and ATI or answer the question of whether ATI should be considered a fundamental human right, I considered these subsidiary questions:

- Why transparency and ATI laws are important?
- Who uses ATI laws?
- How are they considered by different actors?
- What type of information do different actors usually seek?
- What do actors usually do with the information they acquire?
- Are the values that ATI laws uphold worth promoting despite substantial processing costs?

I argue that transparency and ATI are values that enable the shaping of ideas and enrichment of public discourse, and as such they create, enhance and advance human rights. The design, the authority of the legal provisions, and the institutional approaches towards transparency and ATI should recognize the value of ATI as a human right. This recognition should not be based upon an expectation that transparency and ATII will make governments more accountable, or that it will increase the trust in governments, or that it will make the corruption disappear, or that it make people participate more in public decision-making. Instead, a human right approach is based on the necessity of protecting individuals against the wrongdoings of their governments. Governments should appreciate the value of access rights for individuals in their private and public lives. By approaching ATI from this perspective, one can appreciate what it can do for participation, corruption, trust, accountability, and better governance.

1.3 Outline of the Dissertation

This dissertation is structured in four parts. Part one sets the foundations of this research and paves the road for what is coming in the next chapters. This part clarifies to the reader what are the concerns in the research and what needs to be done to address these concerns. Part one includes two chapters, and explores the conceptual and theoretical foundations of transparency and ATI. Chapter one describes the story of the research and the arguments. It provides an overview of the dissertation and lays out the main research question together with subsidiary questions, the concerns of the research, and its purpose. This chapter also describes the methodology employed for carrying out the research explaining what research has been done (interviews, doctrinal research, case law analysis) to address the research questions. This chapter also emphasizes the significance of the research in terms of social, legal, and policy perspectives. Chapter two is a definitional chapter and serves to set up the problem that I am investigating, the conceptual muddle that exist in the literature on transparency and ATI. In this chapter I go back to the roots of the concept of transparency, and follow how the concept has evolved over time, and how it has gradually given rise to the right of ATI. Chapter two also introduces the two main theories that shape the arguments of this research.

Part two begins the discussion of the research findings. The purpose is to have a better understanding of how the two terms are used, the way they have developed historically, how they are protected legally, and where they stand in comparison with other values and rights (such as privacy). For this purpose, this part looks at the existing theoretical debates on both transparency and ATI, exploring them from a historical and legal perspective, and balancing them privacy. Part two contains three chapters. Chapter three analyzes the historical development of transparency and ATI in Canada and the EU, and compares them with the international developments in the field. This chapter tries to answer questions like: How did transparency and ATI emerge and in response to what? What values did they endorse initially? How did they develop and change and why? Has there been a shift on the way they were perceived and valued? Why has Canada not responded to the advancements in transparency and ATI all around the world? What explains the variation in historical development between Canada and the EU? I look at the rationale behind the adoption of ATI laws at the first place, the drive of the governments to pass those laws, the value governments and advocates saw in ATI when drafted these laws. Chapter four looks at the design of the existing legal framework on transparency and ATI, the legal rights they protect, their restrictions and limitations, the constitutional status of ATI rights and the ramifications of the constitutional recognition. The study has a special focus on ATI legislation on the federal level and its constitutional protection. It compares Canada and the EU and then more broadly compares both of them with the international legal framework. Chapter five makes a careful analysis of ATI and privacy, as values that may come into conflict with each other. Privacy and ATI have a close relationship because they are complementary right, but that occasionally clash with each other. This chapter explores the conceptual and legal analysis of ATI and privacy and their implications for the implementation of such rights in practice. It draws comparisons between the two jurisdictions and lessons to be learned from one another.

Part three sheds some light on the dynamics of transparency and ATI. Because their understanding, and the way they are legally protected is informed by many factors and actors involved, it was important to investigate what those factors and actors were, and how they affect the implementation of laws in practice. Hence, part three is preoccupied with investigating the dynamics of transparency and ATI from an actor's perspective. This part contains four chapters.

It looks at transparency and ATI as occupying three spaces: a) government institutions - they are the producers of information records; it is there where deliberations happen and decision-making takes place; it is them who manage the information dissemination by exercising a great amount of power and control; b) supervising/reviewing bodies – they are the Information Commissioner (in case of Canada) or the Ombudsman (in case of the EU) acting as a first step of complaints, and the Courts, being the next step of the review process. Both steps serve as a bridge between citizens and institutions; 3) the public - who is the receiver or the user of the information. I focus in two groups of users for the purpose of this research, nongovernmental organizations (NGOs) and the media. I dedicate one chapter to each of these actors occupying these three spaces and draw comparisons between Canada and the EU at the end of each of the four chapters.

Chapter six examines the administrative management system of ATI by focusing on the role of the government and the public administration. The study of government and administration is important to understand the political tension that exits in implementing the law and the risk that this implementation is captured by political agenda. Chapter seven looks at the perspectives of oversight institutions and their role in improving the general climate of transparency in government and protecting ATI rights. Chapter eight focuses on the interpretation of ATI rights by the courts and their role in safeguarding, expanding and transforming their legal protection and status. This chapter becomes essential for this research because it considers courts as the best venue that can advance human rights claims of ATI by engaging in an expansive interpretative exercise to give life to the constitutional principle of the "living tree". The Charter can accommodate the constitutional recognition of ATI if courts expand its meaning to allow for essential changes that are commanded by the growing importance of information in society. Chapter nine observes transparency and ATI from a user's perspective focusing on how and why the two chosen groups (NGOs and media) exploit ATI requests. This chapter is important to answer questions on who uses ATI, for what purposes, and what they do with the information acquired.

Part four provides the analysis and conclusions. It is focused on the value of transparency and ATI from a human right perspective. This is the culminating portion of the research which is mainly concerned with providing answers to the questions of conceptualizations of transparency

and the constitutional recognition of ATI. Part four consists of two chapters. Chapter ten offers definitions for transparency and ATI, by departing from a value-based approach. In addition, this chapter provides a framework for measuring transparency and ATI against some set of standards - it develops a typology of information access/delivery by using standards assessed from a user's perspective. Chapter eleven offers transparency models by exploring the challenges and tensions around transparency and the government behaviour in response to these tensions. In addition, this chapter makes a careful analysis of ATI as a human right from an instrumental and intrinsic perspective. The Chapter culminates with a framework to establish a fundamental right of ATI in Canada based on an interpretative and comparative intervention. This Chapter is important to answer the main question of this research and other questions as well, such as what is the value of transparency and ATI and if they are worth promoting despite substantial processing costs. Chapter eleven wraps up the dissertation highlighting some of the empirical findings brought by this research, how this research contributes to the literature on transparency and ATI, and what it advances compared to what others have done in the field. In addition, this last chapter summarizes some of the conclusions about the value of transparency and ATI in Canada and the EU, and more broadly, and what they mean for future developments.

1.4 Significance of the Research

This dissertation contributes to the literature by bringing together Canada and the EU under the umbrella of transparency. It builds upon the existing scholarship by evaluating whether the legal framework in the two jurisdictions of study promotes human rights. This research explores the value of transparency and ATI and advances its recognition as a fundamental human right.

My research aims to make a scholarly contribution to the Canadian and European Legal Studies. The significance of this research stems from the fact that a comparative analysis allows for lesson-drawing on the design and status of transparency and ATI. The comparison also permits for a better understanding of the long-term developmental trajectories for the improvement of the status of ATI and its role in the broader picture of human rights as it is affected by government transparency. This research has a practical value and engages a broad

range of actors such as legislators by providing them a model for upgrading legal provisions and ensuring better protection for ATI rights; policy-makers in facilitating their implementation of access rights, in understanding the tensions underlying processes of handling information requests and prioritizing the interests at stake; scholars in assisting them to engage in ongoing conversations around transparency and encouraging them to use access to information requests for research purposes; and NGOs in making a better use of access rights to promote human rights while complying with their missions.

CHAPTER 2: CONCEPTUAL FRAMEWORK

This chapter explores the definitional muddle that exists around the concepts of transparency and ATI. Its purpose is to lay out the conceptual problem I am investigating by illuminating the work that has been done previously in the field.

The chapter looks at the conceptual framework on transparency and ATIn by keeping a special focus on how they are perceived and analyzed. The previous literature is carefully examined in an attempt to elucidate the definitional problem, and introduce an explanation of how this problem affects the practice in the areas of transparency and ATI rights. Transparency is a multidimensional term, and therefore requires a multidisciplinary analysis. This chapter engages in a dialogue and interaction with work in various disciplines such as law, political and social science. This approach helps capturing and depicting the many faces of transparency.

2.1 Exploring the conceptual framework

2.1.1 Early foundations

The term "transparency" became widely used at the end of the twentieth century. However, its roots extend far back in time. The origin of transparency as an idea can be traced in Europe at least since the eighteenth century. The incorporation of transparency in the works of Rousseau, Bentham, Kant and Constant is a testimony of this early origin. However, back in the eighteenth century, the term "transparency" was rarely used and the idea of ATI was still a nascent concept. Transparency was often used interchangeably with the term "publicity" which indicated that being transparent meant conducting affairs openly in public. In the second half of the eighteenth century, the pursuit of transparency was closely linked to the idea of representative governments. By then, transparency transcended to a higher status with claims about its normativity in the realm of public law. As a result, a normative discourse articulated around the norm of transparency was truly developed in Europe at the end of the eighteen century. In this context, the rich philosophical contributions of Jeremy Bentham, Immanuel Kant, Jean-Jacques Rousseau, and Benjamin Constant are valuable, because they each featured a different appeal for

transparency and they established the foundations for today's normative approach towards transparency.

Jeremy Bentham, the British philosopher and jurist, examined transparency both from a philosophical and a legal perspective bringing into play his significant theory on the Philosophy of Law, with the principle of legality at the core of his theory. In his work, Bentham observed the evils that affect public life, and opacity and lack of transparency were amongst them[13]. For Bentham, secrecy was considered an evil and something unacceptable in conducting public affairs. He elaborated on the requirement of legality in the practice of public authorities. According to Bentham, the principle of legality becomes a measure against the misuse of authority; publicity happens through surveillance, and this facilitates and promotes integrity in both the legal and political domains. Bentham argues that "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."[14] This claim about justice as the most important legal principle is enhanced by transparency. Therefore, for Bentham there is no justice without transparency because visibility of procedures does not only guarantee legal security, but it also offers an advantage since, just like in a theatre stage, morality is put into practice and observed by all.

In addition, Bentham associates opacity and ignorance more radically with arbitrary power. Bentham's notion of transparency is most often thought of in the literature as the exercise of an 'all-seeing', and therefore omnipotent power[15]. However, Bentham also sees transparency as an instrument that limits power and that checks misuse of authority. Bentham states: "The partisan of arbitrary power does not think thus: he does not wish that the people should be enlightened, and he despises them because they are not enlightened. You are not able to judge, he says, because you are ignorant; and you shall always be kept ignorant, that you may not be capable of

[13] Jeremy Bentham, eds, *First Principles Preparatory to Constitutional Code*, Edited by Philip Schofield, (New York: Oxford University Press, 1989) [Bentham, *First Principles*].
[14] Jeremy Bentham, "Principles of Penal Law" in *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring***,** vol.1, (Edinburgh: Tait, 1843) at 316 [Bentham, "Principles of Penal Law"].
[15] See Michel Foucault, "The eye of power" in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977 (Colin Gordon ed.)* (New York: Pantheon Books, 1980) at 153 [Foucault, "The eye of power"].

judging."[16] This contribution is very powerful and goes to the core of my arguments for transparency and access to information – the idea of information as knowledge with the potential to create capacities for rational judgment, and thus engagement in public space, and further participation in public affairs. According to Bentham's understanding, not only secrecy keeps people away from knowing what is happening in the public realm, but the lack of knowledge affects their good judgment, making them incapable of thinking rationally. Ignorance takes away the opportunity to develop intellectually and further to reason rationally.

Furthermore, responding to the argument that transparency hinders trust in public authorities, Bentham extrapolates that making decisions secretly and mysteriously does not necessarily lead to a good reputation because hiding is not a good strategy to gain trust. To Bentham, secrecy is never profitable to reputation, for it encourages doubt and allow misrepresentation. Publicity, rather than affecting honour, more often preserves it, of course, given that good behavior and honest intentions are in place. This correlation of transparency and trust is very often discussed nowadays as one of the drivers that makes governments not very keen to publicity. The fear of failing to deliver what has been promised, makes governments contemplate they will fail people's trust and will be defeated. However, Bentham argues that this is not the case because transparency will act like a check mechanism which keeps governments on track and not allow them to fail. For him, transparency represents the most effective source of control, as it helps to curb infringing behaviors. When Bentham mentions the publicity that must surround legal procedures, he emphasizes its superiority: "Without publicity, all other checks are insufficient in comparison with publicity, all other checks are of small account."[17]

Bentham lists twelve means of diminishing abuses of power and five of them are directly linked to the requirement of publicity. These measures involve: 1) acceptability of secret information; 2) freedom of press, 3) publication of the reasons and facts that have motivated the development of laws or other acts of government, 4) exercise of power that respects rules and forms, 5) recognition of citizens' right to associate, allowing them to express their feelings and

[16] Bentham, "Principles of Penal Law", supra note 14 at 575.
[17] Jeremy Bentham, "Rationale of Judicial Evidence, Specially Applied to English Practice" in *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring***,** vol. 4, (Edinburgh: Tait, 1843) at 335 [Bentham, "Rationale of Judicial Evidence"].

their desires with regards to government's public measures[18]. All these measures are fundamental for transparency to work and their application represents a challenge for the implementation of transparency and access to information regime. Especially the last measure is important for this research because it links citizens and governments in a relationship that works both ways in exchanging information. Although Bentham talks about citizen's right to associate, (which is a fundamental human right in both Canada and the EU today, distinguished from ATI) he looks at this right from another angle – that of giving feedback on government's public measures. That is the approach that the EU has taken when it upgraded the right of access to documents into a constitutional right using a broader interpretation of the freedom of expression.

Bentham's contribution in the transparency literature is significant because he raises very important claims about publicity, legality, justice, limits of authority, hindrance of rationality and public trust, which are at the heart of debates around transparency. They constitute legal principles that give rise to a normative dimension of transparency which facilitates its applicability to the working of a state as a complex body of institutions. These principles assist in understanding different aspects of transparency, but not transparency as a unified concept.

Publicity, as a dimension of transparency has been elaborated by another scholar, the German philosopher Immanuel Kant. Publicity for Kant represents a special criterion to evaluate the legal nature of a norm; it provides this norm with other dimensions – those of 'legality' and 'legitimacy'. Kant writes that "Every claim of right must have this capacity for publicity, and since one can easily judge whether or not it is present in a particular case."[19] In his approach Kant looks deeper on the effects of publicity of norms and makes important claims on their legitimacy. He makes his claim very simple – every legal norm should be published not only for people to know it exists, but also to make a good judgment based on it. Publicity, in this philosopher's work, similarly as in Bentham's work, rises to the level of a mystical formula in public law: "All actions that affect the rights of other men are wrong if their maxim is not

[18] Bentham, "Principles of Penal Law", supra note 14 at 570 -578.
[19] Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Moral*, translated with an introduction by Ted Humphrey (Indianapolis: Hackett Pub. Co., 1983), at 135 [Kant, *Perpetual Peace*].

consistent with publicity."[20] When one employs Kant's work, it becomes obvious that publicity takes on an ethical and legal dimension, most fully developed in "Perpetual Peace".

Kant considers that publicity warrants a political and moral unity. As a result, if a political action or statement cannot be exposed to the public it is morally harmful. Using Kant's moral ethics, Habermas argues that public opinion, which comes as a result of publicity is indeed "aimed at rationalizing politics in the name of morality."[21] As a result, if a political action or a maxim cannot be revealed or 'divulged' it is detrimental. In Kant's view therefore, transparency's virtuous dimension is always linked to an absence of duplicity and to the requirement of truthfulness. Hence, in Kant's view transparency's ethical dimension is always linked to deception and honesty. From this perspective, transparency constitutes a method or a standard for the control of the legal nature of norms and rules. Of course, publicizing does not always guarantee the legal character of rules, but an absence of the publicity of norms provides some ground for questioning of their legal nature. In other words, Kant suggest that transparency is a condition that if present gives norms their legal dimension and makes them legitimate. Otherwise, they lose their status of enforcement, for they are not considered to be legal. Transparency, in Kant's understanding, focuses on the normative rule with a regard for how it is respected, as well as its accessibility. The lack of publicity is arbitrary, and goes against a constitutional regime, that of a juridical State which is based on a specific idea of freedom from arbitrariness. Hence, in a juridical State people are free to reject any unpublished norms. The conceivable nature of the law and its application, embodied by the stability of the legal system, originate in a particular conception of transparency, which in turn refers to the necessity of a codification that is accurate, rational, and above all, public. This particular dimension of Kant's work and its application today certainly needs to be revisited since it touches upon the foreseeable nature of the law and the stability of the legal systems.

Kant's understanding of transparency focuses more on the publicity requirement, meaning the publishing of norms. This is a limited view for two reasons. First, it only includes a one way

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[20] *Ibid.*

[21] See Jürgen Habermas, *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society* (MIT Press, Cambridge Mass.: 1991), at 102 [Habermas, *The Structural Transformation*].

communication between governments and citizens, and second, it focuses more on the publications of final forms of norms, such as an act passed by parliament. This view leaves out the possibility of early engagement of the citizens before norms become finalized. Kant's normative dimension of transparency is very compelling today and that is the reason why so many legislatures in the world, including Canada and the EU, have made transparency a governing principle and have passed laws on FOI. However, this legal approach of understanding transparency is (as I will analyze later on) challenged by another approach - the political one. This means that how the legislation works in reality depends on the will of the politicians in power and of the bureaucrats who are the ones responsible for the dissemination of information. Just having laws on books and publishing them does not guarantee the successful application of those laws, but it is a good start in a democratic state where the principles of legality and justice are cared for. This tension between the normative and the political dimension of transparency is one of the main preoccupations in this research, and to which I commit lots of attention.

Benjamin Constant, a French politician, is another important contributor in early discussions on transparency. Just as Bentham, he argues that publicity is important in the workings of the government because any attempt to operate in secrecy will be detrimental and lead to suspicions and mistrust. According to Constant, the public opinion of the people's representatives depends heavily on their attitudes towards publicity, meaning that the more openly they behave, the less suspicious their actions will appear in public's view. Constant contends that this kind of behaviour will save the representatives from all accusations made against them. He brings the example of ministers in government and argues that if they are opened and transparent they do not have to fear about their honour. Constant maintains that "A full public explanation, in which the representative bodies of the nation enlightened the entire nation on the conduct of accused ministers, would prove perhaps both their moderation and his innocence."[22] The idea is that public officials are not immune of making mistakes, they are people, and as such they may act wrongfully. Being perfect is not what is expected from, instead they are required to be honest and opened about their public affairs.

[22] Benjamin Constant, eds, "Principles of politics applicable to all representative governments" in Political Writings (ed.Biancamaria Fontana), (Cambridge: Cambridge University Press, 1988) 171 at 233 [Constant, "Principles of politics"].

Constant's understanding of transparency is mainly focused on official's behaviour, which is a simplified view of the complexity of bureaucracy nowadays. This behavior is shaped by political and hierarchical constraints, and is not simply one person's response, but that of the whole bureaucratic machinery. Constant's approach towards transparency holds an important message - public officials should not fear the public's scrutiny, even in cases of wrongfulness. However, truth be told, this is easier said than done. Revealing cases of wrongfulness is one of the biggest challenges of transparency nowadays. Governments, being threatened by information that could reveal their maladministration practices, try to hide any piece of information that could lead to blaming and shaming. This way, they distance themselves even further from the public and cover their activities with a secrecy veil. This is probably the most complex matter in this the study of transparency because issues of hiding information are difficult to research. This kind of study involves concerns of institutional behaviours, bureaucratic hierarchy, political culture, legal norms, social construct, and many others. Especially for jurisdictions with multiple levels of governments, such as Canada and the EU, where diverse legal, political, social and culture norms are intertwined, the challenges of shaping governments responses to transparency become even more complex. For this reason, I will return to Constant's theory of principles of politics later on in my research.

An early advocate who has left his mark on the doctrine of transparency is Jean-Jacques Rousseau, a Swiss philosopher. He shares the ideas of Bentham and Kant about the importance of transparency, but from another perspective. Rousseau is not much concerned about the legal aspect of transparency, but looks at it more broadly. He focuses at transparency in society as a whole and a sum of relationships with the selves and with the others. When Rousseau speaks of transparency, he seldom discusses publicity. Looking at Rousseau's theory of human association Hill explains that transparency is prized "as an instrumental good, being, among other things, the social condition necessary for civic cooperation… and regarded opaque relations as the breeding ground for many vices."[23] For Rousseau, the absence of transparency is linked to the question of evil and a transparent political society, visible and readable in all its parts, displays honours at

[23] Greg Hill, *Rousseau's Theory of Human Association: Transparent and Opaque Communities* (New York: Palgrave MacMillan, 2006) at 2 [Hill, *Rousseau's Theory*].

the outside world and prevents the anonymous status which monitors both vice and virtue[24]. According to Starobinski, Rousseau's ideal world is one where "nothing comes between one mind and another, and each individual is fully and openly to the other."[25]

The application of Rousseau's theory today may seem idealistic, to say the least, if not impossible because his model of a transparent society is very obviously that of mutual surveillance and universal visibility. To speak in realistic terms, Rousseau's theory cannot apply to certain public institutions, and not exactly according to the model he proposes. We are all aware that some aspect of government workings are excluded from public scrutiny and transparency rules. However, Rousseau's theory of transparency raises important questions about the benefits of being transparent; how much transparency is good transparency; how privacy and human interaction play out in rules of transparency, and so on.

The rich philosophical contributions of Bentham, Kant, Constant and Rousseau are a very valuable asset in understanding transparency today. They represent different approaches on transparency, mainly in terms of far-reaching principles such as justice, legality, ethics, publicity, morality, legitimacy, trust or honour. As such, these early works constitute a solid foundation for developments of transparency as a moral, social, legal and political project. The principles and philosophical analysis developed by these authors have created a doctrinal corpus which developed over centuries, and has certainly informed debates on transparency and access to information today.

2.1.2 Exploring the definitional problem of transparency

A. Defining transparency

As I described above, the work of some of the early philosophers prepared the stage for the development of transparency as a term and a process. Later, the contemporary scholars enriched

[24] Jean-Jacques Rousseau, "Government of Poland" in *The Social Contract and other Later Political Writings* (Cambridge: Cambridge University Press, 1997) at 227-228 [Rousseau, "Government of Poland"]. He says: "I should like that all grades, all employments, all honorific awards be marked by external signs, that no public figure be allowed ever to move about incognito."

[25] Jean Starobinski, *Jean-Jacque Rousseau: Transparency and Obstruction*, trans. Arthur Goldhammer (Chicago : University of Chicago Press, 1988) at 23 [Starobinski, *Jean-Jacque Rousseau*].

its understanding with novel ideas. However, even though the literature on transparency is rich and diverse, nowadays, there is no agreement between scholars on what constitutes "transparency". While transparency has been widely prescribed as a cure-all for better government, the term exists in a conceptual muddle, and is "more often referred to than defined"[26], as Hood advises. Although many scholars and advocates have offered their insights, the ultimate description of transparency has not yet been found. Florini argues that "[a]lthough the word 'transparency' is widely used, it is rarely well defined. There is no consensus on what the definition should be or how transparency should be measured."[27] Indeed, the study of transparency is significantly challenged by the absence of a single, generally accepted definition across disciplines that now make extensive use of the term, including law. In the meantime, transparency brings together all these disciplines, and offers an excellent opportunity to examine the rational and practical interrelations between law and social sciences.

In recent years, transparency in governance has attracted increasing attention among various academic disciplines[28] leading to a wide debate on the nature of transparency. In the EU, "This debate has developed along three central dimensions that may be described as the definitional, the ethical and the implemental."[29] An important part of the definitional debate focuses on what transparency entails and what not[30]. On the one hand, transparency proponents tend to favor an expansive scope for transparency, which allows for a more definitional leeway and a broad application. On the other hand, transparency sceptics see it as a form of government communication, simply as what documents governments decide to make available. They view it with a more 'real' lens focusing in perverse costs and effects. Therefore, transparency advocates

[26] Christopher Hood, "Transparency in Historical Perspective" in Christopher Hood and David Heald, eds. *Transparency: The Key to Better Governance?* (New York: Oxford University Press, 2006) 3 at 3 [Hood, "Transparency in Historical Perspective"].
[27] Ann Florini, "Introduction: The Battle over Transparency" in Ann Florini *The right to know: transparency for an open world* (New York: Columbia UP, 2007) at 3 [Florini, "Introduction"].
[28] Albert Meijer, Deirdre Curtin & Maarten Hillebrandt, "Open Government: Connecting Vision and Voice" (2012) 78 International Review of Administrative Sciences 10 [Meijer et al, "Open government"].
[29] Maarten Zbigniew Hillebrandt, Deirdre Curtin & Albert Meijer, "Transparency in the EU Council of Ministers: An Institutional Analysis" (2014) 20:1 European Law Journal 1 at 4 [Hillebrandt et al, "Transparency in the EU"].
[30] See Meijer et al, "Open Government", supra note 28; Martial Pasquier & Jean-Patrique Villeneuve, "Organizational Barriers to Transparency: A Typology and Analysis of Organizational Behaviour Tending to Prevent or Restrict Access to Information" (2007) 73 International Review of Administrative Sciences at 147 [Pasquier & Villeneuve, "Organizational Barriers"].

are frequently misjudged as looking at transparency solely as an end in itself[31]. While transparency sceptics identify serious tradeoffs between transparency and other public values, advocates see such relations as less problematic.[32] Critics identify inherent tensions between transparency and privacy, effective decision making, national autonomy, and efficient administration, which leads to arguments that administrations must strive for optimal rather than maximal transparency[33]. In the EU, some authors warn about the pitfalls of considering transparency as a panacea for legitimacy problems pointing that this association is weak.[34] That is because of various factors, such as information overload, proceduralization, or the risk that the media cherry-picks only information that highlights policy failures.[35]

There are many definitions on the term transparency, depending on the chosen perspective. This demonstrates a craving for "maturity" within the academic discourse. One can notice that the inclination for a definition of transparency has improved over time. The earlier definitions tend to be simple. For instance, at the early 90s transparency was mostly defined as "lifting the veil of secrecy"[36], "the ability to look clearly through the windows of an institution"[37] or as a contrast "with opaque policy measures, where it is hard to discover who takes the decisions, what they are, and who gains and who loses."[38] The general idea behind these definitions can be pictured as something happening behind curtains and once these curtains are removed, everything is open and can be scrutinized. Put simply, common sense understanding associates

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[31] Tinne Heremans, "Public Access to Documents: Jurisprudence between Principle and Practice (Between Jurisprudence and Recast)", (2011) Egmont Royal Institute for International Relations Working Paper 50 at 12-13 [Heremans, "Public Access to Documents"].
[32] Stefan G. van Grimmelikhuijsen, "Transparency and Trust: An Experimental Study of Online Disclosure and Trust in Government" (2012) PhD thesis, Utrecht University at 69–75 [Grimmelikhuijsen, "Transparency and Trust"].
[33] Heremans, "Public Access to Documents", supra note 31 at 89–90.
[34] Thorsten Huller, "Assessing EU strategies for publicity" (2007) 14 *Journal of European Public Policy* at 563; Deirdre Curtin and Albert J. Meijer, "Does Transparency Strengthen Legitimacy?" (2006) 11 *Information Polity* at 109 [Huller, "Assessing EU strategies"].
[35] Deirdre Curtin & Albert J. Meijer, "Does Transparency Strengthen Legitimacy?" (2006) 11 Information Polity 109 [Curtin & Meijer, "Does Transparency Strengthen Legitimacy?"].
[36] J Davis, "Access to and Transmission of Information: Position of the media" in Veerle Deckmyn and Ian Thompson, eds, Openness and Transparency in the European Union (Maastricht: European Institute of Public Administration, 1998) 121 at 121.
[37] M. Den Boer, "Steamy Windows: Transparency and Openness in Justice and Home Affairs" in Veere Deckmyn and Ian Thompson, eds, Openness and Transparency in the European Union (Maastricht: European Institute of Public Administration, 1998) 91 at 105 [Boer, "Steamy Windows"].
[38] Julia Black, "Transparent Policy Measures", *Oxford Dictionary of Economics*. (Oxford: Oxford University Press, 1997) at 456.

transparency with unlimited visibility, openness and insight.[39] From such perspective, the disclosure of information in itself is significant, but it reduces transparency to a question of information provision. At the end of the 90s, long-time advocate of transparency, the European Ombudsman Jacob Söderman, gave a more complete description of transparency as: "the process through which public authorities make decisions should be understandable and open; the decisions themselves should be reasoned; as far as possible, the information on which the decisions are based should be available to the public."[40]

Entering in the new millennium, the conceptualization of transparency became more sophisticated moving beyond the idea of seeing through. For instance, Luna refers to transparency as "the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions…. transparency requires not only visibility of policy choices but a publicly declared rationale for these decisions'."[41] Williams introduces a market perspective in defining transparency "as the extent to which the organization provides relevant, timely, and reliable information, in written and verbal form, to investors, regulators, and market intermediaries."[42] Likewise, Millar et al, describe institutional transparency as "the extent to which there is available clear, accurate information, formal and informal, covering practices related to capital markets, including the legal and juridical system."[43] Oliver examines transparency as a process with participants. He indicates that transparency can be described through three elements: an observer, something available to be observed and a means or method for observation.[44] This type of definition builds upon the principal agent theory in which a principal requires information about the agent to check whether

[39] See Adrian Henriques, *Corporate truth. The limits to transparency* (London: Earthscan, 2007).
[40] Jacob Söderman, "The citizen, the Administration and Community Law" General report for the 1998 FIDE Congress, Stockholm, June 3-6, 1998, at 6, online: <http://edz.bib.uni-mannheim.de/daten/edz-b/omb/07/fide-1-eng.pdf> [Söderman].
[41] Erik Luna, "Transparent Policing" 85 *Iowa L. Rev.* (2000) 1107 at 1164 [Luna].
[42] Cynthia Clark Williams, "Trust diffusion: the effect of interpersonal trust on structure, function, and organizational transparency" (2005) 44:3 *Business and Society* 357 at 361 [Williams, "Trust diffusion"].
[43] Carla CJM Millar, Eldiomaty, T., Hilton, B.J. & Choi J Chong, "Corporate governance and institutional strategic transparency in emerging markets" (2005) 59:1/2 Journal of Business Ethics 163 at 166 [Millar et al, "Corporate governance"].
[44] Richard W. Oliver *What is Transparency?* (New York: McGraw-Hill, 2004) at 2 [Oliver].

the agent sticks to the 'contract'[45]. An actor's perspective definition on transparency is also offered by Florini who identifies transparency as "the degree to which information is available to the outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders."[46]

At a more general meaning, transparency is described as an arena of communication[47], and as such, it is not an innocent phenomenon. Transparency is about where lines are drawn, about inclusion and exclusion, about legal and illegal, about approval and disapproval, about an everyday or an honorary execution. Transparency is also a phenomenon that clarifies, explains, makes accessible, and provides guidance. At the same time, information which has been made transparent is also selective and exclusive, emphasizes one thing rather than another, draws lines, and obscures.[48] Being so many things at the same time, Fenster describes transparency as having an aspirational goal: full openness to the public[49] assuming that it is more like a work in progress which improves over time, but it can never be ideal. Of course, depending on circumstances, this ideal goal becomes a moving target. This is a conclusion in which Fenster arrived from earlier work. He advises that transparency's goals require a context-specific definition of transparency, viewed in terms of specific policy objectives, system constraints, and the costs and benefits of open government requirements, rather than an approach that regulates secrecy based on the presumed motivations of officials in the abstract.[50]

Among legal professionals transparency is referred to as a normative concept, as a set of standards for the evaluation of the behavior of public actors[51] Using legal lens Hood suggests that transparency denotes "government according to fixed and published rules, on the basis of

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[45] See for instance, Andrea Prat, "The More Closely We Are Watched, the Better We Behave?" in Christopher Hood & David Heald, eds. *Transparency: The Key to Better Governance?*, 91-107 (New York: Oxford University Press, 2006) at 92 [Prat, "The More Closely"].
[46] Florini, "Introduction", supra note 27 at 5.
[47] Mikkel Flyverbom, Lars T. Christensen & Hans K. Hansen, *Disentangling the power-transparency nexus*, Paper presented at the 1st Global Conference on Transparency (2011), Newark [Flyerbom et al].
[48] *Ibid*.
[49] Mark Fenster, "Seeing the State: Transparency as a Metaphor" (2010) 62 *Admin. L. Rev.* 617 at 620 [Fenster, "Seeing the State"].
[50] See Mark Fenster, "The Opacity of Transparency" (2006) 91 *Iowa L. Rev.* 885 at 936 [Fenster, "The Opacity"].
[51] See for instance, Mark Bovens, "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism" (2010) 33:5 *West European Politics* 946 at 946 [Bovens, "Two Concepts"].

information and procedures that are accessible to the public, and (in some usages) within clearly demarcated fields of activity."[52]

All these definitions of transparency inform and speak about the conceptual muddle in which transparency is situated. To add to the difficulty of understanding the term, transparency is often used interchangeably with openness. To avoid any misinterpretation and confusion in this research, I am providing some definitional background on openness which I encountered while reviewing the transparency literature.

B. Openness

Another term that will continuously surface in the research alongside with transparency is that of "openness". Some scholars make no difference between transparency and "openness".[53] Some others do, for instance, according to Birkinshaw[54] and Larsson[55] if in the concept of "transparency" the accent is put on simplicity and comprehensibility, "openness" has to do with a mentality.[56] In addition, Birkinshaw argues that "Openness covers such items as opening up the processes and meetings of public bodies."[57] In fact, transparency is more often used in academic discourse. Although in some cases it is expressed in legislation and derived by jurisprudence, the word "transparency" is not often used in legislation. Instead, openness is used, especially in the European legal framework. For instance, Article 1 of the Treaty of the EU contains the openness principle: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as

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[52] Hood, "Transparency in Historical Perspective", supra note 26 at 4.
[53] Michael O'Neill, "The rights of access to community-held documentation as a general principle of EC law" (1998) 4:3 *European Public Law* 403 [O'Neill, "The rights of access"].; Pierpaolo Settembari, "Transparency and the EU Legislator: Let he who is without sin cast the first stone" (2005) 43:3 *Journal of Common Market Studies* 637 [Settembari]; Deirdre Curtin & Joana Mendes, "Transparence et participation: des principes démocratiques pour l'administration de l'Union Européenne" (2011) 137-138 *Revue française d'administration publique* at 103 [Curtin & Mendes, "Transparence et participation"].
[54] Birkinshaw, "FOI and Openness", supra note 2 at 190.
[55] T. Larsson, "How Open Can a Government Be? The Swedish Experience", in Veere Deckmyn and Ian Thomson, eds, *Openness and Transparency in the European Union* (Maastricht: European Institute of Public Administration, 1998) at 40-42 [Larsson].
[56] David Heald, "Varieties of Transparency", in Christopher Hood & David Heald, eds, *Transparency: The key to better governance?* (London, Oxford University Press, 2006) at 26 [Heald, "Varieties of Transparency"].
[57] Birkinshaw, "FOI and Openness", supra note 2 at 190.

possible to the citizen."[58] In this context, the two terms have similar meaning, and it is inevitable that I use openness in this research in any case that refers to a legal framework.

C. Access to Information

While transparency is often equated with access to information, the latter should be regarded much narrowly. While it is true that transparency has a much wider meaning, and ATI is a component of transparency, the latter also entails conducting affairs in the open or subject to public scrutiny[59], according to Birkinshaw. Their relationship is obvious: the transparency principle is realized by a number of legal instruments, with ATI being one of them.

The terms "access to information" (ATI), "access to documents" (ATD) and "freedom of information" (FOI) are being used interchangeably in this research. They have the same or similar meaning depending on the jurisdiction. ATI has been defined by Access Info Europe as "a fundamental right that has been recognized as such by international human rights tribunals and at least fifty constitutions around the world. This right has been linked to the fundamental right to freedom of expression, and is essential to protect other human rights."[60]

Birkinshaw describes FOI as "access by individuals as a presumptive right to information held by public authorities."[61] In this context, FOI, just like ATI is a component of transparency. This definition distinguishes access as an individual right which is positive in nature, and obliges public authorities to provide access to the information required.

The Canadian legal framework uses the term ATI at the federal level since the Act that regulates the public access to government-held documents uses this terminology.[62] However,

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[58] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/1, 30.03.2010. Article 1. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0001.01.ENG#C_2010083EN.01001301>. [TEU]
[59] Birkinshaw, "FOI and Openness", supra note 2 at 189.
[60] Access Info Europe, "Open Government Standards: Transparency Standards" at 1. <http://www.access-info.org/wp-content/uploads/Transparency_Standards12072013>. Accessed 8 April 2014.
[61] Birkinshaw, "FOI and Openness", supra note 2 at 188.
[62] *Access to Information Act*, RSC, 1985, c. A-1 [ATIA].

most of the provinces in Canada use the term FOI in their respective statutes.[63] In addition, FOI is used in other jurisdictions such as the US, Australia, New Zealand, etc. Furthermore, FOI is a generic term that has been used as an umbrella in discussions about access rights and may imply a broader meaning than simply the right of access to public information. The EU refers to the same right as ATD since the Regulation[64] that contains the European provisions of this right uses the term "documents" as opposed to "information".

Making sense of the conceptual muddle that surrounds the concept of transparency is a difficult, but necessary exercise if ones need to penetrate to the core of the problems for this concept. This exercise could be facilitated by looking at the recurring topics that are closely associated to transparency, and often surface in the literature when discussions about transparency are made. To better understand the concept of transparency, I have made a classification of these topics under some main themes, and will engage with them in the section that follows. These themes not only assist to disentangle the conceptual muddle, but also will assist on making connections between transparency and ATI. In addition, these main themes will act as pillars for constructing arguments on the nature and value of transparency and ATI in this research.

2.2 Making sense of the conceptual muddle of transparency - Main themes

A careful analysis of the literature on the conceptual framework reveals some main themes and ideas around which debates on transparency and ATI are developed over time with proponents and critics for each of these themes.

A. Democracy, good governance and accountability

Democracy, good governance and accountability are broad umbrella ideas under which other matters such as legality, corruption, trust, effectiveness, security, emerge in scholarly debates.

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[63] See *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Freedom of Information and Protection of Privacy Ac*t, RSBC, c. 165.

[64] Reg (EC) No 1049/2001 of European Parliament and of the Council of 30 May 2001 Regarding public access to European Parliament, Council and Commission documents 31.05.2001, L 145/43, Official Journal of the European Communities. See <http://www.europarl.europa.eu/register/pdf/r1049_en.pdf> [Reg. 1049].

Legality and legitimacy are two of transparency's most prominent dimensions today. The aspiration for legality has greatly increased over the past two decades, probably as a result of the growing influence of the rule of law and democratic governance. Following the path of Bentham and Kant, the importance of the principle of legality has been recognized and emphasized by many twentieth-century theoreticians of the State. For instance, Hans Kelsen as a jurist and a legal philosopher has paid particular attention to transparency. For him, in democracy, the legality of state activities is best guaranteed by publicity. He argues that "Since democracy is concerned with legal security, and thus with lawfulness and accountability in the workings of government, there is a strong inclination here to control mechanisms, as a guarantee for the legality required. And the principle of publicity is therefore paramount, as the most effective guarantee."[65] Using a legal argument, transparency tends to be introduced as a precondition for administrative or legislative legality or the rule of law. In public administration, according to Lessig, without appropriate access to government information it will be very difficult to enable citizens to control the legality of the administration and its actions.[66] In addition, referring to transparency of the legislative procedures Curtin and Meijers claim that legal rights of access to documents may be viewed in their broader democratic context.[67] The quest for transparency from a legalistic perspective is probably the most convincing one in the literature since it goes to the core of transparency debates with foundations laid down three centuries ago. The legal arguments are also the most difficult to bypass or oppose.

Regarding debates over issues of democratic governance, transparency has gained a wide application to explain processes of accountability and deliberations[68] or as a means of ensuring

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[65] Hans Kelsen, "State-form and world-outlook" in *Essays in legal and moral philosophy* (Dordrecht: D. Reidel Publishing Company, 1933) at 103-104 [Kelsen].
[66] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) [Lessig, *Code*].
[67] Deirdre Curtin & Herman Meijers, "The principle of open government in Schengen and the European Union: Democratic retrogression?" (1995) 32:2 Common Market Law Review 391 [Curtin & Herman Meijers, "The principle of open government"].
[68] See Peter Bathory & Wilson McWilliams, "Political Theory and the People's Right to Know", in *Government Secrecy in Democracies*, eds, Itzhak Galnoor, 3-21 (New York: Harper Colophon, 1977) [Bathory & McWilliams].; Christian Bay, "Access to Political Knowledge as a Human Right", in *Government Secrecy in Democracies*, eds, Itzhak Galnoor, 22-39 (New York: Harper Colophon, 1977) [Bay, "Access to Political Knowledge"].; Suzanne Piotrowski, *Government Transparency in the Path of Administrative Reform* (New York: State University of New York Press, 2007) at 107-108 [Piotrowski, *Government Transparency*].

that public authorities, are responsive, efficient and effective in the formulation and execution of policies.[69] Because of this wide applicability Hood describes transparency as it "has attained quasi-religious significance"[70] while Florini speaks in highly enthusiastic terms and noting that transparency "holds great promise for improving the state of the world."[71] Florini explains that transparency can contribute to efficient and effective governance by providing feedback channels, enabling officials and citizens to evaluate policies and adjust them accordingly. It provides a means of detecting, and correcting errors in the policies of governmental institutions. Pasquier and Villeneuve are more realistic in their prospects when arguing that "transparency in state activities becomes a *sine qua non* condition of good governance."[72]

Transparency is also debated in terms of its connection to government accountability and the potential to hold public officials responsible for their wrongdoings. Fox argues that "The concepts of transparency and accountability are closely linked: transparency is supposed to generate accountability."[73] That is made possible only if information becomes available to the public. According to Lindstedt and Naurin, this is the publicity condition. Furthermore, "if the release of information to the public is to affect the behavior of potentially corrupt government officials, the public must possess some sanctioning mechanism. This is the accountability condition."[74] However, the accountability processes are not by any means simple and easy applicable. One has to be naïve to think that having transparency measures in place will automatically make public officials more accountable. As I have mentioned previously, this tension is present throughout this research and many of my arguments will be dedicated to better understand this tension.

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[69] See Ann Florini, "The End of Secrecy" (1998) 111 Foreign Policy 50 at 53-56 [Florini, "The End of Secrecy"].; Neal Finkelstein, "Introduction: Transparency in Public Policy", in Neal Finkelstein, eds, *Transparency in Public Policy*: *Great Britain and the United States*, 1-9 (Basingstoke: Macmillan Press, 2000) at 6-7 [Finkelstein, "Introduction"].; David Heald, eds, "Transparency as an Instrumental Value", in *Transparency: A key to Better Governance?* 59-74 (London: Oxford University Press, 2006) at 64 [Heald, "Transparency as an Instrumental Value"].

[70] Hood, "Transparency in Historical Perspective", supra note 26 at 20.

[71] Ann Florini, "Behind Closed Doors: Government transparency gives way to secrecy" (Spring 2004) Harvard International Review at 18 [Florini, "Behind Closed Doors].

[72] Pasquier & Villeneuve, "Organizational barriers", supra note 30 at 149.

[73] Jonathan Fox, "The uncertain relationship between transparency and accountability" (2007) 17:4-5 Development in Practice [Fox, "The uncertain relationship"].

[74] Catharina Lindstedt & Daniel Naurin, "Transparency is not Enough: Making Transparency Effective in Reducing Corruption" (2010) 31:3 International Political Science Review 301 at 302 [Lindstedt & Naurin, "Transparency is not Enough"].

Many scholars argue about the undesirable consequences of transparency on governance. For instance, Heald explains that the necessity to account may lead to the quest for blame-avoidance.[75] Hood reflects upon the blame-conscious bureaucratic culture that underlies the futility, jeopardy and perversity effects that transparency produces. He explores what happens when the much-discussed doctrine of transparency, as a key to good governance, meets the widely observed behavioral tendency of blame-avoidance in politics and public administration. Hood recognizes three common types of blame-avoidance strategy, namely agency strategies, presentational strategies and policy strategies.[76] In addition, he investigates what can happen when a widely promoted governance doctrine meets a commonly observed type of behaviour. Hood identifies ways in which that combination can produce nil effects, side-effects and reverse-effects in the pursuit of transparency. He refers to the work of Roberts in arguing about the side-effects or reverse effects of transparency. Hood admits that "Alasdair Roberts' (2006) comparative work on governmental adaptation to freedom of information regimes suggests that the achievement of 'a new culture of openness' tends to be elusive, to say the least."[77] Hood advances similar arguments as Roberts when talking about this "new culture" emerging because of transparency. He states that "More presentational responses to transparency measures …. include the avoidance of record-keeping (or the keeping of records in such a form as to be unintelligible to outsiders), perhaps combined with the tactic of producing so much data that only the most pertinacious and initiated individuals can effectively distinguish signal from noise."[78] Hood stresses the fact that the tension between the pursuit of transparency and the avoidance of blame is at the heart of some commonly observed problems in public management, and recommends that something other than the "bureaucratic" strain of transparency may be called for when those problems are encountered. Hood's claim is a very significant one and has very serious implications on the way transparency works in practice. Hood's idea is not a new one, and the problem is not a new phenomenon. The same argument was made by Constant some three centuries ago who responded to this problem by encouraging government officials to be

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[75] Heald, "Transparency as an Instrumental Value", supra note 69 at 60.
[76] Christopher Hood, "What happens when transparency meets blame-avoidance?" (2007) 9:2 *Public Management Review* 191 at 199 [Hood, "What happens"].
[77] *Ibid*, at 201.
[78] *Ibid*, at 204.

transparent even in the face of mistakes since this gives them the possibility of defending themselves and explaining their decisions.

Other perverse effects of transparency could also be noticed. For Aucoin transparency causes "the temptation of public servants to commit less to paper, to fail to keep appropriate records, and to participate in efforts to restrict what is made public."[79] This is indeed, a growing problem in today's administration which is more technologically advanced than it ever used to be and very close to being paperless. In addition, O'Neill writes that "those who know that *everything* they say or write is to be made public may massage the truth."[80] Producing less documents, choosing to disclose some documents instead of others, deliberating in closed meetings are some of the techniques used by bureaucracy today to give another perception of the truth. I pay particular attention to this aspect of transparency and develop a typology of transparency to describe and make sense of this challenge.

Many critics of transparency argue about the negative effect of transparency on the behavior of politicians and bureaucrats. Heald talks about the perverse effects of over-exposure as "a feeling of suffocation."[81] Other critics argue that closed deliberations allow policymakers to make more thoughtful consideration of the available choices, to engage in more fulsome and substantive debate over the most popular and unpopular alternatives on public issues, and to bargain openly in order to reach a widely acceptable and optimal result, without the inevitable pressure that accompanies public scrutiny[82]. From an economic perspective, Andrea Prat has shown that there are some significant theoretical exceptions to the famous dictum by Bentham that "the more closely we are watched, the better we behave." For Prat, even from a principal-agent perspective in economics, "it is not always in the interest of the principal to have access to

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[79] Peter Aucoin, "New Political Governance in Westminster Systems: Impartial Public Administration and Management Performance at Risk," (2012) 25:2 Governance 177 at 182 [Aucoin].
[80] Onora O'Neill, *A Question of Trust. The BBC Reith Lectures 2002* (Cambridge: Cambridge University Press, 2003) at 73 [O'Neill, *A Question of Trust*].
[81] Heald, "Transparency as an Instrumental Value", supra note 69 at 60.
[82] See Michael A. Lawrence, "Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission" (1995) 45 CATH. U. L. REV. 1 at 10-12 [Lawrence, "Finding Shade"].; James T. O'Reilly & Gracia M. Berg, "Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission" (1995) 36 Harv. Int'l L.J. 425 at 458 [O'Reilly & Berg, "Stealth"].

all available information of activities of the agent"[83] because an information overload can create more confusion and make the understanding of public issues more complex than it would be otherwise.

In "Blacked out" Roberts spends several chapters showing how the structure and practices of governance have direct implications for ATI. First, access depends on a professional civil service and well organized records. Where these are absent, access and transparency are severely truncated. Second, governments are increasingly outsourcing functions to the private sector, which is generally not covered by access legislation.[84] The era of the New Public Management brought new anxieties on transparency since the idea of public institutions and their services became a moving target. This spurred more criticism against transparency.

Roberts observes that "In the last decade, ….there has been an increasingly articulate backlash against transparency measures."[85] He mentions transparency critics such as Grumet[86], Frum[87] and Fukuyama[88] who all argue that the problem with American government is too much transparency. Roberts responds to them by saying that most critics of excessive transparency assume that it serves exclusively as a tool for oversight of politicians and bureaucrats. Roberts admits that transparency - conceived in this particular way - aggravates governmental dysfunction by reducing the capacity of policymakers to deliberate candidly and make the compromises that are essential for legislation to be adopted. Transparency also makes it easier for outsider groups to intrude in negotiations, and it is assumed that negotiations become more difficult as the number of involved groups increases.[89] However, Roberts explains that despite

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[83] Prat, "The More Closely We Are Watched", supra note 45 at 94.
[84] Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (Cambridge, MA: Cambridge University Press, 2008) [Roberts, *Blacked Out*].
[85] Alasdair Roberts, "Too much transparency?: How critics of openness misunderstand Administrative Development" *Paper prepared for the Fourth Global Conference on Transparency Research, Università della Svizzera italiana,* June 4-6, 2015, *at* 3. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601356> [Roberts, "Too much transparency?"].
[86] See Jason Grumet, *City of Rivals: Restoring the Glorious Mess of American Democracy* (Guilford, CT: Globe Pequot Press, 2014) [Grumet, *City of Rivals*].
[87] David Frum, "The Transparency Trap: Why trying to make government more accountable has backfired" (2014) The Atlantic, online: <http://www.theatlantic.com/magazine/archive/2014/09/the-transparency-trap/375074/> [Frum, "The Transparency Trap"].
[88] Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014) [Fukuyama, *Political Order*].
[89] Roberts, "Too much transparency?", supra note 85 *at* 3-4.

these constraints, blaming transparency for problems in government affairs does not have any foundation. These complaints, in Roberts' view, are misguided for two reasons. They depend upon a misconception about the purposes served by transparency in government, and about the role of transparency reforms within the larger pattern of administrative development.[90] Hood and Heald also respond to this misperception of transparency saying that "it is logically problematic to argue that transparency measure or any other policy measure could simultaneously produce futility, jeopardy, and perversity."[91] I agree with Roberts, Hoods and Heald and argue that despite challenges that accompany transparency, it also upholds values that are worth fighting for. The main problem with the critics of transparency is that they approach its value looking at its failures and not its promises. I will further the arguments in support of the value of transparency by taking a human right approach.

The issue of public trust on government institutions and how it is affected by transparency, has also produced lots of discussions among scholars. This issue has been the focus of many studies, especially by scholars of public administration and political science, which have generated controversial results.

On the one hand, transparency optimists argue that transparency is as an important instrument to increase citizen trust in government[92] and there are findings in some studies that support the idea that transparency and trust play a substantial role, as moderator and mediator respectively, in curtailing corruption and enhancing citizen satisfaction.[93] Citizen satisfaction is not equated with trust, even though may affect trust positively. There are more direct studies that have shown

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[90] Ibid, at 1.
[91] Christopher Hood & David Heald, eds, *Transparency: The key to better governance* ? (Oxford University Press: New York, 2006) at 220 [Hood & Heald, *Transparency*].
[92] Anne M. Kjaer, *Governance* (Malden: Polity Press, 2004); Richard W. Oliver, *What is Transparency?* (New York: McGraw-Hill, 2004) [Kjaer]; Patrick Birkinshaw, "Transparency as a Human Right", in Cristopher Hood & David Heald, eds, *Transparency, The Key to Better Governance?* 47-58 (Oxford: Oxford University Press, 2006) [Birkinshaw, "Transparency as a HR"].; Hood, "Transparency in Historical Perspective", supra note 26.; Florini, "Introduction", supra note 27.; Ben Worthy, "More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government" (2010) 23:*4* Governance: An International Journal of Policy, Administration, and Institutions 561 [Worthy, "More Open"].
[93] Heungsik Park & John Blenkinsopp, "The roles of transparency and trust in the relationship between corruption and citizen satisfaction" (2011) 77:2 International Review of Administrative Sciences 254 at 270 [Park & Blenkinsopp].

small positive effects of transparency on trust-related measures.[94] Other studies show that government transparency may contribute to greater trust in government.[95] However, empirical research has not been able to demonstrate a clear positive relationship between transparency and public decision-acceptance and trust.[96]

On the other hand, transparency pessimists question whether showing citizens the results of government policies will actually boost their trust.[97] These pessimists argue that results of the exposure of wrongdoing in public affairs by means of transparency may lead to politics of scandal and even demystification of government. For instance, Lord[98], Bernard and Kristin[99] and Hubbard[100] believe that transparency makes conflicts worse more and casts doubt on the idea that transparency is one possible explanation of the democratic peace. Their key argument is that government policies and democratic processes are so complex that they cannot be easily communicated and explained to the public through a set of standard performance indicators. Also, according to critics of transparency, attempts to try simplifying complex government policies will have adverse effects and result in a further decline in trust. People may become dissatisfied to see that governments do not operate as fast as they imagined and wished them to, and accomplish less than they expect. For instance O'Neill argues that transparency erodes trust

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[94] See for instance, Tolbert, C. & Mossberger, K. "The effects of E-Government on Trust and Confidence in Government" (2006) 66:3 Public Administration Review 354 [Tolbert & Mossberger].; Grimmelikhuijsen, S. "Do transparent government agencies strengthen trust?" (2009) 14 *Information Polity* 173 [Grimmelikhuijsen, "transparent government agencies"].; Cook, F., Jacobs, L. & Kim, D. "Trusting What You Know: Information, Knowledge, and Confidence in Social Security" (2010) 72:2 *The Journal of Politics* 397 [Cook et al]; de Fine Licht, J., Naurin, D., Esaiasson, P. and Gilljam, M. "Does transparency generate legit-imacy? An experimental study of procedure acceptance of open and closed-door decision-making" (2011) QoG Working Paper Series, at 8 [Licht et at].

[95] Gant, D.B & Gant, J.P. "Enhancing E-Service Delivery" (2002) *E-Government Series, State Web Portals: Delivering and Financing E-Service*, Pricewaterhouse Coopers Endowment [Gant & Gant].

[96] See for instance, Grimmelikhuijsen, "Transparency & Trust", supra note 32.

[97] See O'Neill, *A Question of Trust,* supra note 80*;* O'Neill, O., "Transparency and the Ethics of Communication", in C. Hood and D. Heald, ed, *Transparency: The Key to Better Governance?* (Oxford: Oxford University Press, 2006) 75-90 [O'Neill, "Transparency and Ethics"].; Bovens, M.A.P. & Wille, A. "Deciphering the Dutch drop: Ten explanations for decreasing political trust in the Netherlands" (2008) 74:2 International Review of Administrative Sciences 283-305 [Bovens & Wille]; Etzioni, A., "Is Transparency the Best Disinfectant?" (December 2010) 18:4 The Journal of Political Philosophy 389–404 [Etzioni, "Is Transparency the Best"].

[98] Kristin M. Lord, *The perils and promises of global transparency: Why the information revolution may not lead to security, democracy or peace* (Albany: State University of New York Press, 2006) [Lord, *The perils*].

[99] Bernard I. Finel & Kristin M. Lord "The Surprising Logic of Transparency" (1999) 43:2 International Studies Quarterly 315-339 [Finel & Lord].

[100] Hubbard, P "Freedom of Information and Security Intelligence: An economic analysis in an Australian context" (2005) 1:3 Open Government: a journal on Freedom of Information [Hubbard].

and undermines governance.[101] In addition, O'Neill contests that transparency measures without an effective ethic of two way communication can be a cure that is worse than the disease.[102] However, she is not against transparency if the process happens through an effective two-way communication. According to her, this can produce real transparency.[103]

Between optimists and pessimists of a relationship between transparency and trust stands a third group of scholars who are sceptic that such a relationship exists after all. According to this group, trust in government is a general attitude that can hardly be expected to be changed by encountering information on one specific topic and this form of trust is affected by many other factors.[104] Some studies have been carried out[105] which indicate that neither optimists nor pessimist are right. The sceptical position argues that transparency seems to have hardly any effect on trust. De Fine Licht uses procedural fairness (justice) theory to test that increased transparency does not increase trust in decision-making. Her argument is that "People are, …. quite uninterested in politics, and therefore the simple belief —or assumption—that information is there, *if they would take the time and effort to engage in it*, is enough to create a perception of transparency."[106] However, only the perception of transparency is not enough to establish its relationship with trust. Other studies have also shown null results.[107]

Roberts belongs to this third group of scholars, and has elaborated on the relationship between trust and transparency. He brings evidence from democracies with long experience of FOI,

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[101] O'Neill, *A question of trust*, supra note 80.
[102] O'Neill, "Transparency and Ethics", supra note 97.
[103] *Ibid.*
[104] See for instance Alasdair Roberts, "Dashed Expectations: Governmental adaptation to transparency rules", in C. Hood & D. Heald eds, *Transparency: The Key to Better Governance?* (Oxford: Oxford University Press, 2006) 107-144 at 119 [Roberts, "Dashed Expectations"]; Bovens & Wille, supra note 97.
[105] Tolbert & Mossberger, supra note 94; Cook et al, supra note 94; Jenny De Fine Licht, "Do We Really Want To Know: The Negative Effect of Transparency in Decision-Making on Trust and Decision Acceptance" (2010) 34 Scandinavian Political Studies 183-201 [Licht, "Do we really want"].
[106] Jenny de Fine Licht, "Does Actual Transparency matter?: Develping an experimental design for testing the link between actual and perceived transparency in relation to perceived legitimacy", Paper prepared for the Transatlantic Conference on Transparency Research Utrecht, June 8-9, 2012, at 12 [Licht, "Transparency matter?"].
[107] Worthy, "More open", supra note 92; Bauhr, M. & Grimes, M. "Seeing the state: The Implications of Transparency for Societal Accountability", Paper presented at the Midwest Political Science Association Conference, 30 March-3 April 2011, Chicago [Bauhr & Grimes]; Grimmelikhuijsen, S. "Transparency of Public Decision-Making: Towards Trust in Local Government?" (2010) 2 Policy & Internet 5-35 [Grimmelikhuijsen, "Transparency of Public Decision-Making"]; Grimmelikhuijsen, "*Transparency & Trust",* supra note 32; Licht, "Do We Really Want", supra note 105.

particularly Canada, to show how governments resist moves to greater transparency. They do so partly through aggressive legal defence of the public-interest exemptions allowed in all freedom of information laws, and also through informal adjustment of record-keeping and other documentation in order to avoid disclosure of potentially embarrassing information. Roberts doubts that freedom of information promotes trust or culture change. He rightly points out that "In practice, the probability that the adoption of a FOI law will lead to cultural change or improve trust is small."[108] The reason for this sceptical view is that the existence of freedom of information laws are not sufficient for governments to be open. Governments deploy deceitful tricks to resist while formally complying, and Roberts outlines numerous methods by which a bureaucracy that intends on keeping information out of the public domain may actually do so. Roberts illustrates with concrete examples the capacity of the bureaucratic system to adapt to transparency rules using many techniques that actually decrease transparency. These range from changes in record-keeping practices, to restructuring government services, to not keeping records at all. This explains the underlying pessimism that suggests that greater transparency in the form of simply making files, data and information available will probably have the perverse effect of reducing actual transparency. It becomes clear that freedom of information laws do not equate with "openness" even when "openness" is the stated aim of such laws.

Looking at all the debates about the relationship between transparency and trust, I see a real challenge to establish a positive or negative effect. I would agree with the third group of scholars - 'the sceptics' - who find it hard to see any effect of transparency and trust. However, I do find O'Neill's idea of a two-way communication as essential for the establishment of trust-transparency relationship. I will return to it later in this research.

Another idea that often emerges on discussions around transparency and ATI is national security. Roberts argues that ideas of transparency have little to no traction is the area of national security.[109] In the post 9/11 era the scope of information falling under the umbrella of national security has grown considerably and includes information that was previously available. Roberts also points out that the trend toward greater networking of security agencies increases the

[108] Roberts, "Dashed Expectations", supra note 104 at 108.
[109] Roberts, *Blacked Out*, supra note 84.

amount of information shared between agencies, while also reducing the amount of information shared to the public. While there is an undeniable tension between national security and the right to information, there is no evidence to suggest that legitimate national security interests are necessarily better served in practice when governments operate in total secrecy.

B. The implications of technology

The last decade has seen the booming of the information technology which has had major implications in record keeping and dissemination of information. Many authors hold a very optimistic view of technology as presenting great promises for transparency. Noveck introduces a very optimistic view of technology by making a plea for "wiki government". She argues that technology will help to overcome limitations to transparency and open government.[110] Similarly, Lathrop and Ruma give a promising perspective of the value of technology for transparency.[111] However, authors like Pasquier and Villeneuve draw attention about the dangers of new technologies by challenging existing values and raising new institutional uncertainties.[112]

Roberts explores the implications of vast stores of digitized information for openness and transparency and argues that the advancement in technology represent opportunities and risks. While information and communication technologies can significantly improve the conditions for openness by capturing more in writing and facilitating dissemination, they also can create problems. The massive amount of data can be overwhelming. In addition, much of the data is unstructured, scattered and diffuse. Compared with paper-based bureaucracies which create more limited types of documents, in a digital environment information appears in all sorts of forms, from databases to emails and spreadsheets to presentation files, stored idiosyncratically on personal computers and communication devices. Roberts points out that the practical barriers to transparency that existed in a paper-based world are being displaced by new practical barriers of a digitized environment. The sheer volume of emails used in government is so huge that one

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[110] Noveck BS, *Wiki Government: How Technology Can make Government Better, Democracy Stronger, and Citizens More Powerful* (Washington: Brookings Institution Press, 2009) [Noveck, *Wiki government*].
[111] Lathrop D & Ruma L, "Preface", in: Lathrop D & Ruma L, eds, *Open Government: Collaboration, Transparency and Participation in Practice* (Beijing: O'Reilly, 2010) at xix–xxv [Lathrop & Ruma, "Preface"].
[112] Pasquier & Villeneuve, "Organizational barriers", supra note 30.

study demonstrated that "in 2002 Canada's 150,000 federal public servants exchanged about 6 million e-mails every working day."[113] This is more than a decade ago. The situation is much worse now that information technology has usurped almost every government activity.

C. The empowerment of citizens

The empowerment of citizens is also a big umbrella theme which hosts other themes such as participation, knowledge gaining, and human rights.

The empowerment of citizens is unquestionably a very compelling aspect of transparency and ATI. There are authors who argue that "There can be no doubt that states should enact fundamental rights of access to information to empower citizens."[114] In support of this idea, Florini states that "transparency is seen as an essential element of democracy, part of empowerment of ordinary citizens so that they can take meaningful part in shaping the decisions that affect their lives."[115] However, there are some theorists who argue that a certain degree of "virtuous ignorance" may strengthen rather than undermine representative democracy.[116] This scepticism about democratic governing goes all the way back to Plato's hierarchical Republic[117], where there have been those who hold the notion that the job of governing needs to be left in the hands of those who know best – the philosophers. The ship needs a captain; even the guardians are just to act on the philosophers' rulings; wise leadership is essential because important matters cannot be left in the hands of the many. The corresponding argument is that citizens are incompetent and reluctant to deal with abundant and complex goals, processes and information and this is why they trust the leader to do this job better in their behalf. However, this claim depicts a very simplistic if not distorted picture of reality. Our society is not divided into 'philosophers' and citizens. As a result, such claims have no plausible foundation and

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[113] Murray Rankin, "The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada", June 10, 2008, at 12 [Rankin, "ATIA 25 years later"].
[114] Albert Meijer, Paul't Hart, & Ben Worthy, "Assessing Government Transparency: An Interpretive Framework" (2015) Administration & Society, 1–26, at 21 [Meijer et al, "Assessing Government Transparency"].
[115] Florini, "Behind Closed Doors", supra note 71 at 18.
[116] See for instance Keane, J. *The life and death of democracy*. (London: Simon & Schuster, 2009) [Keane].
[117] Plato Republic, translated by G.M.A. Grube, revised by C.D.C. Reeve (Indianapolis : Hackett Publishing Company Inc., 1992) [Plato].

justification, especially in the twenty first century, when it is generally accepted that information is power. In defense of this idiom, Cane argues that knowledge is necessary for accountability, and hence for democracy. Cane explains that "a precondition of effectively holding public administrators accountable is knowledge and information about their activity. Secret government is unaccountable government."[118] However, Hood referring to transparency analysis note "it would seem that the optimistic view about the effects of transparency provision is far from proven and the most important element in that view - citizen knowledge - is probably not provable."[119] I would agree that knowledge is difficult to measure and an empirical study of how citizens' knowledge affects transparency is difficult to undertake.

This dissertation is not engaging in any empirical research that proves that a relationship exists between knowledge and transparency. However, one can depart from an assumption of a lack of knowledge to realize its value for transparency. Without first knowing what is going on in government, nobody can take any action. Getting to know is the first step, it is like a key to the gates of a city. Where you want to go next once you entered the city depends on many factors.

In simplistic terms knowledge is generated through continuous information about a certain topic. As such, transparency is understood as information delivery. Rawlins urges organizations voluntarily to "share information that is inclusive, auditable (verifiable), complete, relevant, accurate, neutral, comparable, clear, timely, accessible, reliable, honest, and holds the organization accountable."[120] However, as argued by O'Neill, this optimistic view of the effects of information on transparency is "one-sided" because it "encourages us to think of information as detachable from communication, and of informing as a process of "transferring' content."[121] In contrast, O'Neill calls for a more "complete view" of transparency, which recognizes the importance of the reception and use of information, and of the process of communication. Even if organizations were able to supply all the types of information prescribed by Rawlins and others, such understanding reduces transparency to a feature of the sender without considering the abilities of receivers to actually handle the information made available. Pasquier and

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[118] Peter Cane, *Administrative Law*, 5th ed., (Oxford: Oxford University Press, 2011), at 126 [Cane].
[119] Hood & Heald, *Transparency*, supra note 91 at 220.
[120] Rawlins,"Give the emperor a mirror", supra note 8 at 79.
[121] O'Neill, "Transparency and Ethics", supra note 97 at 81.

Villeneuve share a similar view with O'Neill, arguig that transparency is essential to the process of information exchange.[122] This perspective recognizes that information does not travel in one way, but both ways from institutions to the public and then vice versa. Viewing transparency as communication rather than the transmission of information reminds us of the interpretive and relational complexities involved in transparency practices.

Indeed, there may be complications arising by reducing transparency to a mere information delivery. This view ignores many factors that have to do with the sender and the receiver of information. The senders - namely public institutions - may sway the use of language to provide a certain context and to fit the purpose they want to achieve by disseminating a certain type of information. It is widely accepted that people tend to selectively chose a specific language to convey a message across audiences – a message which may not necessarily be the truth. O'Neill calls this "massaging the truth."[123] What we might get as a result may be a different version of the "truth" which may influence the public towards a distorted understanding of the public issues. In addition, there are claims against transparency that look at the receiver of the information – namely the public – and examine its capacity in absorbing, elaborating and using information. Not all people are able to process amounts of information at the same speed and depth. More transparency may benefit the most those who are relatively more capable of taking advantage of increased available information, reinforcing already existing social inequalities. The danger is that the opportunities created by transparency and its companion mechanisms be appropriated by the more educated and skilled sectors of society, in detriment of the less well off. For instance, the information may be used not only by interested citizens but by mass media and interest groups, which are different from ordinary citizens because of their power and influence. This may undermine the public interest in exerting disproportional influence through selective use and misuse of government information. O'Neill argues that "Transparency is useful to the media and to campaigning organizations who can discover information that bears on others' performance."[124] It is indeed very interesting to look at people's capacity to absorb and respond to the information they get. I will analyse the tension that information delivery creates for

[122] Pasquier & Villeneuve, "Organizational barriers to transparency", supra 30 at 149.
[123] O'Neill, *A Question of Trust*, supra note 80 at 73.
[124] O'Neill, "Transparency and Ethics, supra note 97 at 88.

different categories of people in society and respond to the claims that dismiss the value of transparency as detrimental for social justice by using capacity arguments.

Closely related to the idea of capacity on using knowledge, is the theme of participation, which has drawn lots of attention amongst scholars because of its effects on transparency. Pasquier and Villeneuve argue that "transparency in state activities becomes a *sine qua non* condition ….active participation of citizens…. [it] is a tool that encourages the involvement of the people in the development and implementation of public policies."[125] Participation and democracy is viewed as a symbiotic relationship for many scholars. Levy calls transparency the "key feature of the democracy of the future."[126] By referring to Kant's theory on the need for transparency in the public sphere, he comes up with a "public use" of transparency – which includes accountability and participation. Some authors state that a government with transparent decision making processes can vastly increase citizen participation and, ultimately, improve democracy[127]. In fact, Habermas maintains that "Democracies satisfy the necessary 'procedural minimum' to the extent that they guarantee the political participation of as many interested citizens as possible."[128] Other authors claim that at the core of democracy is the ability of the people to participate, and influence government through openly expressed public opinion. Calland and Tilley argue that without access to information, there can be no discussion of a range of available options, no voting in accordance with one's best interests and beliefs, no meaningful public policy discussions, and no informed political debate.[129] Stiglitz looks at transparency and information from a democratic participation perspective and views them as a prerequisite for citizen participation. He argues that "meaningful participation in democratic processes requires informed participants."[130] Noveck[131] and Lathrop and Ruma[132] introduce a

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[125] Pasquier & Villeneuve, "Organizational barriers to transparency", supra note 30 at 149.
[126] Pierre Lévy, *Cyberdémocratie: essai de philosophie politique*. (Paris: Jacob, 2001) [Levy]
[127] Stodolsky, D. S. "Scientific publication needs a peer consensus" (2002) 13:2 Psychology [Stodolsky].
[128] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: The MIT Press, 1996) at 303 [Habermas, *Between Facts and Norms*].
[129] Richard Calland & Allison Tilley, eds, *The right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre, 2002) at xi [Calland & Tilley, *The right to Know*].
[130] Joseph E. Stiglitz, "The Role of Transparency in Public Life", in World Bank, *The Right to Tell: The Role of the Mass Media in Economic Development* (Washington: World Bank, 2002), at 30 [Stiglitz, "The Role of Transparency"].
[131] Noveck, *Wiki government*, supra note 110.
[132] Lathrop & Ruma, "Preface", supra note 11, at xix–xxv.

promising view of transparency from a technological perspective by connecting ATI to new forms of citizen participation.

Rowe and Frewer[133]categorize three different levels of citizen participation: 1) citizen communication, where information is conveyed from the government body to the public; 2) citizen consultation, where information flows from the public to the government; and 3) citizen participation, where information is exchanged between the public and the government and some degree of dialogue takes place. This categorization is a simpler presentation of the Arnstein's ladder of participation[134] which includes eights levels of participation, from manipulation, being the lowest level, to citizen control being the highest level, and this is where real participation happens.

Pateman has developed the "Participation and democratic theory" which elaborates on transparency in an indirect way. Pateman looks at democracy as involving the active participation of citizens in decision-making at all levels of society. For Pateman, participation plays a crucial educative role "gaining of practice in democratic skills and procedures."[135] According to her "people learn to participate by participating, and that feelings of political efficacy are more likely to be developed in a participatory environment."[136] I borrow Pateman's idea of learning and skill-formation through the process of participation, and develop it further by applying it to transparency processes. From a user's perspective Pateman's theory offers standards towards which information exchange can be measured.

Despite the promising opportunities that transparency holds for citizen empowerment and participation, there are arguments that challenge this optimistic view. Some scholars have questioned the value of transparency for citizens, with some of them being highly critical. For instance, Grumet states that "the supposition that transparency uniquely empowers regular folks

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[133] Gene Rowe, & Lynn Frewer J., "A typology of public engagement mechanisms" (2005) 30:2 *Science Technology and Human values* 251-290 [Rowe & Frewer].
[134] Sherry R. Arnstein, "A Ladder of Citizen Participation" (July 1969) 35:4 Journal of the American Planning Association 216-224 [Arnstein, "A Ladder"].
[135] Pateman, Carole (1970). *Participation and Democratic Theory*. Cambridge: Cambridge University Press, at 42-43 [Pateman].
[136] *Ibid*, at 105.

is quaint fantasy."[137] Yeager argues that the "notion of liberal democratic pluralism – that the 'public' benefits from the disclosure of government information – is merely false advertising."[138] A more critical view of the value of transparency comes from Fukuyama, who, decrying the recent dysfunction of the democratic processes in the US, concludes: "The obvious solution to this problem would be to roll back some of the would-be democratizing reforms, but no one dares suggest that what the country needs is a bit less participation and transparency."[139] Fukuyama represents a dramatic perspective of transparency by blaming it for the state of government affairs. He proposes to turn back to the times when states governed in secrecy, and portrays this as an acceptable type of governance even for democratic states.

Fukuyma's approach to transparency is a very limited one. Blaming transparency for government's failures, falls short of recognizing many other factors that can contribute to those failures. A response to Fukuyama's assumptions comes from Bass, Brian and Eisen who explain that "information obtained through open government is on occasion used as ammunition in political battles, but transparency is neither the cause of the systemic problems, nor would secrecy be the cure."[140] Although, reality demonstrates that some information will remain secret for the general public due to their sensitive nature, exclusions have to be legal and not arbitrary. Secrecy applies as an exception, not as the default practice. Thompson debates that "Secrecy is justifiable, only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret)."[141]

As it is the case with other transparency-related themes, between optimistic and pessimistic views on the citizen participation continuum, there are authors who establish themselves somewhere in the middle of the continuum. They remain sceptic about any effect of transparency in participation. This groups of scholars find it difficult to establish a direct relationship between

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[137] Grumet, *City of Rivals*, supra note 86 at 109.
[138] Matthew G. Yeager, "The Freedom of Information Act as a Methodological tool: Suing the government for data" (July 2006) Canadian Journal of Criminology and Criminal Justice at 500 [Yeager, FOIA].
[139] Fukuyama, *Political Order*, supra note 88 at 504.
[140] Gary D. Bass, Danielle Brian & Norman Eisen, *Why Critics of Transparency Are Wrong*, Centre for effective Public Management at Brookings, November 2014, at 20 [Bass, et al, *Critics of Transparency*].
[141] D.F. Thompson, "Democratic Secrecy" (1999) 114 Political Science Quarterly 181–193 [Thompson, "Democratic Secrecy"].

transparency and participation. For instance Lessig argues that "Giving amounts of information produced and disclosed, available capacity for processing it, and attention span issues, there is no way to assume that it produces better citizen choice, and the available evidence suggest its impact is actually both low and slow."[142] Indeed, the effects that transparency may have on participation have been little explored.[143] Some empirical research has been done with the purpose of studying the transparency-participation relationship, and they have generated no positive results. Researchers tend to agree that people are, in general, quite uninterested and unknowledgeable about politics, and careless about most of the information they actually receive. Earlier research have demonstrated a sort of apathy of citizens in political matters.[144]

While these results draw attention to a very complex aspect of transparency, they certainly do not deny the great promise that transparency holds for those citizens who are interested in participating in public discussions. These studies are a warning for researchers that participation heavily depends on subjective factors, but also on the circumstances surrounding individual cases. Pateman's and Habermas's theories serve as a good theoretical background to understand the challenges and limitations of transparency and access to information and to explain the variations in the existing research.

A last emerging topic in transparency debates is the consideration of ATI as a human right. This is the core concern, and the culmination of my arguments in this research. There is an existing body of literature that recognizes ATI as a human right, with groups of scholars debating around the values of access rights from three perspectives: an instrumental perspective, an

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[142] See Lawrence Lessig, "Against Transparency: The perils of openness in government," *The New Republic*, Oct. 9, 2009, online: <http://www.tnr.com/article/books-and-arts/against-transparency> [Lessig, "Against Transparency"].
[143] D. Naurin, *Deliberation behind Closed Doors: Transparency and Lobbying in the European Union* (Colchester: ECPR Press, 2007) [Naurin, *Deliberation*].
[144] See for instance P. Converse, "The nature of belief systems in mass public", in Apter, D. ed, *Ideology and Discontent* (New York: Free press, 1964) [Converse, "belief systems"].; B. Page & R. Shapiro, *The rational public: fifty years of trends in Americans' policy preferences* (Chicago: University of Chicago Press, 1992) [Page & Shapiro, *The rational public*].; P. Sniderman, R. Brody, & P. Tetlock, *Reasoning and choice: explorations in political psychology* (Cambridge: Cambridge University Press,1993) [Sniderman et al, *Reasoning and choice*].; M. Lodge, M. Steenbergen & S. Brau, "The responsive voter: Campaign information and the dynamics of candidate evaluation (1995) 89 American Political Science Review 309-326 [Lodge et al, "The responsive voter"].; S. Althaus, "Information effects in collective preferences" (1998) 92:3 American Political Science Review 545-558 [Althaus].; R. Luskin, J. Fishkin & R. Jowell, "Considered opinions: Deliberative polling in Britain" (2002) 32 *British Journal of Political Science* 455-487.; J. R. Hibbing & E. Theiss-Morse, *Stealth Democracy: Americans' Beliefs about How Government Should Work* (Cambridge: Cambridge University Press, 2002) [Hibbing & Theiss-Morse, *Stealth Democracy*].

intrinsic perspective, or both. This research aims to be part of this body of literature by furthering the arguments in favour of the recognition of a human right status of ATI.

The view of ATI as a human right is welcomed on a wide range of broadly democratic grounds, including the protection and realisation of individual rights[145]. For instance, Roberts favours the recognition of a separate right to access to information. He argues: "the logic suggests that access right is better understood as a corollary of basic political participation rights, rather than the right to freedom of expression alone."[146] Roberts recognises an instrumentalist basis for a right to information when he suggests that political participation rights "have little meaning if government's information monopoly is not regulated."[147] Some non-governmental organizations with a dedicated work in transparency also promote the instrumental approach of access rights, such as Access Info Europe and Article 19. Access Info Europe's mission is "dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights."[148] Article 19 promotes that "The right to access public information about one's economic, social and cultural rights is not only related to these rights - it is a precondition for their realisation."[149]

Florini supports both approaches in recognizing ATI as a human right. She takes an instrumentalist approach when she argues for a right to information deriving from the recognition of democratic rights. Florini states that "a broad right of access to information is fundamental to the functioning of a democratic society. The essence of representative democracy is informed consent, which requires that information about political practices and policies be

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[145] See David Banisar, "The irresistible rise of a right" (July 2005) 34:3 Index on Censorship 79-84, online: <https://www.researchgate.net/publication/249773805_The_irresistible_rise_of_a_right> [Banisar, Rise of a right]; David Banisar, "*Freedom of Information Around the World 2006: A Global Survey of Access Records Laws.* The Online Network of Freedom of Information Advocates, 2006, online: <http://www.freedominfo.org/documents/global_survey2006.pdf> [Banisar, FOI around the world]; Birkinshaw, "FOI and Openness", supra note 2; Birkinshaw, "Transparency as a HR", supra note 92; Ann Florini, "Conclusion: Whither Transparency?", in Ann Florini ed, *The Right to Know; Transparency for an Open World* (New York: Columbia University Press, 2007) 337-48.

[146] Roberts, "Structural Pluralism", supra note 12 at 262.

[147] Ibid.

[148] See Access Info Europe, Mission and Strategy, online: <http://www.access-info.org/mission-and-strategy>.

[149] Article 19, *Access to Information: An Instrumental Right for Empowerment* (London: Article 19, 2007) at 18, online: <https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf> [Article 19, ATI].

disclosed."[150] However, Florini also argued that access to information is not only "a necessary concomitant of the realization of all other rights" but is also "a fundamental human right."[151] Just like Florini, Stiglitz supported both approaches. Stiglitz reinforced the existence of an intrinsic ATI right acknowledging that greater openness could be justified on instrumental grounds as a means to an end. He also believed that greater openness has an intrinsic value simply because citizens have a basic right to know.[152]

Birkinshaw makes a bold and daring argument about access rights – he advocates for ATI as a human right arguing that it is "fundamental to all other human rights", to one's "membership as a full member of the human race", and to one's "position as a citizen and a human being."[153] This is a morally based approach, one that is usually used to justify the existence of all other human rights. This approach cannot easily be associated to other scholars and Birkinshaw's approach is unique in this regard. Birkinshaw states that "The argument for human rights is based upon protection for individuals against inefficient, oppressive, or even bullying government. They are rights that are necessary for our individual integrity, for our acceptance by the state and civil society as full members of that community, for our right to belong."[154] Birkinshaw talks about FOI as a human right that can be applied universally, without making any difference on which jurisdiction. He speaks generally about the nature that FOI ought to have, and not necessarily has. Birkinshaw's claims about human rights are certainly very challenging and will be very important for this research. The claims that he makes about a universal recognition of ATI as a human right, raise important questions about the applicability of this approach in the two jurisdictions in focus.

The arguments brought by Roberts, Florini and Birkinshaw are very important for this research because they provide the foundations for the recognition of ATI as a human right. I build on their work to see how transparency and access rights are considered in Canada and the EU and how these considerations affect their practicability.

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[150] Florini, "Introduction", supra note 27 at 3.
[151] *Ibid.*
[152] Stiglitz, "The Role of Transparency", supra note 131 at 30.
[153] Birkinshaw, "Transparency as a Human Right", supra note 92 at 56.
[154] *Ibid*, at 55.

The three themes that I analyzed above are important in understanding transparency and assist on making sense of the conceptual muddle found in the literature. These themes contribute to the unpacking of the complexity of transparency as a term, and channel its conceptualization into venues that will guide this research in the next chapters. Outside of the three main themes that I discussed above, there are other debates about the nature of transparency and ATI that inform about the tensions that accompany these two terms. The section below illuminates these tensions.

2.3 Tensions in the meaning of transparency and access to information

The three themes outlined above raise questions and doubts about the meaning of transparency. They examine the limitations and advantages of transparency and identify its use as a means of rhetoric. Critical remarks are often complemented by the observation that empirical knowledge on the actual workings of transparency is, unfortunately, rather scarce to prove the real consequences of transparency. These findings are very significant because they provide different perspectives on analyzing the ways transparency and ATI work in practice. They signal that the study of transparency is an unfinished project that deserves further study and is a moving target. The best way to approach the study of transparency is by addressing both its positive and negatives consequences in an attempt to find the optimal balance between the two.

The bifurcation of transparency consequences into negative and positive is worth scrutinising. Hood openly and skeptically questioned the often unspoken assumption that more transparency is a good thing in itself. Hood warns that transparency is more than openness, just as governance is more than government.[155] He advises that one should be aware of the pitfalls of having transparency in place and analyze both positive and negative sides of transparency. This kind of approach is important to understand the conceptual and practical challenges of transparency.

Just like Hood, Florini tries to comprehend and illuminate the consequences of transparency. She recognizes that transparency is good and necessary but explores it with a certain degree of practicality. Florini admits that transparency needs to be balanced and optimized because neither

[155] Hood, Hood, "What happens", supra note 76.

too little nor too much transparency are desirable. In order to understand this tension Florini asks a timely and compelling vital question: What information should governments ….disclose?[156] and, of course, assuming what should be kept secret. She argues that excessive secrecy corrodes democracy, facilitates corruption, and undermines good public policymaking, but keeping a lid on military strategies, personal data, and trade secrets is also essential to the protection of the public interest. Florini provides lessons from many nations' bitter experience and provides a careful analysis of transparency's impact on governance, business regulation, environmental protection, and national security. As government interests clash with citizen insistence over the growing demand for public scrutiny, they both need a better understanding and new insights into how greater transparency can serve the public interest while, at the same time, protecting valuable sensitive information. In continuing to answer her question about how much transparency is worthy, Florini engages in a simple depiction of transparency as the opposite of secrecy.[157] Secrecy means deliberately hiding your actions; transparency means deliberately revealing them. Florini argues that transparency is a choice, revitalised by changing attitudes about what constitutes appropriate behavior. According to Florini, secrecy and transparency are not conditions but ideals, as such, they represent two ends of a continuum. What we are seeing now is a rapidly evolving shift of consensus about where states should be on that continuum.[158]

Regarding the "good" and the "bad" of transparency, Etzioni also argues that transparency is overrated and by no means able to produce the expected benefits.[159] Because the concept of transparency refers to a variety of ideas, behind it there are various expectations. Fung, Graham and Weil also argue that there are both positive and negative consequences from transparency. While in principle it creates more options, it is not clear if and how transparency produces engagement or participation. The same goes for promoting better, more effective and efficient, or more egalitarian policy and law making or better outcomes.[160] Any attempt to dismiss such a complex and conflicting nature will lead to a handicapped regulation of transparency as a

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[156] Ann Florini, *The right to know: Transparency for an open world.* (Columbia University Press: New York, 2007) [Florini, *The right to know*].
[157] Florini, "The End of Secrecy", supra note 69.
[158] *Ibid.*
[159] Etzioni, "Is transparency the best", supra note 97.
[160] Archon Fung, Mary Graham & David Weil, *Full disclosure: The perils and promise of transparency* (New York: Cambridge University Press, 2007) [Fung et al, *Full disclosure*].

phenomenon. Indeed, the notion of transparency is not neutral, because it responds to deep aspirations of people. Transparency is a moving target which is constructed and continuously reconstructed through social and political developments. According to O'Neill, powerful actors will generally be able to define transparency in specific ways and to steer developments in a certain direction.[161] However, Roberts makes the opposite argument that the rules of power games change through transparency.[162] In other words, transparency is affected by social and political advancements and affects social and political constructs as well.

The questions raised by Hood, Florini, Roberts and others are indeed very important questions. There is a tension between a need to disclose information and the need to protect from such disclosure based on claims of privacy, national security, public interest etc. I analyze this tension in my research trying to understand when claims of protection from disclosure are justified. I build on the work of these scholars, explore further the pressures on transparency, and pay attention to the benefits that transparency can create.

One of the most complex and difficult areas of transparency is its institutional culture which is historically embedded in secrecy. Curtin and Dekker argue that the lack of transparency is structural; resulting from incremental changes in the constitutional fabric of a system that was not designed to be open from the outset.[163] Indeed, today's democratic institutions were not fashioned with transparency in mind, or at least not with the modern understanding of institutional openness. These institutions started out as secretive bureaucracies and continued to conduct public affairs as far as possible from the public eye. Hence, secrecy is an inherited feature of government. Roberts has continuously raised the secrecy concern in his work[164] and studied how it has gradually been carved to give way to transparency. However, according to Roberts, the spill-over of passing access laws is not in itself an indicator of a new paradigm in democratic governance that has replaced the old culture of bureaucratic secrecy. The global trend

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[161] O'Neill, *A Question of Trust, supra note 80;* O'Neill, "Transparency and Ethics", supra note 97.
[162] Roberts, "Dashed Expectations", supra note 104.
[163] Deidre Curtin & I. Dekker, "The EU as a layered International Organization: Institutional Unity in disguise" in Paul Craig and G. De Burca, eds, *The Evolution of EU Law* (Oxford: OUP, 2009) [Curtin & Dekker, "The EU"]; Deidre Curtin & M. Egberg, *Towards a New Executive Order in Europe?* (London: Routledge, 2009) at 17 [Curtin & Egberg, *New Executive Order*].
[164] See for instance, Roberts, *Blacked Out, supra note 84.*

toward enacting access to information legislation would seem to imply a distinct shift toward openness, so Roberts asks a simple question: "Has the old presumption of secrecy really been overthrown in favour of a new presumption of openness?"[165] His answer is "no", and he shows that legislation alone is not sufficient to counter histories and practices of secrecy.

Similarly, Pasquier and Villeneuve argue that secrecy has deep roots in institutions. According to them, institutional rules and culture result from historical trajectories. Pasquier and Villeneuve highlight that "cultures of transparency and secrecy are rooted in historical traditions and traditional state-society relations."[166] Generally, those in power tend to consider public information their own property and not of the citizen and therefore they will be cautious to make these documents accessible to the public. Furthermore, bureaucratic organizations are by nature hierarchic, reclusive and risk-adverse and "public service organizations are little inclined to disclose the information at their disposal."[167]

The study of institutions adds another layer of difficulty to the analysis of transparency. If one focuses on achieving transparency by simply implementing legal provisions, not only will get superficial results, but these results will vary from one institution to another. Indeed, the road to transparency through access laws can be a snaky and shaky one because of the force of dynamic conservatism in institutions. The trajectory of this road will heavily depend on the political system of a country. For instance, according to Roberts, "Experience has shown that the governing institutions in the Westminster systems are particularly resilient and capable of rejecting alien transplantation such as FOI laws or of developing new routines designed to minimize the disruptive effect of these new laws."[168] In Westminster countries like Canada and the UK, the culture of bureaucracy is deeply embedded in secrecy and the attitudes of those in power are hard to change, becoming a big impediment to transparency. It is hard for governments in these systems to adopt to legal changes that challenge their style of governing by allowing their decision-making to be questioned and errors exposed.

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[165] *Ibid*, at 18.
[166] Pasquier & Villeneuve, "Organizational barriers", supra note 30, at 157.
[167] *Ibid*.
[168] Roberts, "Dashed Expectations", supra note 104 at 108.

The behaviour of public service providers is studied more in depth by Roberts who scrutinizes the highly centralized structures for controlling the communications activity of the government departments. He illustrates this with the Canadian experience and the ATIA which was intended to constrain executive authority, but officials developed internal routines and technologies to minimize its disruptive potential[169]. These practices restrict the right to information for certain types of stakeholders, such as journalists or representatives of political parties. Roberts labels these practices as "internal law" and examines them through empirical research. He uses an econometric analysis of 2,120 requests handled by Human Resources Development Canada in 1999-2001 to suggest that some politically sensitive requests - often filed by journalists or political parties - are given differential treatment, with longer delays and tougher decisions on disclosure.[170] The analysis of these practices illustrates that internal bureaucratic procedures play an important role in defining what the right to information means in practice. Roberts admits that this analysis demonstrates how a statutory right can be shaped through the exercise of administrative discretion.[171] Robert's study indicates that the implementation of the access legal provisions highly depends on the willing of the public officials. He argues that:

> Whether a freedom of information law succeeds in securing the right to information depends heavily on the predispositions of the political executives and officials who are required to administer it. Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation.[172]

This conflict between the law and the practice is an ongoing tension for transparency and Roberts spends a considerable time in his work demonstrating how the structure and practices of governance have direct implications for access to information. To examine these implications he makes three arguments. First, access depends on a professional civil service and well organized records. Where these are absent, access and transparency are severely reduced. Second, governments are increasingly outsourcing functions to the private sector, which is generally not covered by access legislation. Therefore, what might once have been subject to access legislation

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[169] Alasdair Roberts, "Spin control and freedom of information: lessons for the United Kingdom from Canada" (2005) 83:1 *Public Administration* 1–23 [Roberts, "Spin control"].
[170] Roberts, "Administrative discretion and ATIA", supra note 5.
[171] *Ibid*, at 176.
[172] *Ibid*.

becomes exempt. Finally, Roberts examines the implications of technology[173] which adds new strains on transparency and access rights. In addressing access rights' implications Roberts also argues that transparency can only become a reality if people would act upon it. He calls for an engaged citizenry by posing a fundamental question: "Do we have a right to information? Certainly. But we also have a responsibility to act on it."[174] This question goes to the core of the arguments made by many critics that people do not use access rights because they are not interested in doing so. Robert's provocative question and answer certainly deserve closer attention and I am going to expand on Roberts' work in this research.

Just like Roberts, Hood makes some provocative claims when making a distinction between access to information and transparency and warning about their legal nature. He says that transparency in the public sector is not simply access to information and passive compliance is not enough.[175] Another warning comes from Hood when he notes in this quotation of Rousseau: "Books and auditing of accounts, instead of exposing frauds, only conceal them; for prudence is never so ready to conceive new precautions as knavery is to elude them."[176] One should be cautious on taking into consideration the fact that the study of transparency should not only be focused on what is on the books, what are the legal rules and what documents are produced in the name of transparency, for they can be deceiving. Transparency is more than that - it has a much broader meaning.

The sections of this chapter provided a solid foundation for studying transparency and ATI and unpacking the complexity and conceptual muddle that surrounds them. Themes such as democratic legitimacy, legality, accountability, good governance, information asymmetry, participation and human rights have been occupying the scholarly debates for about two decades. Different scholars argue about different facets of transparency, how they can be measured and what are their consequences. However, almost all discussions lead to a common understanding of transparency – its complexity and its continuous inherently battle with secrecy. All these

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[173] Roberts, *Blacked Out*, supra note 84.
[174] *Ibid*, at 238.
[175] Christopher Hood, "Conclusion", in Christopher Hood, & David Heald, ed, *Transparency: The key to better governance* ? (New York: Oxford University Press) [Hood, "Conclusion"].
[176] *Ibid*, at 215.

discussions are very informative and shed light on some complex issues of transparency, to which this research pays particular attention. I am aware that the gap between the law and the practice will be the most challenging aspect in my research in terms of detecting when such gap exists, investigating political and bureaucratic behaviour in complying with transparency measures and measuring its consequences. This divide between law and practice really affects the recognition of ATI as a human right. I build on the work of Roberts and Birkinshaw when arguing about the law-practice divide and the constitutional recognition of an ATI right.

CHAPTER 3: THEORETICAL APPROACHES

This chapter outlines the two theories I employ for this research with the purpose of setting up the standards against which the rhetoric of transparency and access to information will be measured. The chapter includes an explanation of the choices I made in using these two theories and the reasons behind these choices.

The Habermas's discourse theory of law and Pateman's participation and democractic theory will provide not only the theoretical foundations for this research, but also some practical perspectives on how to make sense of transparency developments using these theories. They will both assist me in furthering the arguments about how access to information works in practice and how it can be recognized and protected.

3.1 Pateman's Participation and Democratic Theory

Carol Pateman, a very famous British political theorist is not a transparency scholar. However, one of her early books "Participation and democratic theory"[177] conveys a very significant message on how transparency can be transformed in a tool to achieve a model of democracy where participation of citizens in public affairs is crucial. To my knowledge, I am the first to adopt her work on transparency and ATI. I use Pateman's theory because it provides some standards of citizen participation based on acquiring skills and knowledge, social training, psychological attitudinal responses, and learning experiences.

Patemans' theory performs a deep analysis of the concept of democracy and participation, and touches upon some of the contentious relationships in this research such as that between transparency, democracy and participation. Pateman's theory found a wide application in the wake of the "participatory revolution" in the 1960s[178] when participatory democracy included the

[177] Pateman, supra note 135 at 22-44.
[178] See Ingolfur Blühdorn, "The Participatory Revolution: New Social Movements and Civil Society", in K. Larres ed, *A Companion to Europe Since 1945* (London: Blackwell, 2007). [Blühdorn, "The Participatory Revolution"]; See also, Ingolfur Blühdorn, "The third Transformation of Democracy: On the Efficient Management of Late-modern Complexity", in Blühdorn, I. and Jun, U., eds, *Economic Efficiency – Democratic Empowerment. Contested*

participation of NGOs and other organizations. More recently, the term participatory democracy is increasingly used together with participatory governance, referring to the participation of collective actors of the organized civil society.[179]

The two jurisdictions in focus, namely Canada and the EU, are liberal democracies where there has been considerable attention on a broad range of institutional innovations aimed at encouraging public participation. The general contemporary concern in these liberal democracies, particularly in the EU, is about declining citizens' participation in voting and other political activities. This decline could be explained, in part, by a lack of a two-way relationship between the government and the public, a lack of communication, and a lack of attention to the public needs and concerns. One other explanation is related to the workplace democracy, although there has been little discussion of this kind of democracy. The term "workplace democracy" goes back to the work of Pateman. Several of the leading advocates of participatory democracy have specifically emphasized the importance of democratizing the workplace. In particular, Pateman has made a significant contribution in emphasizing this importance by introducing a new concept – that of a "spillover process" of democratization. She has argued that participation in workplace decision-making will spill over into wider society by increasing the probability of participation in politics beyond the workplace. She explains that the resemblance between the workplace and government experience in terms of the type, intensity and quality of participation suggests that the most efficient and effective way of increasing participation in government is to increase participation in the workplace. This creates a kind of culture that will be then implanted in other forms and types of communications such as that between government and the public. The workplace democracy educates people in a way that makes them feel comfortable to debate over a wide range of issues. Thus, in the light of the current concern for institutional approaches to the "crisis of participation", the spillover theory has much to offer.

Modernisation in Britain and Germany (Lanham: Rowman & Littlefield (Lexington), 2007) 299-331 [Blühdorn, "The third Transformation"].

[179] Michael T. Greven, "Some Considerations on Participation in 'Participatory Governance", in Beate Kohler-Koch & Berthold Rittberger, eds, *Debating the Democratic Legitimacy of the European Union*. (Lanham: Rowman & Littlefield Publishers, 2007) [Greven, "Some Considerations"].

Pateman makes a connection between workplace democratization, political efficacy and public participation by focusing primarily on worker co-operatives.[180] She critiques the work of theorists, such as Schumpeter and Sartori, who had regarded democracy as a popular contest for the votes, that this was an elitist project that prevented mass participation in both political and workplace decision-making. The elitist project systematically refuted people the developmental opportunities that arise through mature systems of participation. Pateman opposes the narrow definition of these elitist theorists, and demonstrates how the workplace is the central to any future project to democratize society.

Pateman strongly critiques liberal democracy as a very "thin" form of democracy which bypasses regular and active participation by all citizens. For Pateman, participation, apart from being a good thing in itself, also plays a crucial educative role. Hence, participation has both an intrinsic and an instrumental value. In my view, this is the most important facet in Pateman's theory and directly relates to my argument of transparency and access to information, as values that are good in themselves and also promote other values.

The educative feature of Pateman's theory brings her spillover process to another dimension - that of a state as an entity comprised by a number of institutions. Following Rousseau and Mill, she argued that individual attitudes and behavior are shaped by the institutions within which they act. In this context, if individuals actively engage in democratic institutions – debating and deliberating – they are more likely to develop the necessary attitudes, skills and psychological qualities that contribute to individual political efficacy, and which in turn will increase political participation. Therefore, the act of participation is itself educative "Educative in the very widest sense, including both the psychological aspect and the gaining of practice in democratic skills and procedures….Participation develops and fosters the very qualities necessary for it; the more individuals participate the better able they become to do so."[181]

Pateman's key contribution to democratic theory was to notice that bureaucratic organizations typical of capitalist liberal democracies give people little opportunity to improve their democratic

[180] These are organizations owned and controlled by the workforce.
[181] Pateman, supra note 135 at 42-43.

skills. Pateman introduces knowledge to explain participatory attitudes of individuals - by democratizing the workplace individuals will be able to participate in routine decision-making affecting their immediate work environment, because they already have knowledge in this field. This quote from Pateman carries an important message: "people learn to participate by participating, and that feelings of political efficacy are more likely to be developed in a participatory environment."[182] If people practice this, their attitudes will also escalate beyond the work environment to civic and political institutions. Moreover, having learnt to participate at work people will have acquired the confidence, skills and desire to participate in civic society.

This idea of "learning to participate by participating" is very important for this research because it has applicability in many aspects of transparency. One of the goals of having transparency in place, is to facilitate and encourage participation. But, participation cannot be realized without governments being transparent and citizens being informed of the working of their governments. Just having representative institutions at the legislative level is not enough. As Pateman puts it "Democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed."[183] In this context, she talks about "social training" which is a process that happens through an extensive interaction between citizens and their government.

A central part of Pateman's explanation for low public participation was that if the experiences and perceptions of the operation of the political system leave citizens with a sense of frustration and powerlessness, then "apathy is a realistic response, it does not seem worthwhile to participate."[184] This, she argued, is a cognitive rather than a psychological response. As such, Pateman's democratic theory offers important insights on issues of democratic deficit, decrease of trust on governments or lack of transparency. Pateman's idea of democracy is much broader and colorful than just a competitive struggle for people's votes. She puts emphasis on participation as a key element of democracy. This is fundamental for understanding the

[182] *Ibid*, at 105.
[183] *Ibid*, at 42.
[184] *Ibid*, at 298.

functioning of democracy and its relation with transparency considering that transparency is considered to be one of democracy's pillars.

I will build on Pateman's work by arguing that transparency is a requirement for participation which leads to more democratic processes in government affairs. Without transparency and access to information, participation will not be realized in its full potential and democratic principles will be undermined. In addition, Pateman's idea of "learning to participate by participating" undergirds many transparency issues. People become more knowledgeable and informed every time they participate, and by mastering their knowledge from the information they get, they participate better in the future.

Participation can also lead to better transparency practices from government since the same repetitive process will have its effect not only on people, but also on bureaucratic organizations. Practice dealing with public participation, will make bureaucracies respond better to public's input. Therefore, Pateman's theory of democratic participation proposes a clear guiding path for both the government and the public. It provides with both a theoretical and practical perspective on the central issues of transparency and participation.

3.2. Habermas's Discourse Theory of Law

Habermas's discourse theory of law gives answers to many concerns in this dissertation. This theory will help me to evaluate the conditions of transparency and ATI in Canada and the EU. The discourse theory of law provides a good foundation for explaining the processes that shape the public discourse and space. It also offers standards for the recognition of a constitutional status of the right of ATI, and how this recognition can be achieved through a process of constitutional stretching.

Habermas has consistently been preoccupied with human rights and democracy in his work, trying to make sense how individual rights and public law can be reconciled. His theory of discourse of law is not a theory of transparency, but his concern about human rights and democracy lead him to address and respond to some of the tensions that exist in the public space,

which are also concerns for transparency. For Habermas, addressing these problems starts with "reconciling private and public autonomy at a fundamental conceptual level, as is evident from the unclarified relation between individual rights and public law in the field of jurisprudence, as well as from the unresolved competition between human rights and popular sovereignty in social-contract theory."[185] Habermas borrows Hobbs's idea of a social contract to find grounds for human rights as deriving from a consensual agreement between individuals and the sovereign. He argues that this is based on a principle of morality and democracy. As such "The human rights grounded in the moral autonomy of individuals acquire a positive shape solely through the citizens' political autonomy."[186] The political autonomy is exercised in a democratic setting through discussions, communicative freedom, and agreement.

What really attracted me from Habermas's theory is that he looks at law as a system of knowledge and a system of action[187] which is shaped through a discursive process of "opinion and will-formation". By law, he does not mean only statutes, but norms in general. Habermas makes a great analysis in his theory in relating knowledge to public sphere. Habermas looks at the public sphere as "a network for communicating information and points of view"[188], which has a great potential as a source of knowledge. This can serve as "a suitable bridge for connecting the deliberative structures of the constitutionally organized political system with deeper processes of social reproduction."[189] He argues that in modern societies knowledge is a scarce resource and it is desirable and which can create paternalistic monopolies on knowledge and hinder the democratic process. This is a good explanation for why government and bureaucracies are not usually very receptive to transparency and access to information reforms. They tend to keep the information they possess for themselves so they create a monopoly of information. This creates a new system of paternalism.

[185] Jürgen Habermas, *Between Facts and Norms*, supra note 128 at 84.
[186] Ibid, at 94.
[187] Ibid, at 114.
[188] Ibid, at 360.
[189] Ibid, at 318.

Habermas reponds to Dahl's[190] concern about the risks brought by the specialization of the technical steering knowledge used in policymaking and administration. Such specialization keeps citizens from taking advantage of politically necessary expertise in forming their own opinions and creates a monopolization of knowledge. Habermas explains that "because the administration does not, for the most part, itself produce the relevant knowledge but draws it from the knowledge system or other intermediaries, it does not enjoy a natural monopoly on such knowledge."[191] It is thus, in the benefit of the bureaucracy to develop a bridge with public deliberative structures to obtain the knowledge required for political supervision or steering. This is a missing link in today's relationship between administration and the public, or at least this link is not fully understood and developed. Both parties in this relationship will suffer because they lack the proper knowledge to understand what is happening at the other side. As a consequence, "individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs."[192]

Further, Habermas examined the public use of public discourse as an unhindered communicative freedom in cognitive terms, as enabling rational opinion-and will-formation: the free processing of information and reasons. He drew attention to mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law,[193] and warned public administrators about the value of public discourse These are very powerful ideas that describe how the legal realm, and democracy at a much broader sense, works.

I borrow this logic to argue about the value of transparency. The system of knowledge, the discursive process and the system of action, taken together in a close relationship, and can be used to explain why transparency is significant. People gain knowledge from the information

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[190] See Robert A. Dahl, *Democracy and Its Critics*, (New Haven: Yale University Press, 1989) at 339 [Dahl, *Democracy*].
[191] Jürgen Habermas, *Between Facts and Norms*, supra note 128 at 372.
[192] Ibid, at 450.
[193] Ibid, at 147.

made available to them, use that knowledge to debate on public matters (and in the discursive process enhance their knowledge) and then take action based a tempered "opinion and will-formation". This process initiates with a single human ability, which according to Habermas is "the cognitive sense of filtering reasons and information."[194]

Furthermore, Habermas relates human rights to the legitimacy of law, with ideas that are beyond "publicity" as explained by Bentham and Kant. He argues that the legitimacy of law ultimately depends on whether a contested norm meets with the agreement of all those possibly affected. He then relates legitimacy with human rights by saying "The substance of human rights then resides in the formal conditions for the legal institutionalization of those discursive processes of opinion-and will-formation in which the sovereignty of the people assumes a binding character."[195] This prerequisite of legitimacy is, in fact, part of the democratic principle which requires that all laws must meet a certain condition: the agreement of all citizens stated in a discursive process of opinion-and-will-formation which provides for an effective participation and takes place in forms of communication that are themselves legally guaranteed.[196] Habermas offers a solution to the question of how citizens can judge whether the law they make is legitimate: the conditions to engage in the public discourse must be legally guaranteed by the basic political rights to participate in processes that form the legislator's opinion and will.[197]

According to Habermas, there are five categories of basic rights, with the fourth being "the basic rights to equal opportunities to participate in processes of opinion-and will-formation". He argues that only this category enables legal subjects to become authors of their legal order, and further emphasizes that "this category of rights is reflexively applied to the constitutional interpretation and the further political development or elaboration of the basic rights."[198]

The idea of communication as a freedom for individuals, which should be part of the political rights, is a very stimulating facet in Habermas's theory. He claims that these political rights

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[194] *Ibid*, at 151.
[195] *Ibid*, at 104.
[196] *Ibid*, at 110-111.
[197] *Ibid*, at 126-127.
[198] Ibid, at 123.

should enable every person to have equal chances to exercise the communicative freedom in all deliberative and decisional processes. Habermas articulates this as follows:

> Equal opportunities for the political use of communicative freedoms require a legally structured deliberative praxis in which the discourse principle is applied. Just as communicative freedom prior to any institutionalization refers to appropriate occasions for the use of language oriented toward mutual understanding, so also do political rights in particular, entitlements to the public use of communicative freedom-call for the legal institutionalization of various forms of communication and the implementation of democratic procedures.[199]

As one can notice, rights of equal participation are crucially important to Habermas, just like they were to Pateman, because they are important for the legitimacy of law. Rights of equal participation, however, cannot easily be achieved. The only way is the recognition of a symmetrical juridification of the communicative freedom of all citizens by means of political autonomy in accordance with political rights. Habermas advices that it is important to introduce the system of rights in this way,[200] and argues that in this model of democracy "the citizens themselves become those who deliberate and, acting as a constitutional assembly, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy."[201]

The most intriguing idea in Habermas's discursive principle for the purpose of this research, is the explanation of how human rights become part of the constitutional fabric of a country. Again, he uses claims of communicative freedom in the form of freedom of opinion and information which make their way to the legal system slowly over time. Habermas extrapolates that "This system of rights, however, is not given to the framers of a constitution in advance as a natural law. Only in a particular constitutional interpretation do these rights first enter into consciousness at all....every constitution is a living project that can endure only as an ongoing interpretation continually carried forward at all levels of the production of law."[202] On the same argument Habermas disputes that "the constitutional state does not represent a finished structure

[199] Ibid, at 127.
[200] Ibid, at 127.
[201] Ibid, at 127.
[202] *Ibid*, at 129.

but a delicate and sensitive-above all fallible and revisable-enterprise, whose purpose is to realize the system of rights anew in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically."[203]

This generalization that Habermas makes about the living constitution that changes over time through interpretation finds applicability in the "living tree doctrine" in the Canadian law. This doctrine allows for Canada's Constitution to change and evolve over time, and provides flexible interpretation that accommodates the realities of changing modern life. If the Constitution could not be interpreted this way, it would be frozen in time and become more obsolete than useful. This understanding of constitutional interpretation becomes central for my arguments on the recognition of the access rights. I claim constitutional status of the ATI rights even though I am not able to find such status in the Canadian Charter.

Moreover, Habermas responds to major concern in this research that originates from critics of transparency and access rights: the use of these rights. Many critics argue that since people do not make a good use of these rights, there should be no preoccupation for their recognition. Habermas explains that there are basic political rights that institutionalize the public use of communicative freedom in the form of individual rights, but they provide a right, rather than an obligation to the individuals. Habermas argues that:

> The legal code leaves no other alternative; communicative and participatory rights must be formulated in a language that leaves it up to autonomous legal subjects whether, and if necessary how, they want to make use of such rights. It is left to the addressees' free choice: whether or not they want to engage their free will as authors, shift their perspective from their own interests and success to mutual understanding over norms acceptable to all, and make public use of their communicative freedom.[204]

According to Sossin, in Habermas's theory of communicative action "the system through which we administer ourselves have become estranged from the social relations by which we define ourselves and reproduce our culture. This has resulted in a peculiar form of apathy and

[203] *Ibid*, at 384.
[204] *Ibid*, at 130.

disenchantment" [205] which he calls the "refeudalization of the public sphere". This form of apathy noticed by Sossin is, in fact, what many other scholars notice when looking for a relationship between transparency and trust. However, the existence of citizen apathy should not be used as an argument against the recognition of access to information as a human right. Habermas responds to these claims with the free will – people are free to use their rights to which they are entitled, but they are not obligated to do so. This free will characterizes human rights generally. Habermas's discourse theory of law touches upon many concerns in this dissertation and gives answers to many tensions of transparency. He elaborates on many concepts through a careful analysis of democratic processes and with a special focus on human rights. For this reason, this theory will assist me to weave together many arguments and advance my claim for the recognition of access to information as a human right.

[205] Lorne Sossin, "The politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36 Can. Pub. Admin. 364 at 367 [Sossin, "The politics"].

PART II

THE NATURE OF TRANSPARENCY AND ACCESS TO INFORMATION

CHAPTER 4: HISTORICAL DEVELOPMENT OF TRANSPARENCY AND ACCESS TO INFORMATION

This chapter makes an analysis of the history of transparency and ATI in Canada and the EU, and explores their origin and development. It is compelling to know how and why transparency has become so normalized that we no longer question its existence or relevance. The chapter engages with the historical dynamics of transparency, but focuses more on the ATI legislation in both jurisdictions because statutory advancements are easier to track and study.

The purpose of this chapter is to understand the how and why access laws came to be. It is important to discern how these laws came to life, what were the initial aspirations, how they progressed and in what environment, who pushed for them, and what was the rationale. The answers to all these questions inform about the intended nature and value of existent access laws and the state of transparency.

4.1 Tracing back transparency and ATI at the international level

Many scholars have engaged with the study of origins of transparency, and argue whether it is a modern construct or has discernible origins in an earlier period. For instance, while mapping out the different strains and meanings of transparency, Hood traces its use back to the Chinese legalists and classical Greeks.[206] Others have traced transparency in religious texts in Christianity and Islam. The following verse in the Bible demonstrate a close relationship between position, trust and accountability: "Everyone to whom much was given, of him much will be required, and from him to whom they entrusted much, they will demand the more."[207] Something similar can be found in Islam: "Each one of you is a guardian and each guardian is accountable to everything

[206] Hood, "Transparency in Historical Perspective", supra note 26.
[207] The Bible, Luke 12:48.

under his care."[208] In addition, both religions remind believers that they are accountable to God for their deeds. The Bible says: "But I tell you that every careless word that people speak, they shall give an accounting for it in the Day of Judgment."[209] Islam has similar provisions, emphasizing the duty of those in power to honestly serve people: "If any ruler having the authority to rule Muslim subjects dies while he is deceiving them, Allah will forbid Paradise for him."[210] A story told about the second Caliph (leader) in Islam, Umar al-Khatthab, who asked the permission from his people to use medicine from the storehouse when he got sick[211], implies a quest for transparency in Islamic governance.

Despite these earlier occurrences, Harlow suggests that the concept was only shaped in the seventeenth century. She advised that, at that time, access to the political process had been a central distinguishing characteristic of citizenship in western political thought.[212] The so-called "Enlightenment" in Europe certainly affected this development. Lathrop and Ruma argued that the ideal of open government, as one context for transparency, and the public's right to "scrutinize and participate in government dates back at least to the Enlightenment."[213] The first FOI law was passed in Sweden in 1766, requiring that official documents be made available to anyone making a request[214]. The importance of transparency and openness was recognized in the Declaration of Independence of the United States. Patrick Henry railed against the secrecy of the Constitutional Congress, saying: "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."[215]

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[208] Hadith from Bukhari, Volume 9, Book 89, Number 252. Narrated 'Abdullah bin 'Umar.
[209] The Bible, Matthew 12:36.
[210] Hadith from Bukhari, Volume 9, Book 89, Number 252, Narrated Ma'qil.
[211] M. Maishanu & A.Mlkallu, "Islamic Value System, Accountability and Transparency in the Public Service", at 5, online:
<http://www.academia.edu/2570307/ISLAMIC_VALUE_SYSTEM_ACCOUNTABILITY_AND_TRANSPARENCY_IN_THE_PUBLIC_SERVICE>
[212] Carol Harlow, "Citizen Access to Political Power in the European Union", in Volume 8 of the Collected Courses of the Academy of European Law, Antonio Augusto Cancado Trindade, (The Hague: Kluwer Law International, 2001) 1-57 at 28 [Harlow, "Citizen Access"] .
[213] D. Lathrop, & L. Ruma, *Open Government: Collaboration, Transparency, and Participation in Practice*, (Sebastopol: O'Reilly Media, 2010) at xix [Lathrop & Ruma, *Open Government*].
[214] Banisar, *FOI Around the World*, supra note 145, at 18.
[215] Cited at Banisar, *FOI Around the World*, supra note 145, at 18.

Although the term transparency was used earlier, the modern idea was truly developed after World War II. Anthropologists West and Sanders admitted that the term was born out of the self-reflexivity of a larger historical moment, namely modernity. Transparency constitutes a fashionable buzzword that inflects ideas with a long historical legacy.[216]

Just after the War, the term FOI emerged under the United Nations (UN) legal framework. In its first meeting in 1946, the UN General Assembly issued a declaration calling for a recognition and protection of the FOI as a fundamental touchstone human right, and defined it as it "implies the right to gather, transmit and publish news anywhere and everywhere without fetters."[217] Two years later, a Draft Convention of FOI, that failed to garner sufficient support, defined the term as "the free interchange of information and opinions, both in the national and in the international sphere."[218] In its very first session in 1946, the UN General Assembly adopted Resolution 59(I), stating that "Freedom of information is a fundamental human right and ….the touchstone of all the freedoms to which the United Nations is consecrated."[219]

In the period following WWII, after a long war that brought destruction and questioned the status of leadership, trust on democratic institutions was gradually being re-established. To accelerate this process, a whole machinery of political indoctrination was implemented in Western democracies teaching average citizens what democracy was and why it was superior to other forms of government.[220] However, the high trust on government started to decline rapidly in the 1960s, which marked a significant turn in politics.[221] In the1970s the situation deteriorated, and data indicated a general decline in trust towards all kinds of socio-political institutions.[222] There was also a decline of trust in elites – in Canada, Europe and elsewhere – influenced by Watergate and more robust investigative journalism. The 1970s came to be perceived as a time

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[216] *See* Todd Sanders & Harry G. West "Power Revealed and Concealed in the New World Order", in Sanders & West, eds, *Transparency and Conspiracy: Ethnographies of Suspicion in the New World Order* (Durham: Duke UP, 2003) at 1, 7 [Sanders & West].
[217] UN General Assembly, Resolution 59(I) (Dec. 14, 1946), online: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf>.
[218] Margaret A. Blanchard, *Exporting the first Amendment: The press-government crusade of 1945-1952*. (New York: Logman Inc. 1986) at 410 [Blanchard].
[219] UN Resolution 59 (1), supra note 217.
[220] Max Kaase, "The Challenge of the 'Participatory Revolution' in Pluralist Democracies", (1984) 5:3 *International Political Science Review* 299-318, at 307 [Kaase].
[221] N.H. Nie, S. Verba & J.R.Petrocik, *The changing American Voter* (Cambridge: Harvard University Press, 1979) [Nie et al]
[222] Crozier, Huntington & Watanuki (1975) and Lipset & Schneider (1983) cited in Kaase, supra note 220 at 312.

of permanent political crisis with respect to the crisis of legitimacy or governability.[223] New questions were raised regarding the future of the democratic process.[224] The post-war political indoctrination had its consequences. The elitist theories of democracy were being highly criticized, and some of them overthrown. New theories of democracy emerged radicalizing the way of thinking about democracy. They highlighted the inherent right of citizens to participate to the fullest, not only on symbolic politics, but also in actual decision making in politics and other sectors of the society. Pateman's Participation and Democratic theory was one of them. Bell postulated that "the axial principle of the modern polity is participation."[225] However, Dahl challenged this view by saying that there was simply no way that citizens in large states could participate in all political decisions.[226]

The demand for transparency and ATI overlapped with the rise of the modern administrative state that was established after World War II. In the 60s and 70s, the crisis of legitimacy lead to an acceptance in western democracies that more had to be done to restore the trust on government. One such way was to be more transparent and provide the public with an effective ATI. After Sweden updated its Freedom of the Press Act, and included it in the Constitution in 1949[227], Finland (in 1951), Denmark and Norway (in 1970), US (in 1966) and France (in 1978), all passed ATI laws. They were considered to be the first wave of countries passing such laws. After a few years, a second wave of countries introduced ATI legislation. Canada belonged to this group of countries. These developments led to the recognition in Canada of the need for special protections for ATI.[228] Canada, Australia and New Zealand introduced FOI laws in the early 80s, being the second wave of an ATI revolution. In 1989, when the Berlin Wall fell down

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[223] J.C. Schaar, *Legitimacy in the Modern State*. (New Brunswick, NJ: Transaction, 1981) at 331-332 [Schaar].
[224] S. P. Huntington, "Postindustrial Politics: How benign will it be?" (1974) 6 Comparative politics 163-191 [Huntington].
[225] D. Bell, *The coming of Post-industrial society*. (London: Heinemann, 1974) [Bell].
[226] R. Dahl, *After the Revolution?* (New Haven: Yale Univ. Press, 1970) [Dahl, *After the Revolution*].
[227] Daniel Berliner, "Institutionalizing Transparency: The Global Spread of Freedom of Information in Law and Practice", Dissertation, University of Washington 2012, at 6, online: <https://dlib.lib.washington.edu/researchworks/bitstream/handle/1773/21770/Berliner_washington_0250E_10985.pdf?sequence=1&isAllowed=y>. [Berliner, "Institutionalizing Transparency"].
[228] Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Access to Information and Protection of Privacy in Canadian Democracy", May 5, 2009, at 3, online: <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2009-05-05-eng.aspx>. [McLachlin, "ATI"].

there were just twelve FOI laws in the world, to be found mainly in longer-established democracies.[229]

In the 90s and 2000s there has been an expansion of FOI laws all around the world. In the 1990's a third wave of countries implemented access laws and with the entrance in the new millennium, most of the countries in the world had ATI laws as part of their legal framework. Many of them, especially in Europe, had introduced an access right in their constitutions, granting this right a higher status, that of a fundamental right. The late 90s and early 2000 signed a race of the Eastern Europe countries towards embracing FOI laws.[230] Today, most of the countries in the world have FOI laws in place. Paraguay became the 100th nation in the world to have adopted such law in September of 2014,[231] a year in which three other countries passed FOI laws, Maldives, Afghanistan and Mozambique.[232]

Despite the widespread of FOI legislation the process has not gone very smoothly. I bring here two significant examples from the US and the UK, which demonstrate the controversy and resistance that have accompanied FOI laws during their passage, and afterwards. The US passed the *FOI Act* in Congress in 1966[233] after a decade of congressional hearings. The executive branch opposed the bill - in 1965 all 27 federal agencies and departments that presented testimony were opposed to it - and so did the President.[234] Although President Johnson was eventually convinced by key staff members, Congressional leaders, and journalists who advocated the bill, Bill Moyers (then a White House aide) wrote: "I knew that LBJ [referring to the president] had to be dragged kicking and screaming to the signing. He hated the very idea of

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[229] Helen Darbishire, "Proactive Transparency: The Future of the Right to Information", World Bank Working Paper, March 01, 2010, at 15, online: <http://wbi.worldbank.org/wbi/document/proactive-transparencythe-future-right-information> [Darbishire, "Proactive Transparency"].
[230] Irma Spahiu, "Government Transparency in Albania and the Role of the European Union" (2015) 21:1 *European Public Law* 109-141 at 111 [Spahiu, "Government transparency"].
[231] Toby McIntosh, "Paraguay is 100th nation to pass FOI law, but struggle for openness goes on", The Guardian, 19 September 2014, online: <http://www.theguardian.com/public-leaders-network/2014/sep/19/paraguay-freedom-information-law-transparency>
[232] FreedomInfo.org, FOI Countries by Date, <http://www.freedominfo.org/>
[233] According to the United States Department of Justice, the Freedom of Information Act (FOIA) was enacted on July 4, 1966, and took effect one year later. It provides that any person has a right, enforceable in court, to obtain access to federal agency records. See <http://www.foia.gov/about.html>
[234] Berliner, "Institutionalizing Transparency", supra note 227 at 6.

the FOI Act; hated the thought of journalists rummaging in government closets and opening government files; hated them challenging the official view of reality."[235]

In the United Kingdom, after a civil society campaign, dating back to 1984, the Labour party made passage of a FOI law a campaign promise in the 1997 election. The law was not passed until 2000, and did not come fully into effect until 2005.[236] And yet, former Prime Minister Tony Blair called the passage of the law his greatest regret from his time in office, due to its frequent use by journalists. He wrote in his memoir: "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it."[237]

The period after 2000s marked a bold move towards international recognition of a right to ATI. On June 18, 2009, 12 members of the Council of Europe signed the Convention on Access to Official Documents,[238] making history as the first binding legal instrument that recognizes a general right of access to official documents. Other international organizations have also taken steps towards this recognition by adopting their own rules on ATI. For instance, in 2010 the World Bank adopted an Access to Information Policy.[239] Also, the International Monetary Fund has a Transparency Policy in which it recognizes the right to information.[240] The UN Sustainable Development Goals have set as a target that every nation in the world will by 2030 "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements."[241]

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[235] Thomas Blanton, *Freedom of Information at 40*, eds, National Security Achieve, July 4, 2006, online: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/> [Blanton, *FOI at 40*].
[236] Berliner, "Institutionalizing Transparency", supra note 227, at 7.
[237] Tony Blair, *A Journey: My Political Life*. (New York: Alfred A. Knopf, 2010) at 511 [Blair, *A Journey*].
[238] See Council of Europe Convention on Access to Official Documents, 18.6.2009, online: <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm> [CoE Convention].
[239] The World Bank Policy: Access to Information <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/393051435850102801/World-Bank-Policy-on-Access-to-Information.pdf> [WB Policy: ATI]. This Policy was a pivotal shift in the World Bank's approach to making information available to the public. It became effective on July 1, 2010 and changed subsequently in April 3, 2013, and June 30, 2015.
[240] Internatinal Monetary Fund, Right to information at the IMF, Policy Briefing, October 2008, at 1, online: <http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/IMF_Transparency___Policy_Briefing___Final.pdf> [IMF, RTI].
[241] Dave Banisar, "A New York Moment on Transparency", Article 19, 25 September 2015, online: <https://www.article19.org/join-the-debate.php/219/view/> [Banisar, "A NY Movement"].

Looking back at FOI laws, one can notice that at the early stages (60s, 70s and 80s) these laws were created with an understanding that FOI was part of the freedom of expression, which was perceived as a right that only affects journalists and political activists. However, there has been a paradigm change in the new millennium. FOI is now considered as a multi-dimensional human right that can affect people and their governments in many ways, and which is protected by many international legal instruments. In many countries, FOI is regarded as critical to the realization of the constitutional socio-economic rights, such as the rights to adequate health care, education and clean environment. Many NGOs are pushing for such recognition. For instance, Open Democracy Advice Centre promotes that if a person wants to find out information about pollution in a particular area, because of an unusual number of illnesses in the locality, a right of ATI can assist to get this kind of knowledge.[242]

4.2 Historical path of access to information in Canada

4.2.1 Milestones leading to the Access to Information Act

In Canada, the term transparency is generally not present, at least not within the *ATIA* legal provisions. This section will mainly focus on ATI legislation. The first time Canada recognized a right to ATI is in the context of the UN framework. Rankin explained that the Canadian government reported at a 1948 UN Conference on the Universal Declaration of Human Rights that "Freedom of Information in Canada is inherent in the Canadian Constitution, but it is not specifically enacted."[243]

At the federal level, the first legislative recognition of a right to ATI came within the context of the Canadian Human Rights Act[244], where Part IV entitled individuals to have access to their personal information contained in government records. This provision was in fact a precursor of the *Privacy Act* which replaced Part IV of the *Canadian Human Rights Act* when it came into effect.

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[242] Open Democracy Advice Centre (ODAC), "Right to Access Information Training Manual", 2011, at 14, online: <http://www.r2k.org.za/wp-content/uploads/2012/12/rti-training-manual-dec-2012.pdf> [ODAC, "RTI Manual"].
[243] Murray Rankin, "Freedom of Information in Canada - Will the Doors Stay Shut?", in Canadian Bar Association, *Government Secrecy in Canada: Behind Closed doors* (1977) 3 at 1 [Rankin, "FOI in Canada"].
[244] S.C. 1976-77, c. 33, as amended by *Miscellaneous Statute Law Amendment Act*, 1978, S.C. 1977-78, c.22, s.5.

However, the actual Canadian commitment to ATI was a specific legislation – the *ATIA*. An ATI law in Canada was not pioneered at the federal level, but instead originated in the provinces. In 1977 Nova Scotia became the first Canadian jurisdiction to pass such legislation[245] followed by New Brunswick in 1978, Newfoundland in 1981 and Quebec in 1982. Table 3 gives a summary of the dates when ATI legislation was introduced provincially and federally.

The path to the *ATIA*'s adoption at the federal level in Canada was long and rocky. It was paved by private Members' bills. The first efforts began a bit prior to the adoption of the FOIA in the US in 1966. According to McCamus, this development has influenced Canadian interest in similar legislation.[246] In 1965 NDP Member of Parliament (MP) Barry Mather, introduced the first ATI Bill in the House of Commons as a private member's bill.[247] Mather was a columnist and a journalist by profession and an MP in British Columbia.[248] His Members' Bill[249] died on the Order Paper. In each parliamentary session, for six years, between 1968 and his retirement in 1974, Mather reintroduced identical legislation. Four times it reached Second Reading, but went no further. It died on the House of Commons Order Paper. Considering that bills go through three readings at the House of Commons[250], this was a relatively short life.

Progressive Conservative MP, Gerald Baldwin, recognized as the father of FOI in Canada[251], tried the same technique. He introduced a private member's bill each year between 1969 and 1974, but they also never made it past second reading. Baldwin created ACCESS, a Canadian Committee for the Right to Public Information, and Ottawa's first effective lobby group for ATI.

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[245] *Freedom of Information Act*, S.N.S. 1977, c.10.
[246] John D. McCamus, "Preface" in John D. McCamus, ed, *Freedom of Information: Canadian Perspectives* (Toronto: Butterworth, 1981), at v [McCamus, "Preface"].
[247] T. Onyshko, "The Federal Court and Access to Information Act" (1993) 22 Man. L. J 73, online: QL [Onyshko, "The FC & ATIA"].
[248] See PARLINFO, Barry Mather <http://www.parl.gc.ca/parlinfo/files/Parliamentarian.aspx?Item=279663fb-c05e-4f76-934e-36da39af24a9&Language=E>.
[249] According to the Canadian Federal House of Commons, a private Member's bill is a piece of draft Legislation presented by Members of Parliament who are not Ministers of the Crown or Parliamentary Secretaries. House of Commons, Private Member's Business Office, "Private Member's Business: A Practical Guide", 9th ed., October 2008, at 3. <http://publications.gc.ca/collections/collection_2009/parl/X9-22-2008E.pdf>
[250] Ibid, at 5. Here it is explained that "Bills…. must pass through several stages: introduction and first reading, second reading, committee stage, report stage, and third reading in the House of Commons, then a similar process in the Senate. The period between introducing a bill and seeing it become law may therefore be lengthy"
[251] David L. Leonard & Gerald Willian Baldwin, The Canadian Encyclopedia, 17/11/2008, online: <http://www.thecanadianencyclopedia.ca/en/article/gerald-william-baldwin/> [Leonard & Baldwin].

Referring to this contribution, Canada's Information Commissioner has called Baldwin an irresistible force which inspired Canada's ATI law. The ATIA was his enduring moment.[252]

At the time that these bills were introduced, the political situation in Canada was boiling from social rights movements. Women, aboriginal, LGBT and separatists movements were rising in Canada in the 60s. The late 1960s in Canada, as throughout the Western world, saw the emergence of a new women's movement[253]. In addition, the year following Prime Minister's Trudeau rise to power in 1968, his government issued a White Paper[254] on Aboriginal policy. Aboriginals responded with their own document, named Citizens Plus, in 1970 or known as the Red Paper[255] which countered all of the proposals of the White Paper, and successfully convinced the government to radically change its policies and positions. Furthermore, the LGBT movement started in 1965[256]. Lastly, the separatist movement was taking place in Quebec in the 60s and 70s. All these social movements contributed to the enhancement of understanding of societal politics and its interaction in democracy.

Certainly, these movements prepared the environment in which ATI arouse and discussed. At that time Canadians complained about the emergence of a class of "super-bureaucrats"[257] whose influence over everyday life seemed contrary to democratic principles. Worries about the expansion of governmental authority were fueled by the 1976 Lambert Royal Commission, which described "a grave weakening, and in some cases an almost total breakdown, in the chain of accountability"[258] within the Canadian federal government. This concern about government legitimacy influenced the public support for an ATI law in Canada. Smith criticized the

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[252] Information Commissioner of Canada, "Annual Report to Parliament", June 1992, at vii.
[253] See *Report of the Royal Commission on the Status of Winner: in Canada* (Ottawa 1970).; See also, *The Canadian Encyclopedia*, Women's Movement, online: <http://www.thecanadianencyclopedia.ca/en/article/womens-movement/>.
[254] Canada, Indian and Northern Affairs. *Statement of the Government of Canada on Indian Policy. (*Ottawa: Department of Indian and Northern Affairs, 1969) (The White Paper, 1969), online: <http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf> [White Paper].
[255] Citizen Plus (Red Paper), 1970.; See also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. **(**Vancouver: UBC Press, 2000) [Cairns, *Citizens Plus*].
[256] For a full timeline see: <http://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516>
[257] C. Campbell & G. J. Szablowski, The super-bureaucrats: structure and behaviour in central agencies. (Toronto: Macmillan, 1979) [Campbell & Szablowski].
[258] James R. Mallory, "The Lambert Report: Central Control and Responsibilities", (Winter 1979) 22 *Canadian Public Administration* at 21 [Mallory].

Canadian government for resembling a "thinly-disguised Presidential system", without the benefit of a strong legislature to balance presidential power.[259] This environment created the background for the introduction of an ATI law. Roberts argued that "The timing of the debate that led to the ATIA is significant"[260] pointing to the political battle that was happening in the US at the early 70s. In October 1974 the US Congress, responding to the secretiveness of the Nixon administration following his resignation earlier in August, passed amendments that substantially improved the 1966 US FOIA. President Ford then vetoed the amendments, arguing that they would erode presidential powers. Congress overrode the veto in November 1974 and gave the Americans the law they still have today.[261] Beyond the American continent, two other Commonwealth countries presented and adopted similar legislation, namely Australia[262], and New Zealand[263], which both passed an ATI law in 1982.

As a culmination of all these developments in Canada was the discussion of the *Charter of the Rights and Freedoms* which was passed by the Parliament the same year as the *ATIA*. The debates surrounding the Charter and all the other events happening in late 70s, early 80s put the government under heavy pressure to consider ATI as a means to re-establish its legitimacy. The Canadian government took a long time to reflect that the adoption of an ATI law was inescapable. As Rubin explains "It took nearly 10 years of public campaigning for access ….rights before the acts' June 1982 passage."[264] He was referring to both the *ATIA* and the *Privacy Act*. This hesitation is explained with the common law tradition in Canada which was not concerned with giving access rights to individuals, except in very special circumstances of litigation. This tradition was mainly concerned with the publication of law and with legal certainty, setting limits to arbitrary actions that undermined individual security.[265] Certainly, the adoption of an ATI law meant changing this transition. According to Roberts, this represented

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[259] D. Smith, "President and Parliament: the Transformation of Parliamentary Government in Canada", in T.A. Hockin, ed, *Apex of Power: the Prime Minister and Political Leadership in Canada*. (Toronto: Prentice-Hall, 1977) 308–25 [Smith].
[260] Roberts, "Spin Control", supra note 169 at 5.
[261] *Ibid.*
[262] Australian Government, Office of the Australian Information Commissioner, Freedom of Information Act 1982. <https://www.oaic.gov.au/freedom-of-information/foi-act>.
[263] Ministry of Justice, The Official Information Act 1982, <http://www.justice.govt.nz/publications/global-publications/o/official-information-your-right-to-know>.
[264] Ken Rubin, "Canada's Access to Information Act turns 30, but who's looking or caring", The Hill Times, July 2, 2012, online: <http://www.kenrubin.ca/articles/canada-ati-act-at-30.pdf> [Rubin, "ATIA turns 30"].
[265] Birkinshaw, "FOI & Openness", supra note 2 at 197.

"for administrations and citizens, a significant cultural transformation away from traditional and historical administrative privileges"[266]

A series of government enterprises preceded the adoption of the *ATIA*. In June 1977, Trudeau's Liberal government released a Green Paper called "Legislation on Public Access to Government Documents."[267] The Green Paper was issued by the Secretary of State, and examined policy options for creating Canada's federal legislation on ATI.[268] It observed that Canada began seriously contemplating the enactment of FOI legislation in the 1970s[269], although prior attempts were made earlier in the 60s. The Green Paper deliberated on the challenge of balancing the need for ATI in government records to enable effective participation of citizens in public decision-making with situations in which government operations required confidentiality. The Green Paper rejected the option of allowing direct appeals to the Federal Court explaining that "There is no way that a judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for his actions."[270] This way of thinking tells a lot about the law we have today.

In October 1979, the Progressive Conservative Government led by Joe Clark introduced Bill C-15, the proposed FOI Act, fulfilling a promise made during his election campaign. Before coming to power Clark gained public support for the *ATIA*. In 1978 he referred to ATI as:

> What we are talking about is power – political power. We are talking about the reality that real power is limited to those who have facts. In a democracy that power and that information should be shared broadly. In Canada today they are not, and to that degree we are no longer a democracy in any sensible sense of that word. There is excessive power concentrated in the hands of those who hide public information from the people and Parliament of Canada.[271]

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[266] Alasdair Roberts, "Free to distrust" (2005) 102 *Prospect (UK)* at 10 [Roberts, "Free to distrust"].
[267] Onyshko, "The FC & ATIA", supra note 244 at 28; See also Mike Larsen & Kevin Walby, ed, *Brokering Access: Power, Politics, and Freedom of Information Process in Canada*, (UBC Press: Vancouver, 2012) at 8 [Larsen & Walby].
[268] Secretary of State, Honourable John Roberts, *Legislation on Public Access to Government Documents* (Ottawa: Ministry of Supply and Services Canada, 1977) [Green Paper].
[269] The first Report on this issue was the federal Green Paper Legislation in Public Access to Government Documents. See *Ibid* at 1-6.
[270] *Ibid*, at 18.
[271] A. Osler, "Journalism and the FOI Laws: a Faded Promise" (March 1999) *Government Information in Canada* at 17. <http://www.usask.ca/library/gic/17/osler.html> [Osler].

The approach taken by the Progressive Conservatives in Bill C-15 was virtually identical to one that had been taken when US FOI Act was amended in 1976[272]. It is important to emphasize that the Liberal party has been in power all the time from the first introduction of the ATI bill in 1965 by Mather. This is the first party change in Canada after 16 years of Liberal rule and represented a break for ATI proponents. However, the Progressive Conservative government fell shortly, after losing confidence in the House of Commons, just after the Bill made it to second reading.

Following public pressure, Trudeau's newly elected Liberal government announced that an ATI legislation would be introduced[273]. Bill C-43 was first presented in Parliament in 1980 by the Honorable Francis Fox, Secretary of state who predicted that the "legislation will, over time, become one of the cornerstones of Canadian democracy ….and bring about a very major change of thinking within government….Under this legislation, access to information becomes a matter of public right, with the burden of proof on the Government to establish that information need not be released."[274] The bill was anticipated to reverse the then-present situation whereby ATI was a matter of government discretion. Government departments and agencies were instructed by a letter from the Prime Minister (PM) Trudeau to abide by "the spirit of the legislation."[275] However, despite the positive attitudes and high hopes, Bill C-43 was later changed preceded by a long debate and the tabling of multiple bills. Rees explains that "the passage of the ATIA into law was delayed for a year until the governing Liberal Party of Trudeau secured the exclusion of cabinet from ATIA jurisdiction (section 69)."[276] On November 4, 1981 the Honorable Francis Fox, tabled certain amendments to the Bill in the Justice and Legal Affairs Committee of the

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[272] Minutes of Proceeding and Evidence of the Standing Committee on Justice and Solicitor General, *Open and shut: Enhancing the right to know and the right to privacy*, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act. Issue No. 9, March 1987, at 114 [Open and shut].

[273] Onyshko, "The FC & ATIA", supra note 244.

[274] *House of Commons Debates*, (29 January 1981) at 6689. See also Micheal W. Drapeau & Marc-Aurele Racicot, *The Complete Annotated Guide to Federal Access to Information 2002 (Toronto: Carswell*, 2002) at 161-162, 179 [Drapeau & Racicot].

[275] Letter from Prime Minister Trudeau to all Members of the Cabinet, 19 Sept. 1980.

[276] Ann Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada", in Mike Larsen & Kevin Walby, ed, *Brokering Access: Power, Politics, and Freedom of Information Process in Canada*, (UBC Press: Vancouver, 2012) at 38 [Rees, "Sustaining Secrecy"].

House of Commons.[277] The final Bill C-43 contrasted with Bill C-15 in that it included exclusion for Cabinet confidences, not merely an exemption as found in other legislation.

McCamus has strongly criticized the Bill C-43 as "a rather pale imitation of the American Freedom of Information Act" and as having "the appearance of a freedom of information law drafted by individuals who have little sympathy for the basic objectives of such a scheme."[278] All these changes happened in the final stages of the legislation. This later version of the bill became law in 1982. PM Trudeau promised that the law would promote "effective participation of citizens and organizations in the taking of public decisions."[279] The *ATIA* received Royal Assent in July, 1982, and came into effect on Canada Day on July 1, 1983. The Act was proclaimed in the final months of Trudeau's Liberal Government and it was considered to be Trudeau's gift to PM Mulroney because it was Mulroney's Progressive Conservative regime that had to deal with its effects.[280] The *ATIA* created the Office of the Information Commissioner. At the same time, Parliament also adopted the *Privacy Act*[281], which provided for the protection of personal information under the control of government institutions.

The passage of the *ATIA* was considered a big success at the time, because it meant a move away from the secretive bureaucratic and political culture of a Westminster model of government. The Information Commissioner Legault has characterized the Act as 'groundbreaking' explaining that Canada was one of the first countries to enact such a law in a Westminster style parliamentary model of government.[282] However, the credit for the *ATIA's* adoption, according to McCamus goes to the American influence and pressure from opposition parties, business, labor and NGO groups, associations of academics, public interest groups and the press.[283] The optimism accompanying the *ATIA*'s passage, however, would not last long. A

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[277] Open and shut, supra note 272 at 114.
[278] John D. McCamus, "Bill C-43: The Federal Canadian Proposals of 1980" in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) 266 at 299 [McCamus, "Bill C-43"]; Similarly, see Murray Rankin, "The New Access to Information and Privacy Act: A Critical Annotation" (1983) 15 Ottawa L. Rev. 1 at 1 [Rankin, "The new ATIPA"].
[279] Rankin, "ATIA 25 Years Later", supra note 113 at 4.
[280] Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament*, (Toronto: University of Toronto Press, 2003) at 49 [Savoie, *Breaking the Bargain*].
[281] Privacy Act, R.S.C., 1985, c. P-21.
[282] Suzanne Legault, "Modernizing the *Access to Information Act*: An Opportune Time, Presentation at the Canada School of Public Service", Armchair Discussion, September 24, 2012
[283] John McCamus, "Freedom of Information in Canada", (1983)10 Government Publications Rev. 51 at 52 [McCamus, "FOI in Canada"].

look at the after-passage period gives a better idea on the tensions and implications that were yet to come.

4.2.2 Post-Access to Information Act environment

Soon after the adoption of the *ATIA*, not only the enthusiasm began to fade, but signs of resistance and hostility began to appear. Considering the long history of secrecy within government, this reaction did not come as a surprise. Savoie argued that "Secrecy and confidentiality have [historically]….permeated government operations at Canada. They begin at the top: members of the Privy Council swear: '….I shall keep secret all matters committed or revealed to me in this capacity, or that shall secretly treated of in Council."[284] This swearing still exists today. As a result of this historical pledge to secrecy, declarations such as the one made by John Crosbie, the first Justice Minister to be responsible for the Act, were not surprising. He dismissed the act as a tool that "gives the media and other mischief-makers the ability to ferret our snippets of information with which to embarrass political leaders and to titillate the public." According to him, "In the vast majority of instances, embarrassment and titillation are the only objects of access to information requests."[285] This declaration meant that the system would be flooding from requests aiming at embarrassing the government. However, in 1985, two years after the Act came into force, J. Thomas Babcock wrote: "Federal agencies and departments received only 475 requests for information during the firsts three months the Access to Information law was in effect, far below the 15,000 in governmental plans."[286] This indicated that the Act was not being used as much as expected, which meant that there were problems either with the law itself or its implementation.

In 1986, three years after the *ATIA* came into force an in-depth review of the provisions and the operations of the act was conducted by the House of Commons Standing Committee on

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[284] Savoie, *Breaking the Bargain,* supra note 280 at 44.
[285] John Crosbie, *No Holds Barred: My Life in Politics* (Toronto: McClelland and Stewart, 1997), at 300 [Crosbie]. See also Ibid, at 51.
[286] J. Thomas Babcock, "Is the Access Act Working?", in Donald C. Rowat, ed, *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, 1985) at 108 [Babcock, "Is Access working"]; See also Marc-Aurèle Racicot & Frank Work, "The *Access to Information Act*: A Canadian Experience", Resource Paper - National Workshop Organised by Commonwealth Human Rights Initiative, May 24-26, 2005, at 6 [Racicot & Work].

Justice[287] and the Solicitor General. The Committee asserted that the Act was of "similar significance" to the Canadian Charter of Rights and Freedoms[288]. Its report "Open and Shut: Enhancing the right to know and the right to privacy"[289] was unanimously tabled in Parliament in March 1987. The Justice Committee proposed that the exclusion of Cabinet records from the operation of the Act be deleted and replaced with an exemption that would not be subject to an injury test.[290] Exempting rather than excluding these documents would have allowed the Commissioner or the Court to investigate the government's determinations that such documents should not be released[291]. The report listed a series of recommendations for amending the *ATIA.*[292] Some of the findings indicated that the act was not well-understood by the public and public service and that the Act needed to modernize some provisions and clarify some others. As a result calls for law improvement emerged soon after the report. In response to "Open and Shut" the government issued "Access and Privacy: the steps ahead"[293] later the same year. However, none of the legislative recommendations were taken into consideration.[294]

Amendments to the *ATIA* were made later on in a span of 10 years. In fact, the *ATIA* was amended four times since its enactment in 1983, but none of them were actually substantial. In 1992, the Act was first amended to deal with the provisions of records in alternative formats to individuals with sensory disabilities.[295] In 1998, the Somalia Affair and the "tainted blood scandal"[296] lead to the introduction of a private member's bill which amended the *ATIA* in 1999 with a new section 67.1[297]. This section made it a criminal offence for anyone to intentionally

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[287] This is often referred to as the 1986 Parliamentary Committee.
[288] Office of the Information Commissioner, Strengthening the Access to Information Act To Meet Today's Imperatives, 2009, online: <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
[289] *Open and Shut,* supra note 272.
[290] An "injury test" is a consideration of "the harm to the interest (e.g., the conduct of international affairs) that could reasonably be expected to result from disclosure." Access to Information Review Task Force [AIRTF], *Access to Information: Making It Work for Canadians – Report of the Access to Information Review Task Force*, 2002 [ATI, Making it Work].
[291] Kristen Douglas, Élise Hurtubise-Loranger & Dara Lithwick, "The Access to Information Act *and* Proposals for Reform", Background Paper, Publication No. 2005-55-E , Ottawa, Canada, Library of Parliament (2012), at 2, online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2005-55-e.pdf> [Douglas et al].
[292] The Access to Information Act and Proposals for Reform, Referenced in Parliamentary Information and Research Service, 6 June 2012, at 2, online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2005]55]e.pdf>.
[293] Government of Canada, *Access and Privacy: The Steps Ahead*, 1987.
[294] Drapeau & Racicot, supra note 274 at 32.
[295] Phillip Coppel, *Information Rights: Law and Practice*, 4th ed, (Portland: Hart Publishing, 2014) at 67 [Coppel].
[296] See: CBC, "A Look Back At Canada's Tainted Blood Scandal", October 4, 2013, online: <http://www.cbc.ca/strombo/news/canadas-tainted-blood-scandal>.
[297] Rankin, "ATIA 25 years later", supra note 113 at 29.

destroy, falsify or conceal a record, or to counsel anyone else to do so. The offence is punishable by a maximum of two years in prison or a fine up to $10,000. This can be considered as a positive development with a potential to improve the *ATIA* implementation. The third amendment was made in 2001, following September 11, which added another exclusion for documents containing national security or foreign intelligence information.[298] Bill C-36, the *Anti-terrorism Act*[299] provided that a certificate by the Attorney General prohibiting the disclosure of information for the purpose of protecting national defense or national security would override the provisions of the *ATIA*. The *Anti-Terrorism Act*, added section 69.1 to the *ATIA* to exclude from the operation of the Act any documents that are prohibited from disclosure by certificates issued under the *Canada Evidence Act.*[300] This amendment was considered a step back to the ATI regime in Canada with negative consequences to the rights of Canadians. It concentrates so much power in the hands of one person – the Attorney General - which can downplay the importance of ATI in favour of matters of national security. This has been a concern for many of the authors in the literature review since matters of security can often be misused to justify violations of ATI rights.

Amendments of the *ATIA* for the fourth time were a promise during the electoral campaign of Harper's Conservative Party which came to power in 2006. As a response to the Gomery Commission[301] in 2006, the government introduced the *Federal Accountability Act* [302](FAA). At the same time, in April 2006, the government tabled a discussion paper entitled "Strengthening the Access to Information Act – A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act"[303]. This discussion paper offered comments on some of the 2005 Information Commissioner's proposals (in the "Open Government Act") and some alternate approaches to consider for reform.[304]

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[298] ATI, Making it Work, supra note 290, Annex 8.
[299] RS, 2001, c. C-46.
[300] RSC, 1985, c C-5. See Douglas et al, supra note 291 at 4.
[301] This is the short form for Commission of Inquiry into the Sponsorship Program and Advertising Activities.
[302] *Federal Accountability Act*, SC, 2006, c 9.
[303] Government of Canada, <http://justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/index.html>
[304] Douglas et al, supra note 291, at 14-15.

The *FAA* amended the *ATIA* in three ways. First, it introduced a legislated "duty to assist" applicants, which required institutions to make every reasonable effort to help applicants receive complete, accurate and timely responses to requests, without regards to their identity. It offered applicants reasonable assistance throughout the request process, informing them when their requests needed to be clarified applying limited and specific exemptions. Second, the *FAA* extended the range of the subjects under the *ATIA*'s access regime by adding several new institutions to be covered by ATI legislation. It also amended the regulatory powers under section 77 of the *ATIA* to allow for additional bodies to be added to the Act in the future. Under this new provision, Cabinet now has the power to make regulations prescribing criteria for adding a body or office to Schedule I of the Act.[305] This is certainly one of the most positive achievements in enhancing ATI regime in Canada so far. The range of institutions covered by the Act has always been criticized by ATI advocates (see Chapter 8 and 9). However, many public bodies are currently outside its purview, including Parliament, some Officers of Parliament, and other organizations performing public functions or spending public money. This has been the subject of significant debate. These first two amendments were considered positive to the strengthening of ATI, but were still less than what was promised during the electoral campaign. What really disappointed the ATI advocates was the third type of amendment brought by the *FAA* which added a number of institution-specific exemptions and exclusions related to some Officers' functions which are not available to other entities already covered by the *ATIA*. The FAA also granted new mandatory class exemptions.

These four amendments were attempts that became finalized in actual changes to the Act. However, these were not the only attempts that occupied the post-*ATIA* environment. The 90s can be considered to be "silent years" in terms of ATI activism. Entering in the new millennium, signaled a real shift in the political and social action toward improving ATI regime in Canada. However, every attempt in achieving this goal failed in face of political indifference and resistance. The 2000s was a busy time for ATI proponents. A private member's bill introduced in the House of Commons in 2000 by Liberal MP John Bryden[306] to overhaul the *ATIA*, was

[305] *Ibid*, at 14.
[306] He has been an MP from 1997 to 2004 <http://www.parl.gc.ca/Parliamentarians/en/members/John-Bryden(1075)/Roles>. From 1969 to 1989, Bryden held a number of positions as a journalist at several Canadian

defeated at second reading. John Bryden continued pressuring the government and together with a group of MPs from various parties formed their own ad hoc Committee on ATI in summer 2001, pushing for changes to the ATI system. This Committee, chaired by Bryden, produced a report in November 2001, "A Call for Openness"[307], containing eleven recommendations for improving the provisions and operation of the Act. One of the recommendations was that section 69 exclusion of Cabinet records be replaced by an injury-based discretionary exemption.

As a response to the pressure from the MPs, the Ministry of Justice and the president of the Treasury Board launched an ATI task force with a mandate to review both the legislative and administrative issues relative to the ATI regime, including the Act, regulations, policies and procedures. The Review Task Force, set up in early 2001, consisting of government officials and chaired by Andrée Delagrave, created advisory committees, published a consultation paper, commissioned and published research papers, and held consultations. In 12 June 2002, it released a lengthy report, "Access to Information: Making it Work for Canadians", containing 139 recommendations for change.[308] The Task Force recognized a need to modernize some aspects of the *ATIA*.[309] For many ATI proponents this report was considered a milestone event. The report found "a crisis in information management" within government and called for an amendment of the *ATIA* that would include a "public interest override"[310]. The Task Force noticed that Canadians were making a relatively modest, but increasing, and more sophisticated, use of the *ATIA*. It emphasized the role of knowledge in a democratic society by saying: "In a knowledge-based society, information is a public resource and essential for collective learning. If Canada is to thrive and compete, government information must be made available as widely and easily as possible."[311] The report recognized that after 20 years, the Act was still not well-understood by the public, requesters, third parties who supply information to government, or even the public service. It pointed out that the public servants did not have the training, tools and support they needed. The work done on ATI was not often perceived as "valued" work or part of their "real"

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newspapers including the Hamilton Spectator, the Globe and Mail, and the Toronto Star. See <http://en.wikipedia.org/wiki/John_H._Bryden>.

[307] MPs' Committee on Access to Information [ad hoc MP's Committee], *A Call for Openness*, Ottawa, November 2001.

[308] The Department of Justice, "A Comprehensive Framework for Access to Information Reform", A Discussion Paper April 2005, at 4. <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/ati-aai/ati-aai.pdf>

[309] Douglas et al, supra note 291 at 4.

[310] Rees, supra note 276 at 60.

[311] ATI, "Making it Work", supra note 290 at 3.

job. The principles of access had not yet been successfully integrated into the core values of the public service and embedded in its routines. The report concluded that there was a pressing need for more education on ATI. Another finding was that the journalistic use of ATI had grown in number and focus - requests were sharper and to the point.[312]

The Task Force made many proposals concerning an array of issues in the ATI system. They included expanding the scope of the Act by extending coverage to most Officers of Parliament, as well as to Parliament, granting order power to the OIC, limiting discretion by a proof of harm test or public interest override, introducing penalties for noncompliance and lowering fees. The Review Task Force, referred to some of the OIC proposals for legislative change in its report, and included them as Appendix A, the "Blueprint for Reform" reprinted from the 2000–2001 annual report of the OIC.[313] The federal government failed to act on the report. Instead, while the work on the task force was still ongoing, in late 2001 the government proposed the *Anti-terrorism Act* with more provisions for secrecy.

In response to the findings of the Review Task Force, in October 2002, the Information Commissioner John Reid tabled a special report in Parliament. He was critical of both the process and the results of the Task Force's review.[314] In addition, following the report of the Task Force, in 2002, the Liberal MP John Bryden introduced another private member bill which had the same fate as previous bills. However, he continued to introduce private members bills in the years to come. In the fall of 2003, he attempted to initiate a comprehensive overhaul of the Act through Bill C-462 which had its first reading in October 28, 2003[315], and died on the Order Paper with the dissolution of the 37th Parliament in May 2004. The bill would have changed the name of the *ATIA* to the "*Open Government Act"*. It would have expanded the scope of the Act by adding new institutions to Schedule I, which lists the institutions under the Act. The bill would have broadened the purpose section of the Act, adding a reference to the federal

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[312] Ibid.
[313] Douglas et al, supra note 291 at 6.
[314] *Ibid.*
[315] Parliament of Canada, Bill C-462, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Bill&Doc=C-462&Language=E&Mode=1&Parl=37&Ses=3>

government's obligation to release information to assist Canadians in assessing government effectiveness and compliance with the *Charter*.[316]

A similar bill was introduced by the NDP MP Pat Martin as Bill C-201, which had its first reading on October 7, 2004.[317] Martin withdrew it later after taking a pledge from then-Justice Minister Irwin Cotler to introduce a government bill. That promise was later broken. Instead, in April 2005, Cotler introduced a discussion paper entitled "A Comprehensive Framework for Access to Information Reform"[318] asking the House of Commons Standing Committee on Access to Information, Privacy and Ethics for input on a range of policy questions before the introduction of legislation. Many areas were left open for consideration by the Committee, but in some areas government positions were indicated.[319] The Minister indicated that while he agreed that reform of the *ATIA* was required, he believed it was important that a parliamentary committee first study the major issues before draft legislation was developed.[320] By motion passed in the House of Commons on 15 November 2005, Members of the Committee agreed that the *ATIA* should be amended to expand coverage of the Act to all Crown corporations, all Officers of Parliament, all foundations and to all organizations that spend taxpayers' dollars or perform public functions; establish a Cabinet-confidence exclusion; establish a duty to create the records; provide a general public interest override for all exemptions or make all exemptions discretionary and subject to an injury test.[321] Rather than embarking on a study of the matters raised in the Framework, the Committee asked Information Commissioner John Reid to develop a bill that would amend the Act. The Commissioner accepted this request and worked on accomplishing it with the help of the Legislative Counsel of the House of Commons. His proposal, in the form of a bill amending the *ATIA*, went substantially further in promoting

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[316] Douglas et al, supra note 291 at 7.
[317] Parliament of Canada, Bill C-201, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Bill&Doc=C-201&Language=E&Mode=1&Parl=38&Ses=1>
[318] Department of Justice, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, April 2005.
[319] Douglas et al, supra note 291 at 7.
[320] House of Commons, Standing Committee on Access to Information, Privacy and Ethics [House of Commons Committee on Access to Information - Honourable John Reid, Information Commissioner)], *Evidence*, 1st Session, 38th Parliament, 5 April 2005.
[321] The motion was carried on division. See House of Commons, *Journals*, 1st Session, 38th Parliament, 15 November 2005.

openness than any of the previous reform proposals.[322] A primary objective was to address concerns about a "culture of secrecy" within political and bureaucratic environments. Like Bills C-462 and C-201, the Commissioner's proposed bill was entitled the "*Open Government Act*", and expanded the number of institutions to be covered by the *ATIA*, reduced the scope of secrecy permitted by the Act, expanded the powers of oversight by the Commissioner and the courts, and increased incentives for compliance and penalties for non-compliance.

The Commissioner's proposed "*Open Government Act*" Bill was endorsed by Justice John Gomery in his 2006 Phase 2 report for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability*[323]. In 2005, the Gomery Commission was created to investigate the scandal, and found that senior officials and Ministers failed to respect the spirit of the *ATIA* – they often delayed responding to information request and failed to document decisions. All of the elements of the Commissioner's proposal were supported in the Gomery report, which also specifically urged the government to adopt legislation requiring public servants to document decisions and recommendations, and made it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.[324] Contrary to other proposals before, the Commissioner did not recommend that his Office be changed from an ombudsman to that of a quasi-judicial, order-making body.[325]

In April 2006, in response to the Gomery Commission's findings, the government introduced the *Federal Accountability Act (FAA).*[326] At the same time, the government tabled a discussion paper entitled "*Strengthening the Access to Information Act – A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act"*.[327] The *FAA* became law in December of 2006.[328]

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[322] Information Commissioner of Canada, *Proposed Changes to the* Access to Information Act*: Presentation to the Committee on Access to Information, Privacy and Ethics*, September 2005.
[323] Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations*, Minister of Public Works and Government Services, 2006.
[324] Ibid, Recommendation 16.
[325] Douglas et al, supra note 291 at 12.
[326] SC, 2006, c 9 [FAA].
[327] Government of Canada, *Strengthening the* Access to Information Act – *A Discussion of Ideas Intrinsic to the Reform of the* Access to Information Act, 11 April 2006, online: <http://justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/index.html>.
[328] For an in-depth analysis of the amendments, see *Bill C-2: The Federal Accountability Act*, LS-522E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2006.

However, what the *FAA* delivered in terms of strengthening the *ATIA*, was not what the Conservatives promised as part of their election campaign. The 2006 election platform of the Conservative Party of Canada included a framework that proposed to: "Ensure that all exemptions from the disclosure of government are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules."[329] The break of this promise brought the reaction of many ATI advocates, including the ad hoc Committee of MPs in the House of Commons. As a result, in October 2006, a House of Commons Committee passed a resolution on to the federal Justice Minister to introduce a bill keeping the Conservatives election promises. Nothing came out of this resolution and the introduction of a bill on ATI kept being pushed back.

On April 1, 2008, the Harper's government shut down CAIRS (Coordination of Access to Information Request System) - the ATI database which had catalogued requests made to the federal government since 1989. Until May, 2008, the Treasury Board, through policy, required government institutions to register their requests in the system. Summaries of requests were logged into the system and disclosed on a monthly basis. The government announced that as a cost-saving measure, this initiative had been cancelled. Harper explained that CAIRS was "deemed expensive, [and] deemed to slow down the access to information."[330] In response, Stéphane Dion, who was then the leader of the opposition, reacted by saying that "The registry made it possible to know who asked for what through access to information."[331] He described Harper's government as the most secretive government in Canada's history.

In the spring of 2008 two MPs introduced bills, very similar to each other, aimed at amending the *ATIA* to implement the reforms proposed by ICC John Reid in 2005. Pat Martin introduced Bill C-554[332], *An Act to amend the Access to Information Act (open government)* on 29 May 2008. A few days later, on 2 June, Bloc Québécois MP Carole Lavallée introduced Bill C-556[333], *An Act to amend the ATIA (improved access)*. Both bills died on the Order Paper with the

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[329] Stand Up for Canada, The 2006 Conservative Party federal election platform.
[330] House of Commons, Debates of May 5th, 2008, Hansard #88 of the 39th Parliament, 2nd Session, online: <https://openparliament.ca/debates/2008/5/5/stephane-dion-2/>.
[331] *Ibid.*
[332] Pat Martin, C-554, An Act to Amend the Access to Information Act (Open Government), House of Commons, 39th Parliament, 2nd Session, First Reading, 29 May 2008.
[333] Bill C-556, An Act to amend the Access to Information Act (improved access), 2nd Session, 39th Parliament, First reading, 2 June 2008.

dissolution of the 39th Parliament in September 2008. Martin re-introduced his bill in the 40th Parliament on 25 February 2009[334], and again in the 41st Parliament on 29 September 2011.[335]

In February 2009, ICC Robert Marleau released 12 recommendations for strengthening the *ATIA* and its enforcement system. Some of recommendations included extending the right of ATI to all persons; granting OIC with order-making powers; extending the application of the *ATIA* to Parliament and the courts; applying the *ATIA* to Cabinet confidences, etc. In March 2009, in the wake of the publication of his special report on systemic issues affecting ATI, he presented these recommendations at the House of Commons Standing Committee on Access to Information, Privacy and Ethics. The Committee studied these recommendations and endorsed most of them. However, the Committee did not support the Commissioner's recommendation that the *ATIA* apply to Cabinet confidences. It heard from various witnesses, and in June 2009, the Committee tabled a report to Parliament. It suggested that the Minister of Justice consider amending the *ATIA* to implement the Commissioner's recommendations.[336] No steps further were taken from the government to amend the *ATIA*. The Conservatives rejected all recommendations in December 2009[337] and limited its action to a review of policies and guidelines on ATI. In the Government's response to the Committee's report, the Minister of Justice, Rob Nicholson, indicated the following:

> The *Access to Information Act* is a strong piece of legislation. It is crucial that careful consideration be given to the impact changes to the legislation may have on the operations of the ATI program. Legislative amendments must be examined in the context of administrative alternatives, such as enhanced guidance and training that can be equally effective to realize continued improvements.[338]

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[334] Pat Martin, C-326, An Act to Amend the Access to Information Act (Open Government), House of Commons, 40th Parliament, 2nd Session, January 26, 2009 - December 30, 2009. http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C326&Language=E&Mode=1&Parl=40&Ses=2

[335] Bill C-301, An Act to amend the Access to Information Act (open government), 1st Session, 41st Parliament, First reading, 29 September 2011. See also Douglas et al, supra note 291 at 13.

[336] House of Commons Standing Committee on Access to Information, Privacy and Ethics, *The* Access to Information Act*: First Steps Towards Renewal*, Eleventh report, 2nd Session, 40th Parliament, June 2009.

[337] Douglas et al, supra note 291 at 17.

[338] The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, "Eleventh Report of the Standing Committee on Access to Information, Privacy and Ethics entitled *The Access to Information Act: First Steps Towards Renewal*," Government Response, 2nd Session, 40th Parliament.

On March 18, 2011, the Government announced its commitment to an open government initiative along three main streams: open information, open data, and open dialogue. The Government of Canada first launched its Open Government strategy in March 2011, and then further enhanced its commitment by announcing its intention to join the "Open Government Partnership" in September 2011. However, the Open Government strategy did not include any plans for amending the *ATIA*. Canada's information and privacy commissioners suggested that the Action Plan on Open Government represented a missed opportunity for a comprehensive reform of the *ATIA*. In January 2012, a letter to Minister Clement on behalf of Canada's information and privacy commissioners, the ICC Suzanne Legault, offered to assist the government in developing the Action Plan. The letter suggested that the government recognize and support the relationship between open government and a modernized *ATIA*.[339]

In the 1st Session of the 41st Parliament, on 17 April 2012, the Honourable Tony Clement, President of the Treasury Board Secretariat (TBS) announced Canada's membership in the international "Open Government Partnership"[340] (OGP). At the Annual General Meeting of the Partnership held in Brazil, Minister Clement presented Canada's "Open Government Action Plan" and endorsed the Partnership's declaration of principles as Canada's final steps toward membership in the Partnership.[341]

The OGP strategy brought some progress regarding the online publication of information requests. By 2012 all departments were publishing summaries of completed ATI requests monthly on their websites. Almost a year after, on April 9, 2013, Clement announced the launch of a new pilot project that enabled Canadians to submit ATI and privacy requests online. This pilot made it easier to submit ATI and privacy requests to the three departments participating in the project: Citizenship and Immigration Canada, the Treasury Board Secretariat, and Shared Services Canada. This initiative was part of the modernization of the administration of ATI, one of the commitments of Canada's Open Government Action Plan.[342]

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[339] Information Commissioner of Canada, Letter on open government for the President of the Treasury Board, 20 January 2012, online: <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>.
[340] Open Government Partnership, <http://www.opengovpartnership.org/about>
[341] Treasury Board of Canada Secretariat, "Canada Joins International Open Government Partnership," News release, 18 April 2012, online: <http://news.gc.ca/web/article-en.do?nid=669609>.
[342] Government of Canada, Open Government, <http://open.canada.ca/en#toc6>.

MP Pat Martin continued his efforts for statutory change of the *ATIA*, despite his prior several defeats. He introduced the Bill C-567[343] in January 2014, which was defeated in May 2014.[344] The Bill proposed seven amendments, amongst which, to give the ICC order-making powers, expand the coverage of the act to all crown corporations, officers of Parliament, and foundations and organizations that spend taxpayers' money or perform public functions, subject the exclusions of cabinet confidences to the review of the ICC, oblige public officials to create and retain documents, provide a general public interest override for all exemptions, and ensure that all exemptions from the disclosure of government information are justified only on the basis of harm or injury test.[345]

A new name appeared in the House of Commons in 2014 as a supporter of an *ATIA* overhaul, the Liberal leader, Justin Trudeau. Following the legacy of his father Pierre Trudeau, who holds the signature for the *ATIA* in 1982 (but not necessarily the merit), Justin Trudeau introduced a Bill in 2014.[346] In the House of Commons debate, Trudeau highlighted four ways his Bill would change the *ATIA*: making data "open by default and easily accessible", ATI requests to cost no more than $5.00, giving the ICC enforcement powers, and making it mandatory to review the *ATIA* every five years.[347] Trudeau explained the principle of being opened by default as "when civil servants are uncertain as to whether or not something falls under the exceptions or whether it's a bit of a grey area, their default position will be to release it."[348] In addition, Trudeau emphasized the underlying purpose of his Bill saying that *ATIA* is "stuck in the 1980s and needs to be overhauled to rebuild the trust between citizens and their government."[349] Trudeau's Bill had the support of the NDP leader Tom Mulcair who said that "his party would support anything

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[343] See the text of Bill here <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6392518&File=24#1>.
[344] See the House of Commons Debates <http://openparliament.ca/debates/2014/3/5/pat-martin-2/only/>.
[345] Bill C-567, Pat Martin, An Act to amend the Access to Information Act (transparency and duty to document), House of Commons, March 5th, 2014, online: <http://openparliament.ca/debates/2014/3/5/pat-martin-2/only/>.
[346] Bill C-613, "An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency)". <https://openparliament.ca/bills/41-2/C-613/>.
[347] Ibid.
[348] Lee Berthiaume, "Justin Trudeau proposes more access to government data", Ottawa Citizen, June 11, 2014, <http://ottawacitizen.com/news/national/justin-trudeau-proposes-more-access-to-government-data> [Berthiaume].
[349] Daniel Leblanc, "Trudeau tables bill to make Parliament more transparent", The Globe and Mail, Jun. 11 2014, <http://www.theglobeandmail.com/news/politics/trudeau-tables-bill-to-make-parliament-more-transparent/article19114743/> [Leblanc].

that would make the government more open."[350] Although the Bill was innovative, it faced some criticism for not doing enough, soon after it had its first reading in Parliament. Ken Rubin, a long-time ATI advocate emphasized that for the Bill to improve transparency "Trudeau must do more than move the secrecy yard line slightly."[351] The debates on the Bill did not last long since it was defeated in the House of Commons on April 1st, 2015 with a result of 122 in favor and 139 against.[352] On October 19, 2015, Justin Trudeau became the PM of Canada, and pledged to make transparency one his government priorities. In the Liberal Party's website it is pledged that "open government is a sweeping agenda for change"[353], and greater openness and transparency are viewed as means to restore trust in Canadian democracy.[354] We will be witnessing if the Liberals will be able to keep that promise.

As all these developments demonstrate, the ATI regime in Canada has been characterized by the resistance of the political leadership. Its history has witnessed the obstinacy and indifference of those in power to take serious steps in modernizing the *ATIA*. Although the world has changed so much in terms of information delivery, nearly forty years later, the ATI environment in Canada lingers almost unchanged. As Rankin noticed "the citizen's access to government records remains subject to the whims of the government of the day."[355]

While the word "transparency" was somewhat alien to the ATI regime in Canada at its early years, its recognition has grown over time. From the 2000 and on, ATI is more associated with the notions of transparency and open government. At this period, attempts to change the law are intensified and there is recognition that ATI and government transparency go hand in hand together. Some of the bills introduced (by Bryden, Reid, Martin and Trudeau) after the 2000s go even further in proposing to change the name of the Act from the *ATIA* to "*Open government Act"*. These developments demonstrate some level of maturity in understanding the issues related to the ATI regime, and trying to see ATI embedded in a much broader context. The

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[350] Berthiaume, supra note 348.
[351] Ken Rubin, "Shining light on Justin Trudeau's stand on transparency", The Hill Times, 12.08.2014 <http://www.hilltimes.com/open-government/politics/2014/12/08/shining-light-on--justin-trudeaus--stand-on-transparency/40487> [Rubin, "Shining light"].
[352] See: Parliament of Canada, Vote #374 on April 1st, 2015. <https://openparliament.ca/votes/41-2/374/>.
[353] Liberal Party of Canada, "Real Change: A fair and open government -The 2015 Platform" at 3, online: <https://www.liberal.ca/files/2015/08/a-fair-and-open-government.pdf>.
[354] Ibid, at 4.
[355] Rankin, *FOI in Canada*, supra note 243 at 1.

international advancements in ideas of open government, and the worldwide recognition of the role that government transparency plays in better governance, seems to have influenced the Canadian ATI proponents and part of its political class. Although attempts to modernize the *ATIA* have failed so far, the idea of open government is embraced. This trend opens up new perspectives in appreciating the potential of ATI in achieving government transparency goals.

4.3 History of transparency and access to documents in the EU

4.3.1 Roots of transparency and access to documents

Transparency in Europe has much deeper roots than in Canada. This is comprehensible considering Europe's long history and experience with political institutions. It is well known for scholars of transparency that Sweden has the oldest access law in Europe and in the world, dating back to 1766[356]. The Freedom of the Press Act was largely motivated by the parliament's interest in information held by the King.[357] It granted public access to government documents, and became an integral part of the Swedish Constitution. This is the first ever piece of FOI legislation in the world.

Transparency established its legitimacy in Europe during the second half of the eighteenth century. The Enlightenment challenged the authority of institutions that were deeply rooted in society. It was a time when cultural and intellectual forces in Western Europe emphasized reason, analysis, and individualism rather than traditional lines of authority. Representative governments began to emerge in Europe, and a discourse articulated around transparency was truly developed. Transparency began to transform from a concept to a political, legal and moral project. The 1789 French Declaration of the Rights of Man recognized an ATI in articles 14 and 15. Article 14 stated: "All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to

[356] Lennart Weibull, "Freedom of the Press Act of 1766", Encyclopedia Britannica, online: <http://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766> [Weibull]
[357] Right2Info, "Access to Information Laws: Overview and statutory goals" <http://right2info.org/access-to-information-laws>.

what uses it is put."[358] A similar declaration adopted in Netherlands in 1795 stated that "everyone has the right to help to demand accountability from every Officer of public administration for the execution of his office."[359]

The nineteenth century and the beginning of the twentieth century signed a step back to Europe's history on transparency. The period between 1815 and 1944 witnessed so many events that changed the face of Europe. To mention just a few, some of these developments include the Industrial Revolution, territorial claims, redefining of state boundaries, de-colonialism and many independence wars, two World Wars, the rise, clash and demise of empires (Ottoman, Prussian, Austro-Hungarian, etc) and ideologies (such as communism, capitalism, fascism, Nazism), and political unrest.

It was only after World War two that Europe achieved political stability. The European Coal and Steel Community[360] began to unite European countries economically and politically. The six founders were Belgium, France, Germany, Italy, Luxembourg and the Netherlands.[361] In 1957, the Treaty of Rome created the European Economic Community (ECC).[362] Neither of these founding treaties included any provisions on transparency. Transparency gained popular appeal within the European Community from the early 1990s when it was seen as a useful device to combat claims of democratic deficit and complexity in the operations of the ECC.[363] However, on the state level, the situation was different. Sweden started a revolution of on ATI by modernizing its 1766 law in 1949[364]. Soon after, Finland followed with an autonomous regulation that was introduced in 1951, then Norway, Netherlands, and Austria passed legislation before the 90s.

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[358] See The Declaration of the Rights of Man 1789, <http://avalon.law.yale.edu/18th_century/rightsof.asp>.
[359] Declaration of the Rights of Man and the Citizen of Holland, Article 19, 1 January 31, 1795, <http://comparativeconstitutionsproject.org/wp-content/uploads/Netherlands_1795.pdf>.
[360] Treaty establishing the European Coal and Steel Community, ECSC Treaty. 18 April 1951.
[361] European Union, "The history of the European Union: 1945 – 1959", online: <http://europa.eu/about-eu/eu-history/1945-1959/index_en.htm>.
[362] Treaty establishing the European Economic Community, EEC Treaty - original text (non-consolidated version), 25 March 1957, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0023>.
[363] Birkinshaw, "FOI & Openness", supra note 2 at 189.
[364] Weibull, supra note 356.

4.3.2 EU integration and transparency – Pre-Regulation environment

In the late 1980s and early 1990s, the EU institutions were born out of a deep crisis of legitimacy that confronted the project of European integration.[365] As a response to the crisis, the European Parliament (EP) was among the first of the EU institutions to attempt to put transparency on the political agenda. Curtin and Meijers argue that on two occasions (1984, 1988), it called for "legislation on openness of government."[366] Despite these attempts, the principle of openness was only officially introduced by the Maastricht Treaty in 1992.[367] Declaration No 17 "On the Right of Access to Information"[368] was attached to the Treaty with a view to "strengthening the democratic nature of the EU institutions and the public's confidence in the administration."[369] Accordingly, it was recommended that the Commission submit to the Council a report on measures designed to improve public ATI available to the institutions. The Maastricht Treaty also signed the creation of an important EU institution, which would later become an advocate of transparency, the European Ombudsman. The Ombudsman can only make recommendations and, as a last resort, draw political attention to a case by making a special report to the EP. The effectiveness of the Ombudsman thus depends on moral authority.

Following the signing of the Maastricht Treaty, a series of political developments compelled the European politicians into action in the field of transparency. The Danish voters rejected[370] the Treaty on European Union (TEU)[371] in the June 1992 referendum[372] and a ratification vote in France, in September 1992, almost produced a second defeat.[373] The process of ratification of the TEU by the UK Parliament was prolonged and difficult,[374] while in Germany ratification was

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[365] Alasdair Roberts, "Multilateral Institutions and the Right to Information: Experience in the European Union" (2002) 8:2 European Public Law at 258 [Roberts, "Multilateral Institutions"].
[366] Curtin & Meijers, "The principle of open government", supra note 67 at 417.
[367] Treaty on European Union (Treaty of Maastricht) 7.2.1992, OJ C 191 of 29.7.1992, online: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:xy0026> [Treaty of Maastricht].
[368] Official Journal, C-191 of 29 July 1992.
[369] Ibid, at 1.
[370] European Data Protection Supervisor, "Public access to documents and data protection", European Communities 2005, at 6, online: <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07_BP_accesstodocuments_EN.pdf>.
[371] Treaty of Maastricht, supra note 367.
[372] Catherine Hoskyns, "Democratizing the EU: Evidence and arguments", in C. Hoskyns & M. Newman, eds, *Democratizing the European Union*, (Manchester: Manchester University press, 2000) 176-203 at 196 [Hoskyns].
[373] Neil Nugent, *The Government and Politics of the European Union*, (Palgrave, Basingstone, 1999) at 66 [Nuget].
[374] Stefano Fella, "A Europe of the peoples? New Labour and democratizing the EU", in C. Hoskyns & M. Newman, eds, *Democratizing the European Union* (Manchester: Manchester University press, 2000) 65-92 at 71 [Fella].

delayed for a year by an unsuccessful court challenge that claimed that the delegation of authority to EU institutions violated guarantees of democratic government in the German Basic Law.[375] In response to the Danish vote the EU promised in 1992 to "make the Community more open, to ensure a better informed public debate on its activities."[376]

As the history demonstrates, at the EU level, the need for transparency came as a response to a prevailing culture of secrecy in European politics, and the democratic deficit whose criticism had become commonplace.[377] As Héritier argues "The debate about transparency and access to information came about because of the perceived lack of transparency and openness in the complicated European decision-making processes."[378] A number of initiatives were taken to address the culture of secrecy. In the so-called Birmingham Declaration[379] on "A Community closer to its citizens", the Council engaged to more openness in the decision-making process. The Commission carried out a survey of national laws and practices. Subsequently, at the request of the European Ombudsman, other Community institutions and agencies introduced rules on access to documents (ATD).[380]

Pressure for transparency commitments increased in 1993 as negotiations for accession to the EU began with Sweden and Finland, two nations with strong traditions of governmental openness.[381] On the basis of Declaration No 17, the Commission and the Council adopted a "Code of Conduct on Access to Documents"[382], in which the two institutions committed themselves to providing "the widest possible access to documents"[383] - the Council[384] and the

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[375] Sverker Gustavsson, "Reconciling suprastatism and accountability: A view from Sweden", in C. Hoskyns & M. Newman, eds, *Democratizing the European Union* (Manchester: Manchester University press, 2000) 39-64 at 42 [Gustavsson].
[376] Declaration of the Birmingham European Council, 16 October 1992, online: <http://www.europarl.europa.eu/summits/birmingham/default_en.htm>.
[377] Bruce E. Cain, Patrick Egan, & Sergio Fabbrini (2003) "Towards more opened democracies: The Expansion of Freedom of Information Laws", in Cain, B., Dalton, R. & Scarrow, S. eds, *Democracy Transformed?* (Oxford: Oxford University Press) at 131 [Cain et al].
[378] Héritier, "Composite democracy in Europe", supra note 3 at 821
[379] See the so-called Birmingham Declaration, Annex 1 in Bulletin of the European Communities, n°10, 1992.
[380] Special report of 15 December 1997 by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/F/IJH), <http://www.euroombudsman.eu.int/special/en/default.htm>.
[381] John Lambert & Catherine Hoskyns, "How democratic in the European Parliament", in C. Hoskyns and M. Newman, eds, *Democratizing the European Union*, (Manchester: Manchester University press, 2000) at 180 [Lambert & Hoskyns].
[382] Code of Conduct concerning access to Council and Commission documents 93/730 [1993] OJ L340/41.
[383] Roberts, *Blacked Out*, supra note 84 at 174.
[384] Council Decision 93/731/EC on public access to Council documents OJ L 340/43, 31 December 1993,

Commission.[385] Later, the EP established new detailed procedures for obtaining ATD.[386] However, they pledged to provide public ATD for their documents, but not to the documents they received from other institutions. These decisions acknowledged that the Code of Conduct should be adopted and lay down more specific and detailed rules on access.[387] This move indicated that all three EU institutions were on the same page regarding their commitment to transparency and ATD.

The accession of Sweden and Finland in the EU in January 1995 added two voices for greater transparency.[388] Harden argues that "The entry of Sweden and Finland to the European Union in 1995 increased the pressure for greater transparency."[389] It is not accidental that with the accession of Sweden and Finland the debate on open decision-making in the EU gained momentum.[390] The potential for an erosion of Sweden's historic commitment to open government had been a major issue during the Swedish national debate on accession.[391] Both governments of Sweden and Finland added declarations to their accession agreements stating that access to official documents was a matter of "fundamental" importance.[392] In addition, Netherlands and Denmark increasingly objected to the secrecy surrounding the Council of Ministers, and were dissatisfied with the steps which the Council had taken[393] because "Meetings

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at 43.

[385] Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents OJ L 46/58, 18 February1994, at 58.

[386] European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, OJ L 263/27, 25 September 1997, at 27.; See also Paul Craig, *EU Administrative Law* (New York: Oxford University Press, 2012) at 357 [Craig].

[387]Andrea Biondi, "Access to Documents in the EU" (JuIy/August 1998) European Business Law Review at 221 [Biondi].

[388] Roberts, "Multilateral Institutions", supra note 365 at 259.

[389] Ian Harden, "The Revision of Regulation 1049/2001 on Public Access to Documents", (2009) 15:2 European Public Law 239-256 at 239 [Harden, "Revision of 1049"].

[390] See J. Peterson, (1995) "Playing the transparency game: consultation and policy-making in the European Commission" (1995) 73 Public Administration 473–92 [Peterson].; C. Grønbech-Jensen, "The Scandinavian tradition of open government and the European Union: problems of compatibility?" (1998) 5:1 Journal of European Public Policy 185–99 [Grønbech-Jensen].

[391] Gustavsson, supra note 375 at 39.

[392] Alasdair Roberts, "Supranational governance and the right to information: Experience in the European Union", Paper prepared for the Colloquium of the Transatlantic Consortium for Public Policy Analysis and Education Union, September 22, 2001, at 6. <https://spea.indiana.edu/tac/colloquia/2001/pdf/roberts%20paper.pdf> [Roberts, "Supranational governance"].

[393] D Curtin, "Betwixt and Between: Democracy and Transparency in the Governance of the European Union", in J Winter, ed, *Reforming the Treaty on European Union: The Legal Debate* (Kluwer, 1996) 95 [Curtin, "Betwixt and Between"]; D Curtin, "Citizens, Fundamental Right of Access to EU information: An Evolving Digital Passepartout?" (2000) 37 CMLRev 7 [Curtin, "Citizens"].

of the Council were secretive and minutes were not published. The Commission was perceived as a distant and remote bureaucracy.'[394] All four countries, Sweden, Finland, Netherlands and Denmark "formed an advocacy coalition pushing for more transparency", and they were referred to as "the Gang of four."[395] Upon accession, this Gang sought strategic and diplomatic ways to facilitate the emergence of transparency using preferences and persuasive power derived from their long experience with transparency practices. They proactively shaped the agenda, giving more visibility to transparency, despite many Member States' reluctance to increase transparency. The attitude among transparency-sceptic Member States was that "transparency and all that is for the birds, but if [the pro-transparent members] want it, they can have it."[396] Indeed, the pro-transparency coalition faced little opposition. The former EU Ombudsman, Jacob Söderman, argued that advocates for openness were aided by the plasticity of the concept in the EU. The legal recognition of a right to information was regarded as a corollary of the concept of "European citizenship."[397] Therefore, the capacity of EU member states to resist calls for transparency was restricted by their acknowledgement that citizens of member states were also "citizens of the Union." According to Roberts, the situation was ripen in the EU for the recognition of the right to ATD because:

> Europhiles could use the legal recognition of such right as evidence that the European citizenship has become more than an abstraction. Pragmatists …could promote transparency as a device for maintaining [economic] accountability….And Europhobes…could support a right to information as a check on the power of the decision-makers.[398]

Transparency in the EU advanced even more with the adoption of the Amsterdam Treaty[399] in 1997 which acknowledged a right of ATD.[400] It also embedded the right of ATD in the Article 255 of the EC Treaty. This article called for an adoption of an implementing regulation within

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[394] Craig, supra note 386 at 357
[395] Hillebrandt et al, supra note 29 at 11.
[396] Ibid.
[397] See for instance the Speech of Jacob Söderman, the European Ombudsman, 'The citizen, the rule of law and openness', at the European Law Conference, Stockholm, Sweden, 12 June 2001. <http://www.ombudsman.europa.eu/speeches/en/2001-06-12.htm>
[398] Roberts, "Multilateral Institutions", supra note 365 at 259.
[399] Treaty of Amsterdam, 2.10.1997, OJ C 340 of 10.11.1997, online: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:xy0026>.
[400] Article 45 of Treaty of Amsterdam. It added Article 191a to the EC Treaty which became Article 255 of the EC Treaty.

two years of its entry into force which would give public ATD to the EP, the Commission and the Council.

It is important to mention that at the time of the adoption of the Amsterdam Treaty, ten of fifteen Member States (see Table 5) had laws acknowledging a right of ATD.[401] The Advocate General of the Court of Justice of the EU (CJEU) has observed a strong convergence in national laws[402], which made agreement on a comparable policy for the EU institutions more probable. Roberts argued that the national attitudes towards transparency could be circumvented by the "availability of well-established procedures for delegated rule-making."[403] He noticed that the delegation of rule-making increased the chances for better transparency.

While preparing for the draft of the Regulation, pursuant to the Article 255 of the EC Treaty, the Commission proposed several provisions intended to limit ATD, such as the exclusion of texts for internal use, deliberations that could undermine the effective functioning of the Union or 'authorship rule'. In January 2001, the negotiations entered the last months before the official deadline laid down in the Amsterdam Treaty. The pro-transparency coalition occupied a relatively powerful position. Harden explains that "Sweden held the presidency, while the EP, the media and civil society were on its side, pressurizing negotiating parties to honor the commitment made in the Treaty."[404] In addition, the European Ombudsman and some national governments criticized the breadth and vagueness of the new exemptions.[405] As a result, most of the exclusions were eliminated. Regulation 1049/2001[406] was passed slightly after the deadline, on 30 May 2001.[407] The Regulation was preceded by 18 months of complicated negotiations.

Since the early 1990s, the EU institutions had started to develop independent transparency approaches, which included both formal rules *and* soft approaches. According to Bignami, it

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[401] Roberts, "Multilateral Institutions", supra note 365 at 269.
[402] Philippe Léger, Opinion of Advocate General in European Court of Justice Case C-353/99 P. Strasbourg: European Court of Justice. July 10, 2001.
[403] Roberts, "Multilateral Institutions", supra note 365 at 270.
[404] B. Bjurulf & O. Elgström, "Negotiating Transparency: The Role of Institutions", (2004) 42(2) Journal of Common Market Studies 249, at 263–265.
[405] Ian Harden, "Statement to meeting of the Council of Europe Group of Specialists on Access to Official Information"., Office of the European Ombudsman, Strasbourg, 22 February 2000.
[406] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145, 43.
[407] OJ L145/43 31 May 2001

took almost ten years to decide on Regulation 1049 "after a long, bitter set of negotiations"[408] which marked a substantial enhancement of the right of ATD held by the EU institutions. After the adoption of the Regulation 1049, all three EU institutions adopted their Rules of Procedures[409] according to the provisions of the Regulation.

At the same time that negotiations on the Regulation 1049 were taking place, The EU's history marked another milestone, the adoption of the *Charter of Fundamental Rights of the European Union.*[410] Article 42 of the Charter provides that the right of ATD belongs to any EU citizen or resident. This makes ATD a fundamental Treaty right (pending the entry into force of the Lisbon Treaty) since the TEU recognizes this status for all Charter rights[411]. The Charter represented an explicit attempt to elaborate upon the implications of European citizenship[412] which included the recognition of the ATD.

4.3.3 Post-Regulation environment

By enacting Regulation 1049, the EP and the Council had implemented the provisions of Article 255 of the EC Treaty. The legal basis did not extend to other institutions and bodies other than the EP, the Commission and the Council. Considering this as a weakness, the Council made the executive agencies to be entrusted with certain tasks in the management of Community programs subject to Regulation 1049.[413] Prior to that, the EP, the Commission and the Council adopted a Joint Declaration[414] in which they undertook to make the regulation applicable to agencies and similar bodies, and appealed to the other institutions and bodies to adopt similar

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[408] F. Bignami, "Three Generations of Participation Rights in European Administrative Proceedings" (2003) 11 Jean Monnet Working Paper (New York: NYU School of Law) at 11.
[409] The Council adopted a Decision on 29 November, 2001/840/EC, amending the Council's Rules of Procedure (OJ L 313, 30.11.2001, p. 40, repealing Decisions 93/731/EC, 2000/23/EC and 2001/320/EC); The Commission adopted a Decision on 5 December, 2001 2001/937/EC,ECSC,Euratom, amending its rules of procedure (OJ L 345, 29.12.2001, p. 94.); The EP adopted a Decision on 13 November, 2001, adapting its Rules of Procedure (OJ C 140 E, 13.6.2002, p. 120).
[410] Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ C 364/1, 18.12.2000 http://www.europarl.europa.eu/charter/pdf/text_en.pdf
[411] Article 6 of the Treaty on European Union (TEU) provides that "the Union recognizes the rights, freedoms and principles set out in the Charter of fundamental rights … which shall have the same legal value as the Treaties".
[412] Andrew Duff, "Toward a European federal society". In K. Feus, Ed. An EU Charter of Fundamental Rights (London: Federal Trust, 2000) 13-26.
[413] Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ L 11, 16.01.03, p. 11).
[414] OJ L 173, 27.06.2001, at 5.

rules voluntarily. Many institutions and bodies modified their internal rules to include the same elements as Regulation 1049. For instance, the European Central Bank (ECB), adopted a Decision on public access to ECB documents.[415] In addition, the Commission adopted a White Paper on Governance which initiated a second stage in the evolution of openness[416] because it placed "openness" alongside other "principles of good governance" (Article II), such as accountability and participation.

The EU was faced with another challenge when the French and Dutch rejected the proposed European Constitution[417] in hotly contested referenda in 2005.[418] The rejection demonstrated that the so-debated "democratic deficit" was deepened, meaning that the disconnection between the EU and its citizens had grown. As it was the case previously, the European Commission turned to accountability measures for relief. Thus, discussions on transparency in decision-making assumed greater salience. In March 2005, the EU Commission proposed the European Transparency Initiative (ETI) trying to address issues of lobbying and transparency in the EU decision-making. A Green Paper consultation on ETI was launched in May 2005 to discuss a reporting system that would apply to the Commission, EP and Council, and be easily accessed online by the public. The Green Paper began by stating that "The Commission believes that high standards of transparency are part of the legitimacy of any modern administration."[419] The ETI communication was published in March 2007 and the Commission announced a voluntary lobbying register in 2008.[420]

The recognition of ATD as a fundamental right in the EU was finally sanctioned by the Lisbon Treaty.[421] This treaty placed a new emphasis on transparency. Transparency was

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[415] European Central Bank, Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (2004/258/EC), OJ L 80/42, 18.03.2004. https://www.ecb.europa.eu/ecb/legal/pdf/l_08020040318en00420044.pdf

[416] White Paper on European Governance, COM (2001) 0428 final, OJ C 287, 12.10.2001. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0428

[417] See: A Constitution for Europe, http://europa.eu/scadplus/constitution/introduction_en.htm

[418] Lionel Beehner, European Union: The French & Dutch Referendums, Council on Foreign Relations, June 1, 2005. http://www.cfr.org/france/european-union-french-dutch-referendums/p8148

[419] Europa. (2012a). *Green Paper: The European Transparency Initiative.* Retrieved March 2, 2012, from http://ec.europa.eu/transparency/eti/docs/gp_en.pdf

[420]Alter-EU, The European Transparency Initiative and ALTER-EU. http://alter-eu.org/about/coalition

[421] Treaty of Lisbon, 13.12.2007, OJ C 306 of 17.12.2007. http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:xy0026

See also: P. Birkinshaw, "Transparency and Access to Documents" in P. Birkinshaw & M. Varney (eds), *The European Union Legal Order after Lisbon*, (The Netherlands: Kluwer Law International, 2010), at 252.

considered ancillary both to representative and participatory democracy (articles 10(3) and 11(2) TEU) and was, as such, at the democratic foundations of the Union. In addition, Article 15 of the TEU established that "in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible", and reiterated that "any citizen of the Union, and any natural or legal person residing or having its registered office in a member state, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium.". This recognition gave the right of ATD a new dimension. Not only it was considered a fundamental human right, but it stood at the core of the principles of good governance and participatory democracy.

As part of its ETI, the Commission also started a review of Regulation 1049, and adopted a proposal for a new regulation in April 2008.[422] The purpose was at achieving more transparency in legislation, and bringing the EU provisions into alignment with the Århus Convention.[423] The proposal triggered an intense debate amongst the EU institutions and advocates since it was considered controversial, and became mired in what had been referred to an "an institutional impasse."[424] The EP opposed the choice of a recast procedure of the regulation as well as some other amendments. It decided not to adopt a legislative resolution, as it considered that the dossier should be referred to the next parliamentary term. Hence, there was no formal position of the EP at first reading. Some of the most controversial issues of the proposal concerned: the definition of a 'document' [Article 3(a)] and the scope of application [Article 2(5),(6)]; the exception of legal advice provided by the legal services of the EU institutions [Article 4(2c)]; relation between the right of ATD and the right to personal data protection [Article 4(5)]; and Members States' documents and Member States' rights to restrict access [Article 5(2)].[425]

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[422] Eur-Lex. COM(2008)229: Proposal for a Regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission Documents. April 30, 2008 www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0229_/com_com(2008)0229_en.pdf

[423] Convention on Access to Information, public Participation in Decision-making and Access to Justice in environmental Matters, signed in Århus, Denmark, on 25 June 1998. Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention to Community institutions and bodies (OJ L 264, 25 September 2006, at 13.

[424] Statewatch, "The State of Play: Amending the Regulation on public access to EU documents - an „institutional impasse"" available at http://www.statewatch.org/news/2011/mar/06eu-access-regulation-state-of-play.htm

[425] Maja Augustyn and Cosimo Monda, "Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001", European Institute of Public Administration (EIPA), at 18. http://www.eipa.eu/files/repository/eipascope/20110912103927_EipascopeSpecialIssue_Art2.pdf

There has been some controversy over the proposed regulation and an ongoing disagreement between the Council and the EP. The latter has sought to make changes increasing rights of access, and the Council blocked them. Being "far from a 'marginal' political dossier," the recast of Regulation 1049 had attracted considerable political attention.[426] With the coming into force of the Lisbon Treaty in 2009, a central objective of the ongoing revision procedure had become to align the regulation with its requirements.[427] Some Member States used this process to re-evaluate the status quo, and to advocate a revised law that gives greater weight to other values, such as privacy and effective decision making. A Council minority, led by Sweden, did not tolerate a reform outcome that "rolled back" the existing arrangements.[428] With two groups of Member States advocating change in opposite directions, the process stagnated, and eventually led to a deadlock. Pending resolution of this matter, the Commission published an interim proposal in March 2011 to extend the scope of the Regulation to cover a range of other EU institutions.[429] This was the last action taken regarding the proposal. Regulation 1049/2001 is still under review.

To make the citizen's rights of ATD as effective as possible, the EU institutions obliged to provide public access in electronic form to a register of documents. The EP established a public register of EP documents in 1996, the Council launched such register in 1998[430], and the EU Commission in 2008. In the course of the ETI both, the European Commission and the EP, emphasized the possibility of a common register for all three European institutions. Consequently, an inter-institutional working group between the Commission and the EP was formed at the end of 2008 to prepare a joint register.[431] After a long period of negotiations, a

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[426] Heremans, "Public Access to Documents", supra note 31 at 3; F. Maiani, J.P. Pasquier and M. Villeneuve, ' "Less Is More"? The Commission Proposal on Access to Documents and the Proper Limits of Transparency', (2011) IDHEAP Working Paper, 6–7 [Maiani, Pasquier & Villeneuve, "Less Is More"].; Harden, "Revision of 1049", supra note 389.

[427] Heremans, "Public Access to Documents", supra note 31 at 11.

[428] Wobbing Europe, "EU: Swedish government announces fight against rolling back of EUwob", 20 May 2008. Online <http://www.wobsite.be/news/eu-swedish-government-announces-fight-against-rolling-back-eu-wob>.

[429] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents /* COM/2011/0137 final, March 23, 2011 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0137:FIN:EN:HTML

[430] 6423/1/98 REV 1.

[431] Craig Holman, "Lobbying Reform in the United States and the European Union: Progress on Two Continents. Hg. v. Public Citizen" (2009) at 11. Online <http://www.citizen.org/documents/Lobbying-Reform-in-the-US-EU.pdf>.

compromise was found, so that an inter-institutional agreement was signed on 23 June 2011, which was also the starting point of the common "Transparency Register"[432]. This is a voluntary system, where individuals and organizations can register and then automatically sign a code of conduct. The goal is to improve citizen participation practices, and monitor organizations and individuals engaged in the EU policy making and implementation.[433] Building upon the existing registration systems, the Transparency Register provides citizens with a "one-stop shop" to help them exercise their right to know.[434] The Register enables the registrants to commit themselves to provide accurate and updated information on the entity they represent.[435] However, the voluntary nature of the Register has drawn considerable criticism as being ineffective and providing only selective information.

The right of ATD of the EU citizens was enhanced by the introduction of the European Citizens' Initiative (ECI) expanding the scope of participation rights.[436] ECI's legal basis is found at the Article 11(4) TEU.[437] This initiative was adopted by the EP and the Council on February 16, 2011. It allows EU citizens to participate directly in the development of EU policies by calling on the European Commission to draft legislative proposals. Alemmano referred to ECI as the first transnational, direct democratic tool in history that clearly provides civil society with a new venue of access to EU action.[438]

It is evident that the EU institutions have played a major role on the establishment, development and consolidation of a transparency principle and a right of ATD in the EU. Roberts argued that three institutions are important to the building of the EU's architecture of transparency: the Parliament, the Office of the Ombudsman (EO), and the CJEU.[439] However,

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[432] European Parliament; European Commission (2011): Interinstitutional Agreements.
Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organizations and self-employed individuals engaged in EU policy- making and policy implementation. Brussels: Official Journal of the European Union.
[433] [2011] OJ L191, p. 29.
[434] Communication – on European transparency initiative – A framework for relations with interest representatives COM (2008) 0323 final.
[435] Alberto Alemmano, "Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy" (2014) European Law Review at 10, online: <http://ssrn.com/abstract=2303644> [Alemmano, "Unpacking", supra note 435
[436] M. Dougan, "What are we to make of the citizens' initiative?" (2011) 48 Common Market Law Review 1807.
[437] Also, Article 24 of the TFEU provides for provisions of citizens' initiatives as well as Regulation 211/2011 on the citizens' initiative [2011] OJ L65/1 [Dougan].
[438] Alemmano, "Unpacking", supra note 435 at 11.
[439] Roberts, "Multilateral Institutions, supra note 365 at 272-273.

they have been part of a larger coalition that has pushed for institutional and policy changes on openness and transparency. I will scrutinize the role of the EO and the CJEU in the next chapters. Three EU institutions have been important in the debates around transparency in the EU – all subjects to the Regulation 1049 - the EP, the Council and the Commission.

The EP has been from the start, one of the main catalysts for transparency, emphasizing the need for transparency in addressing the "democratic deficit". The authority of the Parliament has grown substantially after the adoption of the TEU and Amsterdam Treaty. As important as the growth in formal powers has been the emergence of an institutional culture that emphasizes Parliament's role as a counterweight[440] or a "watchdog" over the Council and the Commission.[441] The EP has lobbied for the introduction of legal safeguards on transparency for years. Indeed, the debate on lobbying and transparency began in the EP in 1989[442] with a regulation of financial interests of Members of the EP. In 1991, the EP introduced a proposal for a code of conduct, which failed.[443] It re-introduced it again three years later, and finally established a code of conduct and a voluntary lobbyist register in 1996, which got a *de facto* mandatory character later on.[444] The Council and the Commission followed suit.

The European Council has traditionally been "cloaked in secrecy."[445] However, the crisis of legitimacy in the early 90s and the co-decision procedure played a role in changing this tradition. The "Declaration on the Right of Access to Information" (annexed to the Treaty of Maastricht in 1992) was the first explicit link between transparency and democracy on the part of the European Council. Maastricht introduced the co-decision procedure, according to which the EP and the Council shared the responsibility of lawmaking in the EU. The co-decision meant that the Council was bound in its decisions by the position of the EP which was a proponent of

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[440] See Richard Corbett, Francis Jacobs, et al., The European Parliament (London: John Harper Publishing, 2000) at 5-6 [Corbett, Jacobs, et al]; Lambert & Hoskyns, supra note 381 at 93-116; Neill Nugent, supra note 373 at 215-220.
[441] Ian Harden, "Statement to meeting of the Council of Europe Group of Specialists on Access to Official Information", Office of the European Ombudsman, Strasbourg, 22 February 2000 [Harden, "Statement"].
[442] Michelle Cini, "The Limits of Inter-Institutional Co-operation: Defining (Common) Rules of Conduct for EU Officials, Office-holders and Legislators, Paper prepared for the Conference of the Jean Monnet Multi-lateral Research Group DEUBAL, Leiden University, 3-4 November 2011, at 4. Online <http://www.ces.ufl.edu/files/pdf/DEUBAL/workshops/2011/Cini_DEUBAL_110311.pdf> [Cini, "The limits"].
[443] Michelle Cini & Nieves Pérez-Solórzano Borragán, "Ethical Governance and Lobbying in the EU Institutions", Paper presented at the European Union Studies Association Conference, Boston, 3-5 March 2011, at 8. Online <http://www.euce.org/eusa/2011/papers/5f_cini.pdf> [Cini & Borragán].
[444] Raj Chari & Daniel Hillebrand O'Donovan, "Lobbying the European Commission: Open or Secret" (2011) 11 Working papers series in Economics and Social Sciences, at 5 [Chari & O'Donovan].
[445] Curtin, "Betwixt and Between", supra note 393 at 104.

transparency. In an attempt to respond to the concerns raised in the Danish rejection of Maastricht [446] , the European Council re-iterated its dedication to ensure a better informed public debate on EC activities. However, a more serious attempt on acknowledging and addressing a "democratic deficit" in the EU was only made in 2005. The Council announced that it would open its meetings to a wider audience on all the issues that were decided under the co-decision procedure. This move was criticized by the European Ombudsman, who urged the Council to open its doors to all meetings that deal with concrete policy measures.[447]

The recast of the Regulation 1049, marked a step backwards in the Council's attitude towards transparency. The Council was criticized of restricting the right of the ATD while the EP tried to block its proposal. The recast procedure revealed a strong opposition on transparency between the EP and the Council, which is to date keeping the Regulation at a stalemate. The EU treaties altered at some degree the legal and political parameters of Council transparency policies[448], however, the Council's tolerance towards transparency is declining. A majority has formed in favor of a more conservative policy (supported by the UK, France), and opposed by the "Gang of Four" (Sweden, Finland, Denmark, the Netherlands).[449] This development shows that the initial usage of a language that brought forward the normative dimension of transparency has subsided to a more narrow conception of transparency. It demonstrates that the historical traditions on transparency, and institutional culture deeply affect transparency trajectories.

The European Commission's initial position on transparency was similar to that of the Council. However, under the influence of the Treaty of Maastricht, the Commission seriously engaged with the Council in the formulation of the common Code of Conduct about transparency. Later on, in the 2000 *Discussion Paper*, the importance of transparency and a better information policy was underlined in order "to improve and strengthen the existing relationship between the Commission and the NGOs"[450], with the purpose to foster participatory

[446] Para. 2 of the Birmingham Declaration (European Council 1992).
[447] Press Releases No. 2/7/13, 2006, online <http://ombudsman.europa.eu/release/en/default.htm>.
[448] Maiani, Pasquier & Villeneuve, "Less Is More", supra note 426 at 5.
[449] Hillebrandt et al, "Transparency in the EU", supra note 29 at 19.
[450] European Commission, "Commission Discussion Paper - The Commission and the Non-governmental Organizations: Building Stronger Partnership", 18 January 2000 at 2, online <http://ec.europa.eu/transparency/civil_society/ngo/docs/communication_en.pdf>.

democracy.[451] In 2002, the Commission published a communication[452] to "encourage more involvement of interested parties through a more transparent consultation process."[453] The ETI [454] announced in 2005 by the Commissioner Kallas, introduced the "interest representation" with which the Commission eliminated the negative connotation of lobbyism and simultaneously broadened the participatory concept. Interest representation now includes all "activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions."[455] These developments show a progress in the Commission's position towards transparency. It has given special consideration to the issues of participatory rights and accountability, which stand at the core of the transparency principle.

4.4 Comparisons and conclusions

Looking back at how transparency and the right of ATI/ATD have developed over the years in Canada and the EU, one can notice a few common themes, but also some differences. First, the introduction of an ATI/ATD legislation in both jurisdictions has originated in the provinces /members states, and was later picked by the federation/Union. By the time Canada introduced its *ATIA*, three other provinces (New Brunswick, Nova Scotia and Quebec) had already done so. In the EU, before the adoption of *Regulation 1049*, nineteen of the countries which are now members on the EU, had previously passed laws on ATD. Therefore, one can argue that the right of ATI was born out of national aspirations and then travelled to the federal level. The public was already informed and somehow familiarized about the importance of such laws by the national experiences, achievements and failures on ATI systems. The terrain was already explored by the advocates to bring the discussions on ATI at the forefront of the political battles, and push for changes at federal/Union level. The national debates on ATI had broken the taboo of government secrecy and paved the way to the introduction of an ATI legislation beyond national/provincial borders. The national experiences seem to have facilitated the discussions and

[451] Ibid at 4.
[452] European Commission, "Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission", 11 December 2002, online <http://ec.europa.eu/governance/docs/comm_standards_en.pdf>
[453] Ibid at 3.
[454] The European Transparency Initiative and ALTER-EU, http://alter-eu.org/about/coalition
[455] European Commission, "Communication from the Commission. Follow-up to the Green Paper 'European Transparency Initiative", (Brussels: European Commission, 2007) at 3.

prepared the terrain for a broader ATI system. This is the case especially at the EU, where national experiences of the Nordic countries played a crucial role in the shaping of an ambitious agenda about transparency and ATD. It is not accidental that with the accession of Sweden and Finland in the EU in 1995, the principle of transparency was further developed and the recognition of a right to ATD entered a new dimension.

Second, the developments in both jurisdictions demonstrate that the culture of the government and historical traditions have a major influence in approaches towards transparency. The introduction of an ATI legislation, but especially its implementation strongly relates to the institutional culture of those responsible for giving life to an ATI right. Pasquier and Villeneuve highlighted that cultures of transparency and secrecy are rooted in historical traditions and traditional state-society relations. Institutional rules result from historical trajectories[456]. In Canada, the history demonstrated a persistent culture of secrecy which has played a crucial role in the drafting of the law (changing it at the last phases), the designing of the legal requirements and coverage (leaving out many institutions), the implementation (constant undermining of the rights it upholds) and the improvements of the law (leaving the *ATIA* unchanged for more than three decades). The political system in Canada, which is rooted in the principle of ministerial responsibility, allows for little oversight on government actions. Especially in the case of a majority government, which occupies most of the seats in Parliament, the legislature transforms into a tool in the hands of the government of the day. Having no strong political opposition, and controlling two branches of the government (legislature and executive) with a strong party discipline, breeds a culture of secrecy. As Savoie argued "The government of Canada has stood firm on the doctrine of ministerial responsibility, the anonymity of career officials, and the traditional bargain between politicians and career officials."[457]

In the EU, the situation is more complicated since there is a mix of political cultures and traditions. The introduction of Regulation 1049 confirmed the existence of such diversity and revealed a clash of political cultures between member states. The approach adopted in Regulation 1049 corresponded to the Nordic concept of public ATD. A coalition of Nordic countries, the so-called "Gang of four", made ATD one of the conditions for their accession in

[456] Pasquier & Villeneuve, "Organizational Barriers", supra note 30 at 157.
[457] Savoie, *Breaking the Bargain,* supra note 280 at 60.

the EU, and pushed strongly for it after the accession, bringing with them their home traditions of transparent government. Some scholars spoke about a demarcation between the "protestant North" – Nordic countries with strong traditions of governmental openness – and the "Catholic South" – nations with étatist political cultures in which political executives and bureaucrats are accustomed to greater power and secrecy.[458] A survey conducted by Statewatch[459] in 2000 looked at the refusals of the EU governments to give ATD. The survey showed a clear divide: Germany, France, Italy, Austria, Belgium, Portugal, Spain, Luxembourg and Greece consistently opposed the release of EU documents, while Denmark, Sweden and Finland have consistently supported access on appeal. Three other member states, Netherlands, UK and Ireland have supported them in some appeals. As the survey determined there was a clear split between the EU countries on their approach to ATD. However, this diversity created a positive atmosphere for a healthy discourse on transparency and led to the incorporation of transparency rules in treaty provisions.

Third, circumstances were important for the timing of the ATI legislation in both jurisdictions. This means that the debates on ATI emerged and developed as a result of other forces outside the government, and not because of government inspired policies. The reasons for adopting an ATI law at a specific point in time are related to both national and international developments. In Canada at the time that the idea of ATI was emerging, there were many social movements dominating the Canadian political arena, all raising concerns about the workings of the government and demanding participatory rights. The *ATIA* was a promise made at an electoral campaign, which meant it had a highly political connotation. In addition, when the debate on ATI was heating, there was a similar bill adopted in the US, and later in Australia and New Zealand. The Canadian *ATIA* was strongly influenced by the introduction of a FOIA in the neighboring country, and other countries in the Commonwealth. Some scholars attribute *ATIA*'s success to the American influence, among other things.

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[458] Thomas Jansen, "European identity and the identity of Europe", in T. Jansen (ed.), Reflections on European Identity, European Commission Forward Studies Unit, (Brussels, 1999) 27-36 at 33 [Jansen]; Larry Siedentop, Democracy in Europe, (Penguin Press, 2000) [Siedentop].

[459] Statewatch, "Survey shows which EU governments back openness, which do not", (2000) Statewatch news online <http://www.statewatch.org/secret/confirmtable.htm>.

In the EU, the timing was very important for an elaboration of the principle of transparency and the establishment of a right of ATD. Transparency and ATD in the EU were born out of a serious crisis of legitimacy. The EU was initially established as an elitist project, with six powerful countries deciding to join an economic partnership. For many years, the European integration failed to raise the basic question of its policy legitimacy. Popular resistance to integration was often expressed as a complaint about the secretiveness of the EU institutions. To address this culture of secrecy the Maastricht Treaty emphasized transparency as an important value.[460] Persistent claims of a democratic deficit in the EU, fueled by the initial rejection of the Maastricht Treaty in the 90's and of the European Constitution in 2005, placed the goal of increasing transparency on top of the EU agenda as a solution to the "democratic deficit" problem. Subsequent treaty provisions (such as Amsterdam and Lisbon), Charter status recognition, and Regulation 1049 were a response to the EU crisis of legitimacy.

Fourth, there is recognition for a need to change the legal framework on transparency and ATI, but political compromise seems impossible in both jurisdictions. This means that beside the recognition of a right of ATI, it still remains a highly contested area which heavily depends on government politics. Both the *ATIA* and Regulation 1049 have been lingering for years in government offices or parliamentary Committees without any success. However, the situation is worse in Canada which had problems with the law from the beginning. Proposal for change were made for the *ATIA* soon after its adoption. From 1982, the year the *ATIA* was passed, it has not changed significantly. There have been numerous parliamentary studies and reports analyzing the *ATIA* and its requirements, all of which have reached the same conclusion: the law is outdated and badly in need of an overhaul. Unfortunately, all of these calls for reform have been ignored by federal administrations. Indeed, apart from a few minor changes, some of which actually served to further limit the disclosures required by the *ATIA*, the law remains very similar to what it was 30 years ago.

Regarding Regulation 1049, proposals for change started in 2008, soon after the adoption of the Lisbon Treaty to align the Regulation with the Treaty requirements. Strong positions between

[460] S Peers, "From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU", in V Deckmun (ed), Increasing Transparency in the European Union (Maastricht EIPA, 2002) [Peers]; A Tomkins, "Transparency and the Emergence of a European Administrative Law" (1999-2000) 19 YBEL at 217 [Tomkins].

the EP and the Council have caused stagnation in legislative advancements. The recast procedure of the Regulation is stuck in a political deadlock with no progress for almost ten years with a highly polarized political environment. On the one side, the EP advocates for more transparency, and on the other side, the Council and the Commision ask for sacrifices on the right of ATD in favour of other rights (such as data protection).

Fifth, while paying attention to the language used in the debates that preceded, accompanied, and followed the introduction of the ATI laws in Canada and the EU, I notice some differences. First, in Canada, the terms "transparency" and "openness" have been somehow foreign to the legal framework on ATI. The discussions at the initial phase of the *ATIA*'s adoption, and later in the proposals for amendments, seem to have bypassed transparency as a notion and as a principle. Only after 2000, transparency and openness appear in the debates of ATI proponents in Canada. The ICC Reid and some of the private Member bills (Bryden, Martin and Trudeau) have included transparency in the language of their proposed *ATIA*. The transparency vocabulary was then picked up by the government which in 2011 announced its commitment to transparency and openness. Part of this commitment was the OGP membership.

At the EU, the discourse on ATI was more focused on transparency as a value, and as a panacea in addressing the democratic deficit. The need for transparency came as response to a prevailing culture of secrecy in European politics. However, there has been a shift in the politics of transparency in the EU. From an internally regulated "transparency as communication",[461] the policy has shifted in the direction of "transparency as access"[462], as enforced not only by the pro-transparent Member States, but also by external actors, such as the EP, the CJEU and the EO. This is the second difference between the Canadian and the European framework - transparency is closely related to the right of ATD. This right is viewed as a way of connecting the citizens and the EU institutions and a means of stimulating a more informed and involved debate on European policy. Therefore, because of the importance of the right of ATD, it gradually gained a constitutional status. Hence, at the EU we have a fundamental right discourse, which is not existent in the Canadian legal debates. In Canada, the debate is still focused on ATI as a means

[461] Hillebrandt et al, "Transparency in the EU", supra note 29 at 17.
[462] Grønbech-Jensen, supra note 390 at 187.

to ensure information, and not as a right worth of Charter protection. This difference is my preoccupation throughout this project.

Sixth, another difference noticed in the historical development of ATI relates to the different actors engaged in the deliberations and decision-making. While government institutions in both jurisdictions have initially been hostile towards the idea of transparency, the Canadian counterparts have been more persistent in their opposition. The executive branch of the Canadian government has been more inclined to resist openness and transparency. In fact, the adoption of the *ATIA* was the result of decades of discussion and attempts, going back to 1960s, when a private member's bill seeking to recognize the public's right to access government records was read for the first time. This bill provided the catalyst for further passionate debates that led to other persistent attempts in a span of twenty years to the adoption of the *ATIA.* All those Bills were private members bills, which means the Parliament of Canada was amongst the early advocates who prepared the ground and pushed for the adoption of the *ATIA.* Later, reports from the Standing Committee of Ethics were supportive of statutory changes. In 2004 a new Parliamentary Committee on Access to Information, Privacy and Ethics was formed and held hearings. In 2006, the Commission investigating the "sponsorship scandal" also recommended many changes based on the ICCs recommendations.[463] However, changes in the *ATIA* have not been substantial because of the opposition of the government of the day. One can say that the right of ATI emerged and developed as an outsider of the government. It only made it to the political agenda, not because the government was fond of the idea - it only came as an electoral promise and the perseverance of the MPs and other actors. I would label the Canadian approach to ATI a bottom-up approach.

In the EU, the situation looks a bit different. Although the EU institutions have been accused for acting in secrecy, debates around transparency and ATD seems to have engaged them actively. All three main institutions in the EU have been preoccupied with addressing the democratic deficit in the EU, and have compromised to promote transparency and ATD as a mean to solve legitimacy problems. This does not mean that all three institution were active supporters of the idea of transparency, but they recognized its necessity and value for the

[463] See Alasdair Roberts, "Two Challenges in Administration of the Access to Information Act", Commission of Inquiry into the Sponsorship Program and Advertising Activities, Restoring Accountability - Phase 2 Report. February 2006 [Roberts, "Two Challenges"].

realization of the EU project – the EU integration. Three EU treaties altered the legal and political parameters of Council transparency policies[464], the Maastricht, Amsterdam, and Lisbon. Frequent treaty amendment processes can be regarded as a type of institutional catalyst. Changing institutional structures in the EU meant that the Council in its internal negotiations increasingly had to anticipate the preferences of other institutions.

Just like in Canada, the EP has played the most important role to uphold, promote and expand a right of ATD in the EU. The strengthened role of the EP that resulted from the Maastricht and the Amsterdam Treaties meant that it could increasingly exert political pressure on the Council. During the negotiations leading up to Regulation 1049, the EP for the first time acted as a co-legislator with direct influence on the Council's internal transparency rules. Again, the EP's role was evident in the recast procedure of Regulation 1049. The Commission proposed several provisions intended to limit the right of ATD, but was faced with the opposition of the EP, and other supporters. In the EU, attempts to limit ATD were unsuccessful due to the persistence from EU institutions, national government and NGOs. Such opposition was weak or absent in Canada.

Below are the two tables that provide dates regarding ATI legislation enactment in Canada and the EU in both provincial/Member states and federal/Union level.

Table 1: Canadian statutes on ATI/FOI at the federal and provincial level.

Jurisdiction	**Name of statutes**	**Dates**
Federal	Access to Information Act / Privacy Act	1983 / 1983
1.Alberta	Freedom of Information and Protection of Privacy Act/ Personal Information Protection Act	1996 / 2003
2.British Columbia	Freedom of Information and Protection of Privacy Act/ Personal Information Protection Act	1993 / 2003
3.Manitoba	Freedom of Information and Protection of Privacy Act	1997
4.New Brunswick	Right to Information Act /	1978 /

[464] Maiani, Pasquier & Villeneuve, "Less Is More", supra note 426.

	Protection of Personal Information Act	1998
5.Newfoundland and Labrador	Access to Information and Protection of Privacy Act	2002
6.Northwest Territories	Access to Information and Protection of Privacy Act	1994
7.Nova Scotia	Freedom of Information and Protection of Privacy Act	1977, 1993
8.Nunavut	Access to Information and Protection of Privacy Act	1994
9.Ontario	Freedom of Information and Protection of Privacy Act	1988
10.Quebec	Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information	1982
11.Saskatchewan	Freedom of Information and Protection of Privacy Act	2002
12.Yukon Territory	Access to Information and Protection of Privacy Act	1996
13.Prince Eduard Island	Freedom of Information and Protection of Privacy Act	2001

Source : Table drawn by the author with information from the Department of Justice http://justice.gc.ca/eng/trans/atip-aiprp/provincial.html, Right2Info. http://www.right2info.org/laws/#section-13 and websites from the Access to Information and Privacy Commissioners.

Table 2: The EU and the Member State legislation on ATI/FOI

Jurisdiction	**Name of legislation**	**Dates**
EU	**Charter of Fundamental Rights** Regulation 1049 Data Protection Regulation	 2001 / 1995
1. Austria (member 1995[465])	Federal Law on the Duty to Furnish Information / Data Protection Act	1987 / 2000
2. Belgium (member 1958)	**Constitution**	1994, 2000/

[465] Note that the information about accession dates is drawn from: European Union, EU member countries. http://europa.eu/about-eu/countries/member-countries/

	Law on the right of access to administrative documents held by federal Public Authorities Act on the Protection of Privacy in Relation to the Processing of Personal Data	1992, 1998
3. Bulgaria (member 2007)	**Constitution** Access to Public Information Act / Personal Data Protection Act	 2000/ 2002, 2006
4. Croatia (member 2013)	**Constitution** Act of the Right of Access to Information	2003, 2013
5. Cyprus (member 2004)	Draft Bill on Access to Information	2013
6. Czech Republic (member 2004)	**Charter of the Fundamental Rights and Freedoms** Law on Free Access to Information / On Protection of Personal Data	 1999 / 2000
7. Denmark (member 1973)	Access to Public Administration Files Act on Processing on Personal Data	1985 / 2000
8. Estonia (member 2004)	**Constitution** Public Information Act / Protection Data Protection Act	 2000/ 2007
9. Finland (member 1995)	**Constitution** Act on the Openness of Government Activities / Personal Data Act	 1951,1999/ 1999
10. France (member 1958)	Law on Access to Administrative Documents / Data Protection Act	1978 / 1978
11. Germany (member 1958)	Federal Freedom of Information Act	2005
12. Greece (member 1981)	**Constitution** Law regulating the relationship between state and citizens Law on the Protection of Individuals with regard to the Processing of Personal Data	1986/ 1997

13. Hungary (member 2004)	**Constitution** Act on the Freedom of Information by Electronic Means Act on the Protection of Personal Data and the Publicity of Data of Public Interest	2005 / 1992
14. Ireland (member 1973)	Freedom of Information Act Data Protection Act	1997/ 1998
15. Italy (member 1958)	Law on Access to Administrative Documents / Data Protection Act	1990 / 1996
16. Latvia (member 2004)	**Constitution** Law on Freedom of Information Personal Data Protection Law	 1998 / 2000
17. Lithuania (member 2004)	**Constitution** Law on Provision of Information to the Public / The Law on Legal Protection of Personal Data	 1996, 2000/ 2003
18. Luxembourg (member 1958)	Draft Law on Access to Information	1999-2000
19. Malta (member 2004)	Freedom of Information Act	2008
20. Netherlands (member 1958)	**Constitution** Act on Public Access to Government Information Personal Data Protection Act	 1978 / 2000
21. Poland (member 2004)	**Constitution** Law on Access to Public Information Act on the Protection of Personal Data	 2001 / 1997
22. Portugal (member 1986)	**Constitution** Law of Access to Administrative Documents Act on the Protection of Personal Data	 1993 1998
23. Romania (member 2007)	**Constitution** The Law Regarding the Free Access to the Information of Public Interest	 2001 2001

	Law for the Protection of Persons Concerning the Processing of Personal Data and Free Circulation of Such Data	
24. Slovakia (member 2004)	**Constitution** Act on Free Access to Information / Act on Personal Data Protection	 2000 2002
25. Slovenia (member 2004)	Act of Access to Information on Public Character / Personal Data Protection Act	2005 2004
26. Spain (member 1986)	**Constitution** Law on Transparency, Access to Information and Good Governance Law on the Protection of Personal Data	 2013 1999
27. Sweden (member 1995)	**Constitution** Freedom of the Press Act, Personal Data Act	 1949, 1999 1998
28. The UK (member 1973)	Freedom of Information Act / Data Protection Act	2000 / 1998

Source: Table drawn by the author with information from the 'Global Network of Freedom of Information Advocates, <http://www.freedominfo.org/regions/europe/united-kingdom/>, Legislation on line. http://www.legislationline.org/topics/country/53/topic/3, Right2Info http://www.right2info.org/laws/#section-13, and websites from the Member States.

CHAPTER 5: LEGAL FRAMEWORK OF TRANSPARENCY AND ACCESS TO INFORMATION

It is essential to analyze the access to information laws in Canada and the EU to understand their purpose, requirements, principles and exemptions. Legal provisions have direct consequences on the application of a right to ATI in practice. Many scholars have argued that while the law itself does not fully determine the availability of information, access laws are nonetheless an important contributor to transparency. Kasuya provides a comparison - having a legal guarantee to ATD is analogous to installing a fire alarm. The device's usefulness is only realized when there is a fire. At normal times, the value of the fire alarms is not noticed, so as the transparency instruments.[466] Therefore, the study of ATI could not be complete without the assessment of the law itself.

Both Canada and the EU have passed legislation to protect the right of ATI. This chapter explores the law passed in both jurisdictions with a special attention to the implications of the principles they endorse, and the place they hold in the hierarchy of a broader legal framework. It also looks at two case studies, one in each jurisdiction, namely Ontario as one of the provinces in Canada, and Albania as one of the prospective members in the EU. These case studies are chosen because of their contrast in legal provisions with the constituency to which they belong. National-federal contrasts on ATI legal requirements demonstrate the dynamics of ATI rights and the factors that contribute to those dynamics. I look especially at the purposive sections of the acts in the two jurisdictions and case studies to understand what they imply, what the connection is between ATI and broader principles like transparency and openness, what they say about the intentions of the legislatures and inspirations of the acts, and what are the shortcomings of legal requirements.

Before exploring ATI laws in the jurisdictions of study, I first have a look at the international legal framework on transparency and ATI. The purpose is to understand the international status

[466] Yuko Kasuya, "Democracy and Transparency: Enacting the Freedom of Information Acts around the World", Paper prepared for delivery at the International Transparency Conference, June 10-12, 2012, Utrecht, the Netherlands, at 7.

of the right of ATI and the principles that guarantee such status, and study how Canada and the EU are upholding international obligations.

5.1 International legal framework on transparency and access to information

Internationally, ATI is considered a fundamental human right. Many countries in the world explicitly protect ATI in their constitutions.[467] According to Darbishire, 89 of the world's 98 ATI laws recognize that the right may be exercised by "everyone".[468] However, there are countries that limit this right to citizens and residents only, such as Canada, Malta, and Turkey.[469]

Under the UN legal framework the right of ATI is protected as part of the wider right of freedom of expression. The UN Universal Declaration of Human Rights[470] recognizes the freedom of expression and the right to information in article 19. This article identifies ATI as the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." Similarly, the International Covenant on the Civil and Political Rights[471] (ICCPR) in paragraph 2 of article 19 recognizes the right to information as freedom to seek, receive and impart information and ideas of all kinds and by any means, but with limitations for privacy and national security. Canada signed the International Covenant on the Civil and Political Rights in 1976, while Albania did so in 1991[472].

The UN Human Rights Committee has specifically confirmed[473] that ATI is part of an obligation which falls upon: all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level that– national, regional or local – are

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[467] See Right2Info, Constitutional Protection of the Right to Information. <http://www.right2info.org/constitutional-protections-of-the-right-to>. According to it 59 countries include a right to ATI in their constitutions.
[468] Helen Darbishire, "Is Transparency Working", In Tarlach McGonagle and Yvonne Donders, Ten Challenges for the Right to Information in the Era of Mega-Leaks (ed.). Chapter prepared for and published in: The United Nations and Freedom of Expression and Information Critical Perspectives, June 2015 at 13.
[469] Global Right to Information Rating, 'Country data', <http://www.rti-rating.org/country-data>. Even Malta and Turkey allow for some limited rights for non-citizens.
[470] United Nations, Universal Declaration of Human Rights, General Assembly Resolution 217A, 10 December, 1948. <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>.
[471] Office of the High Commissioner of Human Rights, International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 16 December, 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.
[472] Office of High Commissioner for Human Rights, 'Status of Ratification', <http://indicators.ohchr.org/>
[473] Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III

in a position to engage the responsibility of the State party.[474] In 1999, the UN Human Rights Committee expressed the view in Gauthier v Canada that Article 19, read together with Article 25[475] of the ICCPR "implies that citizens, in particular through the media, shall have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members."[476]

The UN framework conceptualizes ATI as a right to exchange ideas, not simply information, which is a much broader understanding. This conception gives the right of ATI another dimension, beyond the traditional legal understanding. This dimension of ATI is elaborated in the Habermas discursive theory of law, and to a certain degree in the Pateman's theory of participatory democracy. I expand on this conception of ATI because it provides strong arguments to consider ATI a fundamental human right.

Part of the UN legal framework on ATI is also the so-called Aarhus Convention.[477] It prescribes the sharing and free public access to environmental information amongst 47 parties[478] in Europe and Central Asia. Most of the 46 signatory countries in this Convention fulfill their Aarhus obligations through national FOI laws. Albania ratified the Convention on 27 June 2001, and the EU ratified it on 17 February 2005[479]. Yet, there is no North American equivalent to such a treaty, so Canada is not a Convention party.

Internationally, the process of consecration of ATI as a fundamental right culminated in the Convention on Access to Official Documents[480]. This Convention, adopted by the Council of

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[474] UN Human Rights Committee General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 7.
[475] This article states: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.'
[476] *Gauthier v Canada* (633/1995), Merits, CCPR/C/65/D633/1995 (1999).
[477] United Nations Economic Commission for Europe (UNECE), Convention on Access to Informormation, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998. http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[478] UNECE, 'Parties to the Aarhus Convention and their dates of ratification'. http://www.unece.org/env/pp/aarhus/map.html
[479] Ibid.
[480] Council of Europe, Convention on Access to Official Documents, CETS No. 205, 18.06.2009. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680084826

Europe, represents the first internationally binding instrument recognizing a general right of access to official documents held by public authorities. The Convention sets forth the minimum standards to be applied in the processing of requests for access to official documents. It provides in Article 2, that parties shall "guarantee the right of everyone, without discrimination on any ground, to have access, on request to official documents held by public authorities." None of the countries in study has signed or ratified this Convention. However, Robert Marleau, then-ICC supported the Convention by saying that it "is an important initiative aimed at developing an international treaty on the right to information."[481]

5.2 The Canadian legal framework on transparency and access to information

In Canada, there is no specific legislation that deals with transparency, but separate provisions directly or indirectly linked with transparency can be traced in many laws, especially those that regulate the functioning of government bodies. In 2006, the Parliament passed the Federal Accountability Act (FAA)[482] that deals among others with "conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability."[483] FAA is important because not only is an attempt to keep the government accountable, but also because it amended some parts of the *ATIA* in a significant way.

Another statute, the *Canada Evidence Act*[484] (CEA) limits the application of the *ATIA* since it constitutes the statutory means for safeguarding Cabinet confidentiality. CEA enables the Cabinet to establish a regime which prevents the disclosure of information consisting of confidences of the Queen's Privy Council for Canada. Section 39 of CEA sets out a definition of "a confidence" and outlines a list of documents that can be considered as such.

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[481] Information Commissioner supports the Council of Europe's Convention on Access to Official Documents, Ottawa, November 25, 2008 http://www.oic-ci.gc.ca/eng/rtk-mov_mov-rtk_int-eff_eff-int-2008-information_commissioner_supports_the_council_of_europes_convention_on_access_to_official_documents.aspx
[482] FAA, supra note 326.
[483] This is actually the long title of the FAA
[484] Canada Evidence Act, R.S.C., 1985, c. C-5. [CEA]

As mentioned in Chapter 4, the *ATIA* was passed in 1982, and entered into force a year later. Before looking closer to the ATIA's provisions, I first look at the Canadian Charter to see what kind of protection it offers, and the status it confers to ATI.

5.2.1 Charter status of the right of access to information in Canada

ATI is a statutory right in the Canadian legal framework. In the Charter there is no provision for ATI. Although, the *ATIA* and the Charter were passed at the same year, in 1982, ATI did not become part of the fundamental freedoms of Canadians. Article 2, "Fundamental Freedoms" of the Charter includes freedom of opinion and expression and freedom of the press, but not ATI. The lack of this status makes a difference on the treatment of this right. Charter rights have a very special status in Canada's legal and political traditions. The notion of fundamental rights carries relevant democratic implications. They are strongly protected and cannot be compromised by the preferences of the government of the day. The *ATIA* is a piece of federal legislation, which may be repealed or revised by a simple majority vote in the federal House of Commons, to improve or limit the right it confers. If ATI were to be a Charter right, it would establish uniform application of some common rules to all levels of government in Canada. Also, the *ATIA* is administered quite differently from the Charter. Whereas complaints of violations of Charter rights are adjudicated strictly through Canada's court system, the *ATIA* complaints are generally dealt first through the ICC.

There are important consequences from treating a social value – as ATI is often considered - as a human right. First, the fundamental nature of the right requires a strict interpretation of any limitation to the exercise of that right. Secondly, public authorities must subject any such limitation to a scrutiny of proportionality. The principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view. If a social value is accepted as a human right, it is also expected that some sacrifices will be made for the realisation of these rights to take place. Human rights take precedence over other issues. In the case of ATI, a human right status would allow sometimes that the government will be disadvantaged. For many other human rights, these sacrifices seem to be the rule. But "In stark contrast, in the area of access to information, the dominant approach in Canada is to deny requests if there is even a small risk that disclosure of the information may cause even minor

harm to a protected interest."[485] This approach puts into risk the whole ATI regime and makes access rights vulnerable and subject to the will of the government.

There are rights that have made their way to the Canadian Charter as a result of an interpretative enterprise exercised by the Courts. According to the "the living tree doctrine" the Canadian constitution is organic and must be read in a broad and progressive manner to adapt it to the changing times. This doctrine allows for legal stretching in interpreting the Charter rights by putting them in a broader social context beyond the legal realm. That has been the case with the social and economic rights, which were not explicitly included as rights in the Charter. However, the protection of social and economic rights is recognized as a component of other constitutional rights such as the right to equality (s.15) and the right to "life, liberty and security of the person" (s.7). It is up to the courts to provide such protection for those groups who most need protection, and have the most legitimate claims for judicial intervention on their behalf.

In addition, the Supreme Court has also emphasized that broadly framed Charter rights must be interpreted consistently with Canada's international human rights commitments. While international human rights are not directly enforceable as law in Canada, the Court has emphasized that international human rights articulate the Charter values and rights, and that the reasonable exercise of conferred decision-making authority must conform to these values.

While the Charter does not confer constitutional status to ATI, there has been an attempt to push for constitutional protection of the right to ATI under section 2(b) of the Charter, but without success. In 2010, in the case *Ontario Public Safety*[486], the Supreme Court established that ATI is derivate of the freedom of expression, but this claim may arise only in special circumstances. The Court argued that "the scope of the s. 2(*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints."[487] In the case in question these requirements were not satisfied, and section 2(*b*) was not engaged. According to Kazmierski, "The case rightly garnered much attention because it was the first decision in which

[485] Centre for Law and Democracy. Response to the OIC call for dialogue: Recommendations for improving the Right to Information in Canada, January 2013 at 5.
[486] *Ontario Public Safety and Security v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1SCR 815 [Ontario Public Safety].
[487] Ibid at para 31.

a majority of the Court recognized that there was constitutional protection for the right to access government information."[488]

Furthermore, the right of ATI has acquired a quasi-constitutional status thanks to the Supreme Court. In *Minister of National Defence*[489] the Court has characterized ATI as quasi-constitutional because of the role privacy plays in a democratic society. The Supreme Court deems quasi-constitutional laws as fundamental or of special importance to the Canadian legal system. They are given primacy over ordinary legislation. The Supreme Court has held repeatedly that quasi-constitutional statutes are to be interpreted purposively.[490] This means that conflicts in interpretation should be resolved in favour of the underlying purposes of the acts.[491] Additionally, the recognition of the quasi-constitutional status of a statute is a factor in the statute's interpretation, suggesting that the rights it confers are to be construed broadly, and any exceptions to them must be made clear.

The Courts in Canada have a tool box at their disposal which allows them to stretch the legal interpretation of rights by considering a broad contextualization and the Canadian international commitments in human rights. As mentioned in section 5.1 above, Canada has signed the ICCPR and was one of the first countries to ratify its Optional Protocol.[492] These international documents recognize a right to know as having a fundamental value. As such, Canada has committed to confer to such recognition. The living tree doctrine could help push the actual recognition even further to give ATI rights a constitutional status, able to meet international standards.

5.2.2 Exploring the Access to Information Act

When the *ATIA* was introduced in Parliament in 1980, its goals were to have a more informed dialogue between political leaders and citizens, to improve decision making, and have greater

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[488] Kazmierski, supra note 80 at 54.
[489] *Canada (Information Commissioner) v Canada (Minister of National Defense)*, 2011 SCC 25, [2011] 2 SCR 306 [Minister of National Defence].
[490] *Charlebois v Saint John (City)*, 2005 SCC 74, [2005] SCJ No. 77 at para 54.
[491] *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] SCJ No. 46 at para 19.
[492] Michael Byers, "Canada's implementation of International Law: Why it matters ?, In Is our house in order ? Canada's Implementation of International Law", Chios Charmody, eds, (Montreal & Kingston: McGill –Queens's University Press, 2010) at 27.

accountability by the federal government and its institutions.[493] However, the version of the *Act* adopted in 1982 had no mentioning of any of those aspirations. The *ATIA* has 77 sections and its purpose clause (s.2) states:

> The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Reading this purpose clause one can imply that this statute did not intend to bring a fundamental change in terms of better transparency, accountability or citizen participation. Instead, it simply extended the right of the public in accessing to government information.

The *ATIA* applies to "government institutions" at the federal level, which include government departments, ministries, and bodies listed in Schedule 1 and Crown corporations and their wholly owned subsidiaries (s.3). The *ATIA* does not cover to important public authorities such as the House of Commons, the Senate and the judiciary - they are excluded from its application. The *FAA in 2006* extended the reach of the *ATIA* to approximately 70 additional bodies including the Canadian Wheat Board, five Agents of Parliament, five Foundations created under federal statute, seven Crown Corporations, and other parliamentary officers and crown corporations. However, many public bodies still remain out of the scope of the Act.

The *ATIA* has been highly criticized for its wide regime of exclusions and exemptions. It provides a special category of exclusions in sections 68-69. In accordance to article 68, the Act does not apply to:

- published material or material available for purchase; library or museum material; or material placed in the Canadian national archives, libraries, galleries or museums.
- information under the control of the Canadian Broadcasting Corporation that relates to journalistic, creative or programming activities
- any information under the control of Atomic Energy of Canada Limited

Another type of exclusion is found in section 69 which excludes the confidences of the Cabinet from the application of the Act. This exclusion, which became part of the *ATIA* at the

[493] Racicot & Work, supra note 286 at 4.

last minute before its adoption, has been one of the most criticized sections of the Act. Meetings or discussions between ministers can result in the creation of records that are Cabinet confidences, providing that the discussions concern the making of government decisions or the formulation of government policy.[494]According to the Treasury Board of Canada "In order to reach final decisions, ministers must be able to express their views freely during the discussions held in Cabinet. To allow the exchange of views to be disclosed publicly would result in the erosion of the collective responsibility of ministers."[495] It is, in fact, recognized by the Supreme Court that Cabinet confidentiality is essential to good government. In Babcock, the Court explained that "The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly."[496]

To preserve this rule of confidentiality, the Act provides that it does not apply to confidences of the Council. According the section 69 Cabinet confidences include: memoranda or discussion papers presented to Council, agenda, communications, or briefings of Council and draft legislation. However, there are three situations outlined in s. 69(3) of the *ATIA*, where certain classes of documents are producible. First, any Cabinet confidences that have existed more than twenty years can be made public. Second, discussion papers where the decision to which papers relate has been made public. Third, discussion papers where the decision has not been made public must be produced if four years have passed since the decision was made. In all other cases, Cabinet confidences remain not only outside the scope of the *ATIA*, but also the judicial review. In the context of litigation, under the CEA, cabinet confidences cannot be reviewed neither by the ICC nor a court. This type of exclusion make Cabinet confidences unreachable by the ATIA.

In addition, the *ATIA* does not apply to other categories of records which are listed as exemptions in sections 13-24. The exemptions fall into two distinct categories, mandatory and discretionary. Mandatory exemptions must be invoked. They are introduced with the wording

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[494] Subsection 69(2) of the *ATIA*.
[495] Treasury Board of Canada Secretariat, Access to Information Manual, 13.4 Section 69 of the Act – Confidences of the Queen's Privy Council for Canada (Cabinet confidences), online: <https://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp>.
[496] Babcock *v.* Canada (Attorney General), [2002] 3 SCR 3, 2002 SCC 57, at para 18 [Babcock].

"… the head of a government institution shall refuse to disclose …" which indicates that there is no option but to refuse ATI. For instance, section 13 provides that information obtained in confidence will be refused. Discretionary exemptions [s.14, 15(1), 16(1), 16(2), 17, 18, 21, 22, 23, 26] are introduced with the wording "the head of a government institution may refuse to disclose." In these instances, government institutions have the option to disclose or to protect the information. Each exemption is based on "an injury test" or "class test". Exemptions which incorporate an injury test take into consideration whether the disclosure of certain information could "reasonably be expected" to be injurious to a specific interest (i.e. to the conduct of international affairs, the conduct of a lawful investigation, financial interests of Canada etc.). In order to successfully invoke the provision, it must be shown that the expectation of injury is both reasonable and likely (versus improbable or doubtful). Class test exemptions are those applying to a record that matches the description given in the statutory provision (i.e. information obtained in confidence from other governments, advice or recommendations, trade secrets etc.). If the information being requested falls within the described type, then the exemption can be applied.

There are a number of exemptions in the *ATIA* that demonstrate a major structural weakness in Canada's ATI regime. By erecting multiple walls of defense against information requests, the law treats ATI as a threat to be neutralized rather than a right to be promoted. While ATI is not, under international law, absolute, it may be overridden only in limited and justifiable circumstances. Schedule 1 fails to include a large number of the authorities which, according to international law, should be covered by an ATI law. Experience in many countries demonstrates the shortcomings of a list approach.

Another weakness in the Act is the lack of a general provision for the public interest override which is found in many other provincial laws in Canada and internationally. The Act does not contain a general public interest override which would require that information be disclosed in all cases where the general public interest in disclosure outweighs the specific public interest or other (third party) interest protected by the exempting provision. Rather, the public interest in disclosure is addressed on a case-by-case basis and only in connection with two exemptions in the *ATIA*. First, paragraph 19(2)(c) incorporates the provisions of section 8 of the *Privacy Act* which includes, in subparagraph 8(2)(m)(i) a discretionary provision for the release of personal information in circumstances where the head of the institution forms the opinion that "the public

interest in disclosure of the personal information in issue clearly outweighs the invasion of privacy." Second, subsection 20(6) provides for the disclosure of third party information "if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party." These two provisions protect important interests of Canadians, such as privacy, health or safety, but these are not the only cases where one may find a public interest. This demonstrates that the *ATIA* does not engage seriously with the test of the public interest override.

Furthermore, several exceptions in the *ATIA* are either overbroad or the legitimate interest for nondisclosure is hard to find. There are many overlapping as well, which diminishes the clarity of the Act. For example, section 20.4 specifically excludes information about National Arts Centre contracts or donations, while section 14 protects federal/provincial relations. There is no need for these special warrants since section 18(b) already excludes information that "could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution." This argument also applies to sections 16.1, 16.2, 16.3, 16.4, 20.1 and 20.2. Specific information the disclosure of which would be harmful is already covered in section 16(1)(c) of the ATIA. Hence, there is no reason why the law enforcement exception would be insufficient to protect against disclosures that would harm these agencies' investigative and enforcement functions.

Some exceptions in the *ATIA* lack proper harm tests, which make one wonder why it would be necessary to withhold information the disclosure of which would not cause any harm. Exceptions which lack a harm test include: information received in confidence from other States or governments (section 13(1)), law enforcement information (section 16(1)(a)), information related to law enforcement investigative techniques (section 16(1)(b)), information obtained or prepared by the Royal Canadian Mounted Police while performing their duty (section 16(3)), information treated as confidential by crown corporations (18.1(1)), financial or commercial information which is treated as confidential by a third party (section 20(1)(b)), those in favour of government advice (section 21), draft reports or internal working papers related to government audits (section 22.1). There is no doubt that there are legitimate interests protected by these

exceptions, but they fail to include a harm test. In the last example (s.22.1) government should be able to refuse requests for information the disclosure of which would harm its interests, but this does not mean that all information should be treated as confidential. By failing to specify a harm test, these exceptions undermine a public interest in information, and limit ATI as a public right.

There is no penalty or sanction on the public servants who wrongly deny requests for ATI. At the time the *ATIA* was adopted, Rankin argued that it was expected that such provisions were not necessary in Canada and that the legislation itself would provide sufficient motivation in achieving compliance with its objectives.[497] Now, it is known for a fact that the expectation was not met. Although, in 1999, section 67.1 was added to make it an offence to intentionally obstruct the right of access. A punishment of imprisonment varies from six months to two years, and fines ranging $5,000-10,000 may be applied against the offenders. To my knowledge, the penalties have never been applied. However, even these penalties are only given in two cases, when obstructing the work of the ICC, and when intentionally destroying, falsifying or concealing a record. In all other cases, no penalties apply.

Regarding the subjects of the *ATIA*, the law limits the right of ATI only to citizens and permanent residents of Canada. Section 4(2) allows this right to be extended to other persons by order of the Governor in Council. However, this can only happen in rare circumstances. In addition, in 1989, an Extension Order[498] extended the right of ATI to individuals who are present in Canada, even if not permanent residents or citizens. However, this extension was done within the meaning of the *Refugee and Protection Act*, which meant that it could benefit refugees in the country. This is a clear flaw in the *ATIA*, and runs counter to the established international practice. International law recognizes ATI as a human right, which means that it belongs to all people, regardless of nationality.

Among the most significant and recurring problems reported by users of the *ATIA* are long delays in responding to ATI requests. The act has set time limits to answer information requests. In accordance with section 7, public authorities should generally respond to access requests within 30 days. However, section 9 allows public authorities to extend this by "a reasonable

[497] Rankin, "The new ATIPA", supra note 278 at 37.
[498] Access to Information Act Extension Order, No. 1, SOR/89-207. Online <http://laws-lois.justice.gc.ca/eng/regulations/SOR-89-207/page-1.html>.

period of time" by giving notice to the requester and, if their extension runs longer than 30 additional days, by giving notice to the ICC as well. However, the "the reasonableness" of extension is left undetermined, allowing for indefinite time extensions, which could last for months, or even years. In limited cases, requests never get a response, and they are labelled as "deemed refusals."[499]

Formally, time extensions may only be invoked in exceptional cases where "the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution" (s.9(1)(a)) or where "consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit" (s.9 (1)(b)). The 2015 National FOI Audit found that response times exceeded 30 days in 59% of all cases which resulted in a F grade on speed of disclosure.[500] Other studies have shown that public authorities regularly exceed their own, discretionary and often already unduly long timeframes for responding to requests.[501]

ATI requests are without doubt time-sensitive. Timeliness should be the core goal for public authorities in dealing with requests, and the legislation should certainly set it as a requirement. Long delays in access can often render requests moot, for example if the information is sought by a journalist working under a deadline. Studies have suggested that Canadian authorities frequently use their power to delay in responding to requests with the specific purpose of controlling information flows.[502] Another problem with the *ATIA* is that it does not formally even require authorities to respond to requests as soon as possible. Section 4(2.1) requires that the

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[499] This is a term used by information commissioners in Canada. According to the Information and Privacy of Ontario "A deemed refusal occurs….when a public body fails to carry out its duty under the legislation within the time constraints imposed". Office of the Information and Privacy Commissioner, "Deemed Refusals", Above Board, Volume 3, Issue 1, May 8, 2013. online <http://oipc.nl.ca/pdfs/NewsletterMay2013.pdf>

[500] Newspapers Canada, National Freedom of Information Audit 2015. Online <http://newspaperscanada.ca/sites/default/files/FOI-2015-FINAL.pdf>

[501] A study by the Office of the Information Commissioner, for example, found that more than 25% of all requests were not responded to even within the extended deadlines public authorities gave to requesters. See Office of the Information Commissioner, Out of Time: 2008–2009 Report Cards and Systemic Issues Affecting Access to Information in Canada (2010), at 3.

[502] See Roberts, "Administrative discretion and ATIA", supra note 5.

government provide "timely access to the record", but this provision is too vague. There was an amendment made to the Act in 2006 to include a statutory duty to assist requesters. The duty required institutions to make every reasonable effort to help applicants receive complete, accurate and timely responses to requests, without regard to their identity. However, because of the vagueness of this amendments, it has not been taken very seriously by the government. Naurin argued that if transparency is not accompanied by sanctions applied to those acting against social expectations or even in a corrupt and illegal manner, then their public accountability remains toothless.[503]

An area where the *ATIA* lags behind global standards is the cost of access. The *ATIA* has made it a requirement that an application fee must be paid to make a request for information. Although the fee is only five dollars, it affects the making of requests. In addition to the initial requesting fee, requesters may be required to pay access fees based on the resources spent in responding to the request. Once the idea of fees is in place, it affects demands for requests. Indeed, in 2011, the federal government proposed a hike in access fees. Remarkably, this was claimed to be "in order to control demand."[504] The government was specifically seeking to use fees as a means of discouraging Canadians from exercising their right of ATI. Responding to access requests should be a core government responsibility, and the resources to recoup the costs of access should be included within the agency's overall budget.

A. Access to Information Act need for change

It is now widely agreed that the *ATIA* should be updated[505] because it is in desperate need of reform[506]. In fact, the Act was criticized since its adoption as being very seriously flawed. Rankin argued that "a last minute amendment to the Bill may conceivably have gutted it, by exempting politically embarrassing information."[507] In addition, according to Rubin, Canada

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[503] Daniel Naurin, "Transparency, Publicity, Accountability – The Missing Links." (2006) 12:3 Swiss Political Science Review 90-98 at 94 [Naurin, "Transparency"].
[504] Dean Beeby, "Feds eye access-to-information fee hike to 'control-demand'", The Globe and Mail, 13 March 2011, online: <http://www.theglobeandmail.com/news/politics/feds-eye-access-to- information-fee-hike-to-control-demand/article571747/>.
[505] Douglas et al, supra note 291 at 1. See also Roberts, "Two Challenges", supra note 463; Canadian Newspaper Association, "In Pursuit of Meaningful Access to Information Reform: Proposals to Strengthen Canadian Democracy", 9 February 2004.
[506] Rankin, "ATIA 25 years later", supra note 113 at 3.
[507] Rankin, "The new ATIPA", supra note 278 at 1.

never ranked near the top on ATI since the adoption of the Act.[508] He argued that it was no secret that Canada adopted a rather weak access act in 1982, and indeed, in the 1986-1987 Parliamentary statutory review, all the parties saw this, and recommended a better act.

Today, ATI regime is recognized of being outmoded, out of step with international trends, and subject to systemic delays.[509] Canada has fallen behind due to failure to reform the act and modernize its procedures.[510] McKie argued that "Narratives concerning Canada's ATIA follow what has become a disturbingly familiar pattern, punctuated with words including 'broken', 'dysfunctional', and 'useless'."[511] Especially for a legislation like the *ATIA*, which the courts have affirmed is quasi-constitutional in nature[512], its continuing vitality now hinges upon meaningful reform efforts[513].

As explained in Chapter 4, there has been an increased advocacy in the last few years to amend it. Most of the debates focus on the coverage of the *ATIA*. ATI proponents are pushing that "the Act covers the House of Commons and Senate as two of the most significant institutions in the functioning of Canadian Democracy."[514] Also, the Cabinet confidences, and information in Ministers' offices have been part of the amendment proposals. This is the case in all Canadian provinces where Cabinet documents are reviewed by the Commissioner in the case of a dispute. Internationally, only South Africa's FOI law follows Canada's example.[515]

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[508] Ken Rubin, "The myth of access to information", The Hill Times, January 31, 2011, online <http://www.kenrubin.ca/articles/myth-of-access-to-information.pdf>

[509] See Beeby D, 2011. "Canada Ranks Last in Freedom of Information: Study", Globe and Mail, 9 January, online <http://www.theglobeandmail.com/>; Chase, S. "Can Access to Information be Fixed?" Goble and Mail, 15 January 2011, A4.; Hazel, R., & B. Worthy. 2010. "Assessing the Performance f Freedom of Information" (2010) 27 Government Information Quarterly at 352-359 [Hazel &Worthy, "Assessing"]; Stanley Tromp, "Fallen behind: Canada's Access to Information Act in the World Context" 2008, online <http://www3.telus.net/index100.report>.

[510] Canadian Journalists for Free Expression, "A hollow right: Access to information in crisis", A submission by Canadian Journalists for Free Expression to the Office of the Information Commissioner concerning reform Of Canada's Access to Information Act, January 2013, at 3 [CJFE, "A hollow right"].

[511] David McKie, "Access to Information: The Frustrations- and the Hope" in Mike Larsen & Kevin Walby, eds, Brokering Access: Power, Politics, and Freedom of Information Process in Canada (UBC Press: Vancouver, 2012) at 314 [McKie].

[512] See *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773 at para 25 [Lavigne]; Conseil de la Magistrature du Québec v, Commission d'accès à l'information, [2000] R.J.Q. 638 (Que. C.A.), para. 47, cited with approval by Bastarache and LeBel JJ. (dissenting but not on this point) in Macdonell v. Quebec (Commission d'accès à l'information) 2002 SCC 71, at para. 72.

[513] Rankin, "ATIA 25 years later", supra note 113 at 3.

[514] CJFE, "A hollow right", supra note 511 at 9.

[515] Ibid, at 10.

5.2.3 The case of Ontario

Ontario is the fourth province in Canada to adopt an ATI law in 1988 after Nova Scotia, New Brunswick and Quebec. It represents an interesting case to compare with the federal level since the design of the law is slightly different comparing to the *ATIA*. There are two laws governing ATI in Ontario, one at the provincial and the other municipal level. The *Freedom of Information and Protection Privacy Act* (*FIPPA*)[516] and the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*)[517] together establish a system for public access to government information and for protecting personal information. The first thing that one can notice about both these laws is the facts that both ATI and privacy are governed by the same law. This is different at the federal level, where the *ATIA* and the Privacy Act are two separate statutes.

The *FIPPA* came into effect on January 1, 1988, five years after the *ATIA*. The coverage of *FIPPA* was not much different than the one provided by the *ATIA* - legislature, courts, and cabinet confidences were excluded from the Act. It initially applied to all provincial ministries and most provincial agencies, boards and commissions. However, the range of institutions covered under the FIPPA expanded three times in one decade. Information Commissioner of Ontario reports that in 2003, Ontario's energy utilities, Hydro One and Power Generation, were brought under FIPPA; Ontario's universities were placed under *FIPPA* in 2006; in 2012, Ontario became the last province in Canada to bring its hospitals under FOI legislation.[518] In 2005, a definition of "educational institution" was added to subsection 2 (1) of the Act and amendments relating to educational institutions were made to several sections of the Act. Also, the *Broader Public Sector Accountability Act*[519] amended the *FIPPA* to designate hospitals as institutions under the Act.

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[516] R.S.O. 1990, c. F.31 online <http://www.ontario.ca/laws/statute/90f31>.
[517] R.S.O. 1990, c. M.56. online <http://www.ontario.ca/laws/statute/90m56>.
[518] Ann Cavoukian, The evolution of freedom of information in Ontario: From reactive to proactive disclosure, Academics Matters-OCUFA's Journal of Higher Education. May 2013. Online <http://www.academicmatters.ca/2013/05/the-evolution-of-freedom-of-information-in-ontario-from-reactive-to-proactice-disclosure/>.
[519] Broader Public Sector Accountability Act, 2010, SO 2010, c. 25

In 1996, the *Savings and Restructuring Act*[520] amended *FIPPA* giving institutions the authority to refuse access in certain circumstances to records on the basis that a request was frivolous or vexatious. As a result, section 27.1(1) was added to the *FIPPA* to deal with vexatious requests to deny the right to information if "the head [of an institution] is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."[521] According to the Information and Privacy Commissioner (IPC) a request is considered vexatious when "the head considers the request as abusing the right of access or interfering with the operation of the institution; or to be made in bad faith or for ulterior motives."[522] Such provisions have been debated for long of having positive and negative effects on ATI regime. However, the Delagrave Report concluded that there are a "very small" number of frivolous, vexatious or abusive requests under the Act, but recognized that "processing them represents a waste of resources that could be better spent responding to legitimate access requests."[523] However, there is a risk in having these provisions in place. According to Hofley et al "The adoption of a clause allowing for the rejection of a request on this basis would raise the question of the need for a process to ensure that government institutions do not abuse such a power"[524].

Exemptions in the *FIPPA* are listed in sections 12-22, and some of them are subject to the test of public interest override. According to section 23 of the *FIPPA* exemptions do "not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." The public interest override applies to sections 13 (advice to government), 15 (relations with other governments), 17 (third party information), 18 (economic and other interests of Ontario), 20 (danger to health or safety), 21 (personal privacy) and 21.1 (species at risk). The public interest test contains three parts, and all three must be satisfied for the disclosure to take place: 1.a public interest in disclosure, 2.this public interest must be compelling, and 3.this

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[520] Legislative Assembly of Ontario, 36:1 Bill 26, Savings and Restructuring Act, 1996, online <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1581&isCurrent=false&BillStagePrintId>.
[521] Ontario *Freedom of Information and Protection of Privacy Act*, section 10(1)(b). The institution must provide reasons for disregarding a request on these grounds (section 27.1(1)). Criteria for determining whether a request is "frivolous or vexatious" are elaborated in R.R.O. 1990, Regulation 460, section 5.1. Such a request must be part of a "pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution," or be "made in bad faith or for a purpose other than to obtain access." The decision to refuse a request may be appealed to the Information Commissioner.
[522] Information and Privacy Commissioner of Ontario, "Statistical Reports: Glossary of terms", online <https://www.ipc.on.ca/images/Resources/FIPPA-Glossary.pdf>.
[523] ATI, "Making it Work", supra note 290 at 73.
[524] Randall Hofley, Craig Collins-Williams, & Stikeman Elliott LLP, "A thematic comparison of access legislation across Canadian and international jurisdictions", May 9, 2008, at 45 [Hofley, Collins-Williams & Elliott LLP].

compelling public interest must clearly outweigh the purpose of the exemption claim. However, section 23 leaves out certain exemptions. That means that the override does not apply to exemptions covering section 12 (Cabinet records), section 14 (law enforcement records), section 16 (records relating to the defence of Canada), and section 19 (records qualifying for solicitor client privilege).

An interesting provision of the *FIPPA* is section 11(1) which provides for a proactive duty to disclose certain information. It states: "Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public." This section demonstrates a real commitment to promote transparency and openness, despite of the restrictions posed by the provisions in the Act. This is done in the name of the public interest, and for important issues like health and safety. This commitment shows that the government appreciates certain public values and is ready to act proactively in protecting them.

The *FIPPA* is enforced by the Ontario Information and Privacy Commissioner (IPC) who according to section 59 has order-making powers. In addition, the IPC engages or commissions research on issues concerning the ATI and privacy regime in Ontario, and conducts public education programs. The IPC has proved itself to be a very powerful body that has influenced the implementation of the *FIPPA* and the advancement of the rights of ATI and privacy.

Looking at the *FIPPA* and the *ATIA*, one can notice several differences. First, a section similar to section 27.1(1) of the *FIPPA* is not present in the *ATIA*. There is no mechanism in the *ATIA* for rejecting requests based on the ground that they are "unreasonable", "frivolous" or "vexatious". From an institutional perspective having such provision in place is a good thing, because it prevents the overloading of public bodies.

Second, there is no section in the *ATIA* containing a general public interest override, like section 23 in the *FIPPA*. The *ATIA* only provides two provisions of limited application [s.19(2)(c) and 20.(6)], but lacks such an important safeguard in other provisions for exemptions in the Act. This is a major weakness in the *ATIA*, one that undermines the public's right to know about matters of general interest.

Third, a proactive disclosure provision, like the one found in section 11(1) of the *FIPPA*, is absent in the *ATIA*. This adds to the weakness of the federal act, and demonstrates that the act is falling behind not only internationally, but also at home.

Fourth, the IPC has order-making powers, which means that it has some teeth to compel ATI to institutions that fail to disclose information upon request. In addition, the IPC plays a significant role in public education and research. The ICC does not such powers. He/she is rather an ombudsman with powers to investigate and make recommendations. There is no power to order disclosure of a record. Of course, the requesting party and/or the Commissioner may initiate a complaint before the Federal Court, but this is a much longer way to compel an institution to disclose records. This undermines the ICC roles and leave her powerless against government defiance of the *ATIA*.

Fifth, the *FIPPA* covers to a certain extent the legislature "but only in respect of records of reviewable expenses of the Opposition leaders and the persons employed in their offices and in respect of the personal information contained in those records."[525] Although this provision is limited, it is a powerful weapon in the hands of the opposition to control the government in power and keep it accountable. Such provision is inexistent at the federal level, and has been the focus of a lot of debate, especially from the ICC.

5.3 EU's legal framework on transparency and ATD

At the EU, the right of access to administrative documents has been closely developed along the need for more transparency. They have both come a long way in less than two decades. In the past, administrative transparency was considered an appealing but innocuous idea. At best, it was a merely political, non-binding guideline. Its implementation was not commanded by law, but rather entrusted to the good will of the government or even to the discretion of the front-line civil servants. However, transparency now is a principle recognized by the treaties, and ATD has gained a constitutional status. I look closely at this development below.

[525] Section 1.1(1) of the FIPPA

5.3.1 Treaty status

In the EU, legal provisions on transparency are complicated and dispersed in treaties, regulations, the Charter and the Convention. Three treaties have shaped the foundations of transparency as a principle, and of ATD as a human right. First, a theme of transparency gained relevance in 1992 with the Treaty of Maastricht[526], known also as the TEU. Article A(2), which is the very first article, stated: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen." This is a clear expression of a commitment to openness and establishes a principle of transparency. In addition, the Declaration that was attached to the Treaty stated:

> The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

Here, the principle of transparency is clearly linked to democratic governance and trust in institutions, and all of them are related to public ATI. The EU makes real commitments for concrete measures in improving ATI with the intention to bring the Union closer to its citizens. However, the access right was not yet established as a self-standing right. The Treaty of Maastricht, Article 138e signed the creation of the EU Ombudsman appointed by the EP and responsible to administer cases of maladministration of the activities of the Community institutions and bodies.

Second, in 1997, the Amsterdam Treaty introduced Article 191a (which later was renumbered 255 EC Treaty), which established a full right of ATD. This article stated:

> 1. Any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
>
> 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the

[526] Treaty of Maastricht, 7 February 1992, OJ C 191, online <http://www.eurotreaties.com/maastrichtec.pdf>.

procedure referred to in Article 189b within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents[527].

The Amsterdam Treaty brought transparency and ATD to a whole new level. First, it recognized a treaty right to ATD for all organizations and persons in the EU without limitation to citizenship. However, the right of ATD was only limited to three institutions, the EP, the Council and the Commission. Second, it required the establishment of general principles on the right of ATD within two years. This provision was the precursor of the Regulation 1049 - the EU law governing ATI regime. Third, it required from the EP, the Council and the Commission to establish their own provisions on ATD in their Rules of Procedure. As such, the Treaty signed a new era for both the transparency a principle and the recognition of ATD as a fundamental right.

Third, in 2007, the Treaty of Lisbon provided a legal framework for transparency that included a general, unconditional right of ATD. The treaty sanctioned ATD as a fundamental right and considered transparency as ancillary both to representative and participatory democracy. An Article 16 A was inserted in the treaty, with the wording of Article 255 as follows:

(a) 1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

(b) …. The words 'European Parliament, Council and Commission documents' shall be replaced by 'documents of the Union institutions, bodies, offices and agencies, whatever their medium'….

(c) ….

(d) …'The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

[527] Treaty of Amsterdam, Article 45 which inserted Article 191a at 46, online <http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf>.

> The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures…[528].

The Lisbon Treaty brought several changes to the EU legal framework on transparency. First, it reinstated the EU's commitment to improving openness and transparency, and engaging citizens in participating in the EU governance. This commitment explicitly links the principle of openness to the right of every citizen to participate in the democratic life of the Union. Second, it expanded the subjects of the Regulation 1049 (which was already in place from 2001) from only three institutions to all the EU bodies, except for the CJEU and the two EU Banks[529]. Third, it required from the EP and the Council to hold open meetings in the course of legislative proceedings, and publish those documents.

These three treaties changed the face of transparency in the EU and gave ATD the status of a fundamental human right. They signed a new chapter in the discussions of democratic governance and citizen engagement by considering the principle of transparency as one of the pillars of democracy.

Transparency and ATD have also been shaped by two other important legal documents in the EU, the Charter of Fundamental Rights and the Convention on Human Rights. The EU Charter, binding on all the member states from the entry into force of the Lisbon Treaty, explicitly guarantees ATD to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State."[530] The right of ATD is listed under the "Citizen's Rights" Part of the Charter, which means that it is considered important for the enjoyment of the EU citizenship. Article 42 the Charter echoes the terms of the Lisbon and Amsterdam Treaty.

The fundamental nature of the right of ATD has direct consequences in its treatment. First, it requires a strict interpretation of any limitation to the exercise of the right. Secondly, public authorities must subject any such limitation to a scrutiny of proportionality. The principle of proportionality requires that derogations remain within the limits of what is appropriate and

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[528] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 OJ C 306, 17.12.2007, online <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2007.306.01.0001.01.ENG#g-001>.

[529] Note that they are not entirely excluded from the scheme of the Regulation 1049. It applies to them when performing administrative duties.

[530] Charter of Fundamental Rights, Article 42.

necessary for achieving the aim in view. Thirdly, transparency regimes should be revised so as to guarantee the widest possible access to official documents. As a result, the right of access at the EU level significantly influences legislation and court practice in the Member States as they are expected to discipline administrative transparency accordingly. It is possible, for example, to demand specific information from an EU institution, when the source of that information is a Member State.

In addition, the EU Convention, although it does not contain any express right to ATD, has evolved its own "right to freedom of information" as part of the right to freedom of expression in Article 10 of the Convention. It grants the right to "hold opinions and impart information and ideas without interference by public authority." The lack of a self-standing right of ATD has often been identified as an important weakness in the Convention. However, the position is changing, the Convention is considered to be a "living instrument" and recent case law suggests that, the Convention has been influenced by international trends.

To sum up, in less than two decades, transparency and ATD in the EU law have evolved dramatically, from a guidance to a principle, and from an institutional guideline to a fundamental human right. The principle of transparency is considered one the main pillars of the EU law and an inextricable element of the unional principle of democracy.[531]

5.3.2 Exploring Regulation 1049

In the EU, the present regime of ATD is governed by Regulation 1049/2001.[532] At the time of its adoption it was considered by the EU institutions to have constituted a "major change".

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[531] The close link between transparency and democracy was for the first time clearly recognized in the Declaration No 17 on public access to documents, which was attached to the Treaty of Maastricht. The Declaration emphasized that transparency of decision-making process strengthens the democratic nature of the institutions and the public's confidence on administration. Furthermore, this link was for first time reaffirmed by the Advocate General Tesauro in the case Netherland versus Council (C-58/94). In particular, the Advocate General was of the opinion that the principle of democracy, which constitutes one of the cornerstones of the Community edifice, is the basis for the right of access to documents. See Opinion of the Advocate General Tesauro of November 1995, Case C-58/94 (Netherland v. Council), point 14-16.

[532] On the Implementation of the Principles on EC Regulation 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, COM (2004) 45 final; L Cotino, "Theory and Reality of Public Access to EU Information," in D Curtin, A Kellerman, and S Blockmans, eds, The EU Constitution: The Best Way Forward? (Kluwer, 2005) at 233-244; J Heliskoski & P Leino, "Darkness at the break of the noon: The Case law on Regulation No 1049/2001 on Access to Documents" (2006) 43 CMLRev 735; Carol Harlow, "Transparency in the

However, several scholars have argued that it has merely consolidated the existing legal framework[533] since it was shadowed by treaty requirements.

The regulation has a grand opening by boldly stating the treaty principle of openness. The language used throughout the entire Regulation demonstrates great ambitions for the future of the EU. The first Recital underlines the commitment of the EU institutions for "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."[534] Just reading the first opening recital of the Regulation one has a feeling that its mission is not only granting ATD to the citizens but also making them part of the decisions in the EU. This is manifested clearly in Recital (2) where the true purpose of the principle of openness is revealed – to enable the participation of the citizens in the decision-making process. Openness and participation in the EU have even a bigger purpose in the Regulation – to strengthen the principles of democracy.[535] The ambitions and enthusiasm about this "new stage" of the EU politics is evident in the purposive clause. The purpose of Regulation is to "to give the fullest possible effect to the right of public access to documents"[536] and:

> (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to….documents ….in such a way as to ensure the widest possible access to documents,
>
> (b) to establish rules ensuring the easiest possible exercise of this right, and
>
> (c) to promote good administrative practice on access to documents.

The purpose of the Regulation is threefold, all aiming to build the right infrastructure of principles, rules and practices in order to facilitate the exercise of the right of ATD. This

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European Union: Weighing the Public and Private Interest', in J Wouters, L Verhey, and P Kiiver (eds), European Constitutionalism beyond Lisbon (Intersentia, 2009) at 209-238 [Harlow, "Transparency].

[533] D. Curtin, & I.F. Dekker, "Good Governance: the Concept and its Application by the European Union", in Curtin, D. and Wessel, R.A.,eds, *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Antwerp: Intersentia, 2005) at 2 [Curtin & Dekker, "Good Governance"].

[534] Reg 1049, supra note 64, Recital (1).

[535] Ibid, Recital (2).

[536] Ibid, Recital (4).

language shows a serious commitment in establishing a right to ATD, one that goes beyond a mere proclamation of a right, and is promoted through good administrative practices.

Regulation 1049 applies to all institutions in the EU, but the CJEU, two EU Banks and some central agencies. It includes some exceptions listed in Article 4. The exceptions of Article 4 (1) have a general scope. They are regarded as compulsory and absolute, meaning that "should disclosure of a document cause harm to one of the interests mentioned [in Article 4(1)], access to this document should be denied."[537] In other words, there is no possibility of an overriding public interest in disclosure with regard to these exceptions. Article 4(1) provides that:

> The institutions shall refuse ATD where disclosure would undermine the protection of:
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> (a) the public interest as regards:
>
> – public security,
>
> – defence and military matters,
>
> – international relations,
>
> – the financial, monetary or economic policy of the community or a Member State;
>
> (b) privacy and the integrity of the individual, in particular in accordance with community legislation regarding the protection of personal data.

By contrast, the exceptions provided for by Article 4 (2) and 4 (3) have a more limited scope. Both exceptions are subject to an overriding public interest in disclosure. This implies a balancing of the public interest in disclosure against the protection of another interest. Article 4 (2) and 4 (3) state:

> 2. The institutions shall refuse ATD where disclosure would undermine the protection of:
>
> — commercial interests of a natural or legal person, including intellectual property,
>
> — court proceedings and legal advice,
>
> — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
>
> 3. Access to a document, drawn up by an institution for internal use or received by an institution, which related to a matter where the decision has not been taken by the institution,

[537] Report from the Commission on the implementation of the principles in EC Regulation n° 1049/2001, COM (2004)45 final, at 17.

> shall be refused if disclosure of the document would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure.

Article 4(3) has been the focus of a lot of debates. It safeguards the decision-making process of the institutions and is intended to protect the so-called space-to-think. This article makes a distinction between cases where the institution has not yet finished its thinking and those where the thinking period is over because the institution has made a decision. Two tests may be applied in this case, the harm test and the public interest override. Engaging the harm test a document would be denied only if public access would seriously undermine the institution's decision-making process. Furthermore, an overriding public interest requires an evaluation of institutional interest if it is worth being protected. Regulation 1049 does not contain an exception that automatically protects a so-called "space to think". The exception might occur only by applying the two tests. Documents containing internal discussions are thus within the scope of the Regulation. The CJEU[538] has recently established that public access must, therefore, be given to such documents on request unless the institution concerned can show that serious harm to its decision-making process is reasonably foreseeable and not purely hypothetical.

Another important class of exceptions relate to the EU-Member State relationship. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement (Article 4 (5)). In case a Member State holds a document originating from an institution, it is entitled to apply its own national law on public access.

A set of special provisions are included in Article 9 which regards sensitive documents. These documents (called EU RESTRICTED) are classified as "Top Secret", "Secret" or "Confidential" in accordance with the security rules of the institution concerned. They protect essential interests of the EU or one or more of its member states in the areas covered by Article 4 (1) (a), notably public security, defence and military matters.

The Regulation provides that public access applies to all documents held by an institution. The term "document" is defined broadly so as to include any content, whatever its storage medium, concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility (Article 3). A Community institution may - if an exception to public access applies - consider giving partial access to a document. Article 4 (6) states that if only parts

[538] Access Info case.

of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. Partial access is an important element of the ATD regime, as it restricts the scope of exceptions to only cover the specifically excepted information of a particular document. In certain circumstances, an institution might even be obliged to release only a part of a document.[539]

An important element of an ATI regime is the cost of submitting a request. In the EU, submitting a request for documents is free of charge. The only charges that can be incurred when requesting documents are those that correspond to the cost of producing and sending copies. This comes as no surprise as ATD has a human right status in the EU.

The scope of the Regulation extends the right of ATD to every citizen and resident in the EU. The right of access extends even further, as the institutions by discretion[540] may grant access to any natural or legal person not residing or not having its registered office in a Member State. This is expected considering that the EU has joined the Council of Europe's Convention on access to official documents. Its standards provide: first, the right belongs to everyone, without discrimination on any ground (Article 2.1); second, there is no obligation to give reasons (Article 4.1); third, the person can remain anonymous except when disclosure of identity is essential in processing the request (Article 4.2). The EU follows these standards strictly.

The timelines for processing ATD requests are strictly settled in Regulation 1049. According to Article 7, institutions have fifteen working days to respond to access requests. This can be extended with another fifteen days for cases relating to very long documents. In cases of refusals, the applicants have fifteen days to make a "confirmatory application" to the institution to reconsider the refusal. The institution has another fifteen days to either grant the information or give reason for refusals. After refusals, applicants have two choices, they can either institute court proceedings against the institution or make a complaint to the European Ombudsman.

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[539] See the Judgment of the CJEU in Council v. Hautala, elaborated in paras. 2.4.3 and 4.2.

[540] *See* European Parliament and Council Regulation (EC) No. 1049/2001 of 30 May 2001, art. 2, 2001 O.J. (L 145) 44, <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l1145/1_14520010531 en00430048.pdf > (stating that institutions may grant access to documents not only to people residing in the member state, but also to any person not residing in the state as well). For the implementing rules of procedure of the Council, see Council Decision 338/2004 EC, Euratom, and for the rules of the Commission, see 2001 O.J. (L 145). The European Parliament is not as forthright in this matter but exercises discretion in individual cases. EUROPEAN PARLIAMENT RULES OF PROCEDURE, RULES 96, 97 (2005).

Hence, the Regulation provides a two-stage administrative procedure for application, followed by the possibility to contest a refusal through the court or complaint to the Ombudsman.

A. Proposals for change of Regulation 1049

The debate over changes of Regulation 1049, or the so-called the recasting process is going on for almost a decade. The Commission's first proposal was in 2008[541], another attempt came in 2011[542], and the EP proposed amendments tabled by the Parliament on 11 March 2009[543]. The Council and the Commission have come against the EP, with the latter tabling proposals to increase access rights, and the former blocking them and "wishing to restrict in seemingly new ways the right of access to documents and the manner that it has been implemented."[544] MEPs viewed the Commission's original proposed changes as a backwards step for transparency. But the Parliament's amendments to the bill were fiercely opposed by member states in the Council of Ministers. The 2008 proposals to revise the regulation were blocked for so long, the EU's executive was forced to issue a second set of proposals in 2011 to bring the legislation in line with the Lisbon Treaty, which had come into force in the meantime.

The main concerns are focused on normative definitions of what should be considered a document, the scope and extent of exceptions, etc. The most far-reaching of the proposed changes is to amend the definition of "document" so that no application for ATD drawn up by an institution could be made unless that document had been "formally transmitted to one or more recipients or otherwise registered."[545] Another proposed change would exclude any possibility of public ATD that form part of the administrative file of an investigation or of proceedings concerning an act of individual scope until the investigation has been closed or the act has become definitive.[546] The Commission also proposed to add two new exceptions to Article 4 -

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[541] Eur-Lex. COM(2008)229: Proposal for a Regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission Documents. April 30, 2008 www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0229_/com_com(2008)0229_en.pdf

[542] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents /* COM/2011/0137 final, March 23, 2011, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0137:FIN:EN:HTML>.

[543] Philip Choppel QC, Information rights: law and practice, 3rd eds, (Hart Publishing: Oxford, 2010) at 99.

[544] Maiani, Pasquier & Villeneuve, "Less Is More", supra note 426 at 155-170.

[545] This would be changing Article 3(a) of the Reg 1049.

[546] Ibid.

the protection of "the environment, such as breeding sites of rare species", with no possibility of an overriding public interest in disclosure[547] and the protection of "the objectivity and impartiality of selection procedures", subject to the possibility of an overriding public interest in disclosure. This exception would apply to procedures for the award of contracts and for the selection of staff. The exception for the protection of court proceedings and legal advice in Article 4(2) would be expanded to include "arbitration and dispute settlement proceedings."[548] Regarding privacy and integrity of the Individual, the Commission also proposed to replace the exception in Article 4(1)(b) by a new Article 4(5) based on the CJEU case Bavarian Lager. The European Data Protection Supervisor (EDPS) has produced an opinion[549], which is critical of the Commission's proposal.

These proposals would actually narrow the right of access[550] and the scope of the Regulation. One of the objectives "which seems to underlie the proposals, is to increase the institutions' discretionary power to control the flow of information during the policy-making process."[551]

5.3.3 The case of Albania

The Albanian case is interesting for this research since it offers new insights on how transparency emerges in the legal framework and then normalizes in the legal system. This case represents an interesting experiential pattern of the EU's influence in transplanting transparency through accession requirements. I have argued elsewhere that this influence has the potential to ignite a new policy paradigm for transparency that I call "transparency through integration."[552] Albania is not yet a member in the EU, but it is a candidate from June 2014[553]. It was officially recognized by the EU as a "potential candidate country", when it started negotiations on a

[547] Article 4(1)(e).
[548] Article 4(2)(c).
[549] Opinion of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 Jun. 2008, available on the website of the EDPS, online: <www.edps.europa.eu>.
[550] Sylvia Kierkegaard, "Open access to public documents – More secrecy, less transparency!" (2009) 25 Computer law & Security Review 3-27 at 3 [Kierkegaard, "Open access"].
[551] Harden, "Revision of 1049", supra note 389 at 255.
[552] Irma Spahiu, "Government Transparency in Albania and the Role of the European Union", European Public Law 21(1) 2015 at 140 [Spahiu, "Government"].
[553] European Commission, EU candidate status for Albania, 27.06.2014, online: <http://ec.europa.eu/enlargement/countries/detailed-country-information/albania/index_en.htm>.

Stabilization and Association Agreement (SAA) in 2003.[554]The SAA was successfully agreed and signed on 12 June 2006, thus completing the first major step toward Albania's full membership in the EU. The SAA with Albania entered into force in April 2009 and that same month Albania presented its application for membership in the EU. The deadline for the fulfilment of all the commitments in the SAA is 31 March 2019. For Albania to be accepted as an EU candidate, the European Commission has outlined twelve key priorities as identified in the EU 2010 Opinion on the country's European Union Membership Application.[555] These requirements and the Albanian's aspirations to join the EU have deeply influenced the countries approach towards democratization, and transparency as one of the pillars of democracy. As such, the EU has served "as a catalyst for positive change on government transparency."[556]

The principle of transparency is reflected in many legal provisions in Albania. FOI is considered a fundamental human right in the Albanian legal framework. Article 23 of the Albanian Constitution establishes the right to collect, receive and disseminate information[557] and specifically guarantees the right of access to government-held information. In addition, Article 56[558] guarantees the right to be informed for the status of the environment and its protection. Furthermore, Article 17[559] of the Constitution provides for limitations on rights, but only in accordance with the standards articulated in the European Convention on Human Rights (ECHR) which Albania ratified in October 1996 and where FOI, including the right of ATI is a core element of the broader right to freedom of expression. The principle of transparency is also reflected on Article 20 of the Code of Administrative Procedures[560].

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[554] For more details see the European Commission on Albanian Membership status, online: <http://ec.europa.eu/enlargement/countries/detailed-country-information/albania/index_en.htm>.

[555] European Commission, Communication from the Commission to the European Parliament and the Council: Commission Opinion on Albania's Application for Membership of the European Union, para. 3, p. 2. (2010). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0680:FIN:EN:PDF (Accessed 15 Feb.2014).

[556] Spahiu, "Government", supra note 553 at 137.

[557] Albanian Constitution, Law No. 8417, date 21 Oct. 1998 amended. http://www.ipls.org/services/kusht/contents.html (Accessed 5 Apr. 2013).Art. 23 of the Constitution says: (1) The right to information is guaranteed. (2) Everyone has the right, in compliance with law, to get information about the activity of state organs, as well as of persons who exercise state functions. (3) Everybody is given the possibility to follow the meetings of collectively elected organs

[558] Article 56 of the Constitution states 'Everyone has the right to be informed for the status of the environment and its protection.'

[559] Article 17 says 'These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.'

[560] Law No. 8485, date 12 May 1999 'The Code of Administrative Procedures', online: <http://www.pad.gov.al>./Content/KuadriLigjor/en-law/ligji8485.htm?action=view (Accessed 2 Feb. 2014). Art. 20 'Right to be informed' of

Albania was the first country in the region to adopt a law on ATI. The Law "On the Right to Information on Official Documents"[561] was adopted on 30 June 1999. This law was replaced by Law 119 "On the Right to Information" in September 2014, and entered into force in November of that year. This new law was congratulated for the advanced provisions of transparency and safeguards of the right to ATI. Experts stated: "The New Right to Information Law of Albania, is assessed by many experts as one of the most important steps taken towards transparency and accountability, bringing the legislation in line with the best international standards in the region and beyond."[562]

Some of the sweeping changes introduced by the new law are:

- The introduction of a more extensive definition of the term "public authority" extending to commercial companies where the state holds the majority of shares, and entities that exercise public functions (Article 2).
- Proactive disclosure of information, according to well-designed transparency programs which every public institution should have in place. These programs should be revised every 5 years (Article 4 and 5). This includes publication of certain categories information that are made public without request (Article 7).
- The register of requests, which should be updates every three months and published at the website of the public institution (Article 8).
- The obligation for public authorities to designate a Coordinator for the Right to Information, whose role is to supervise the authority's responses to requests (Article 10).
- Much shorter times for responding to information request, from 40 days (with the old law) to 10 working days (Article 15). There is an extension of 5 days in specific cases.

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the Code states: Every person participating in an administrative procedure has the right to be informed on and to have access to the documents used during the procedure, unless limits defined by law. The right mentioned in the first paragraph of this article may be exercised personally or through an authorized representative. The administrative body, developing the administrative procedure, is obliged to grant information to the participants concerning their rights and duties.

[561] The Law on the Right to Information for Official Documents, No. 8503, 30 June 1999, online: <http://hidaa.gov.al/english/pub/l_8503.htm>

[562] Institute for Development of Freedom of Information, "New Right to Information in Albania", 7 November 2014, online:<https://idfi.ge/en/new%E2%80%93freedom%E2%80%93of%E2%80%93ifnromation%E2%80%93legislation%E2%80%93albania>; See Also InfoCip, New Right to Information law enacted by the Albanian Parliament, online: <http://www.infocip.org/en/?p=1312>.

- the creation of a new body, the Information Commissioner, which existed as the Commissioner for the Protection of Personal Data. Previously, the oversight of the access law was attributed to the People's Advocate (Article 24).
- Heavy administrative sanctions for failure to respond to the requirements of the law (Article 18). There are seventeen types of fines which go from $1500 - $3000 Cad in value[563].

In addition, the requests for information are free. According to Article 13, for hard copies tariffs may apply only to cover the cost of reproduction of materials and delivery. The new law also includes a number of new concepts, including reclassification of secret documents[564], and release of partial information and through maximal use of information technology.

All these provisions are very progressive considering the equivalent laws in Canada, and even the EU. The Albanian law has the shortest deadlines, very wide coverage of public bodies, and very high penalties for those who fail to implement the law by letter. What is the most striking element in the law is the purpose clause in Article 1, which states: "The rules provided for in this law intend to guarantee the recognition of a public's right to information, in the framework of exercising the rights and freedoms of individuals in practice, and the formation of ideas on the state of the country and the society." This provision is not found in any of the laws in focus for this research. It resonates with the idea of the right to ATI as developed by Habermas in his discursive theory of law. The law considers the right of ATI as one of the individual's rights and freedoms and looks at it from two perspectives, instrumentally, as facilitating the enjoyment of other rights in practice, and intrinsically as an independent right which contributes to the exchanging and shaping of ideas and views around much bigger issues such as those of state affairs and the society. This second perspective is very compelling considering that it comes from a country with a relatively short experience with democracy. This perspective appeals my idea of the right of ATI as a human right that helps shaping persons in private lives as individuals with right and freedoms, but also shaping citizens in the public sphere by facilitating the

[563] These fines are very heavy considering that the minimum salary in Albania is $220 and the average is $530, according to the Institute of Statistics in Albania (INSTAT), online: <http://www.instat.gov.al/al/themes/pagat-dhe-kosto-e-punës.aspx?tab=tabs-5>.

[564] According to Article 17.5 of the Law 119/2014 "The right to information is not automatically refused when the information sought is found in documents classified as "state secret". In this case, the public authority, receiving the information request, starts immediately the classification review procedure"

dissemination of information that contributes to forming views and actively participating in influencing societal and political directions.

5.4 Comparison of the Canadian and the EU legal framework

Looking at the ATI legislation in the two jurisdictions, and the two case studies, one will notice some significant differences. Table 6 below is a summary of the differences noticed from the comparison between the ATI laws in Canada and the EU, and the two case studies.

First, the *ATIA* and the Regulation 1049 are guided by different principles. Regulation 1049 follows the Nordic approach concerning ATD, and establishes the principle of the widest possible access as its central principle. The EU puts more emphasis on the principle of transparency and openness which holds in itself a bigger mission – addressing issues of democratic deficit in the EU, reducing the feeling of alienation towards the EU institutions among the citizenry, filling the gap between the Union and its citizens, bringing them closer together, and making them part of the decision-making process. Hence, the provisions of Regulation 1049 have developed with the principles transparency, openness and democratic participation at heart. The same purpose and mission is not evident at the *ATIA* and any mentioning with regard to the above principles is missing. The aspirations when the Act was introduced in 1980 were very similar, but then the final draft, did not include such language. The *ATIA* did not show any other ambition, rather than extending the right of ATI to complement other laws already in place. It looks like the inspiration for an ATI legislation came from the same concerns in both Canada and the EU, but then developed in different directions.

This difference demonstrates the dynamics of every ATI legislation which emerge from aspirations of widening democratic rights, but could only develop to truly protect those rights if they are embraced by political power. ATI rights only become embedded in political traditions by a strong advocacy in moments in history when politics need transparency for survival. Rubin claimed that the law was only written because of popular demand and pressure (there was a lobby group called ACCESS) would be pushing matters[565].

[565] Ken Rubin, "The myth of access to information", The Hill Times, January 31, 2011, online: <http://www.kenrubin.ca/articles/myth-of-access-to-information.pdf>.

Second, the right of ATI has a higher status, and hence, a higher protection in the EU than in Canada. ATI is a statutory right in Canada, recognized as quasi-constitutional by the courts. This could be considered a positive development and a step forward on the recognition of the special status of access rights, but it is not enough. There are arguments that the power of the *ATIA* as a whole is often illusory because of a weak oversight body with only limited powers. The Ontario case provides a model that addresses this weaknesses. In the EU, the right of access, has a constitutional nature, as confirmed by the fact that it was reproduced in Article 42 of the Charter of Fundamental Rights. This upgrade in status has been made possible by the different treaties in the EU that put ATD together with the principle of transparency at the heart of the EU law. The right of ATD emerged in the EU project as a right of citizenship, which would allow citizens of the Member States to become citizens of the Union, as it is clearly established in Article 10 (2) of the revised Treaty of the European Union.[566] The Albanian case offers another example of a constitutional protection of the right to ATI. Its law has been upgraded to reflect this status and has a compelling purpose clause which appeals to an ideal right of ATI instrumentally and intrinsically.

Differences in the content of the laws are a result of the status they hold in the hierarchy of legal norms – the higher the status, the higher the protection. Four elements are a reflection of the difference in status of the ATI rights:

a. The time limits available to respond to requests. At the EU requests of access should be processed "promptly"(Article 7 and 8 of Regulation 1049) or without undue delay within 15 working days with a possibility for extension for 15 days. In Albania this time is 10 working days with an extension of 5 days. In Canada, this time is 30 days[567] with the possibility of extension for "a reasonable period of time" in case of complex cases. The same provisions are found in the FIPPA. Of course, what is considered to be "reasonable" is a matter of subjectivity which leads to inconsistencies in timelines within government institutions. Long delays in responses are a big concern because they cause a depreciation of the value of information.

[566] Article 10 par. 2 of the Treaty of the European Union states: Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
[567] Section 7 of ATIA

Darbishire argues that information "is a perishable commodity and to delay its publication even for a short period may well deprive it of all value and interest."[568]

b. The range of persons to whom a right of ATI is granted. The right of ATI in Canada is given on the basis of citizenship or residency. Non-residents cannot file access requests. In the EU the right is enjoyed by everyone. Non-residents seem to be excluded, but the EU institutions have never applied the existing distinction to the detriment of non-residents, implicitly acknowledging the inconsistency of the distinction. In Albania, the right is extended to everyone, even the stateless persons. Indeed, if ATI has a fundamental nature, then the exclusion of non-resident aliens is questionable.

c. The difference in the rules for exemptions. It is often argued that the success of an access regime depends on the clarity of its exceptions – when exemptions to access rights are set up clearly in the law, there is no room for abuse of discretionary power. In the EU, mandatory exemptions are listed clearly, so that there will not be exceptions to the rule (Article 4(1)). For other exemptions (Article 4(2) and (3)), a three part harm test is established to consider in any case when discretionary power would be exercised. A general public interest override test was also found in the FIPPA. Such test does not apply to the *ATIA*. Instead, injury-test and class-test exemptions are set up with most of the discretionary exemptions free from the application of public interest test. Furthermore, there is some overlapping in some provisions, which adds difficulty to the clarity of provisions and complicates the application of the act.

d. The range of institutions covered. In the EU, the Regulation 1049 regulates public access to the EP, Council and Commission documents, in addition to all other agencies which were included after the Lisbon Treaty. In Canada, all courts, the Parliament, the Prime Minister's Office and ministerial offices are excluded from the access regime. Similar coverage was in place for the FIPPA. This wide range of exclusions has drawn lots of criticism among ATI advocates who have come forward with proposals for amendments of the ATIA.

[568] Darbishire, 2010, at 16.

Third, the recent developments in ATI legislation in both jurisdictions reveal the tensions that exist around issues of transparency and ATI. They demonstrate that any advancement in ATI comes through tough political battles. In the EU, amendments to Regulation 1049 have been delayed for years because of the tensions between the main EU institutions. In Canada, amendments to the *ATIA* are not going anywhere because of the little support they have from the political class. Trying to explain the hostility towards ATI laws, Roberts argued that FOI laws are political creatures - although in the long run they significantly improve governance, they do not represent an immediate benefit for those who are in power, and ATI laws depend heavily on the predispositions of the political executives and officials who are required to administer it.[569]

Having examined the legal requirements for ATI in both countries, one can notice that they offer opportunities and challenges for all actors involved. Despite their weaknesses ATI laws provide a starting point towards a wider recognition of ATI rights. Of course, better laws make a better start, but they do not guarantee a successful access rights regime in and on themselves. Sometimes the gap between law and practice is surprisingly much wider than expected, and deeply affects law implementation.

[569] Roberts 2002, at 176.

CHAPTER 6: INFORMATION VS PRIVACY – A CONCEPTUAL AND LEGAL DISCOURSE

This chapter makes an analysis of the rights of privacy and ATI in Canada and the EU. As I explained in the previous chapter, one of the main exceptions for ATI in both jurisdictions is for reasons of privacy. In addition, privacy contains an element of ATI since it gives individuals a right to access their personal information.

The purpose of the chapter is to shed some light on issues surrounding the rights of ATI and privacy, their interactions, and when they complement and/or conflict each other. In doing so, I engage with some definitional analysis of ATI and privacy and then look at the legal provisions to understand what they have to offer for a harmonization of both rights.

As argued previously in this research, transparency and ATI come with the expectation that information held by the government should be openly accessible to the public. In the meantime, we all want that our personal information remains private and be protected. Governments nowadays are vast storehouses of information, including information about individuals gathered from different sources. Tom Onyshko argued more than ten years ago that "the federal government has probably become the single largest collector of personal information in Canada."[570] In this context, two rights are at stake, the right of ATI, and the right of privacy of the persons to whom information belongs. In this case, there is a need to reconcile the twin objectives of these rights, but to do so, one needs to know where to draw the line between public and private information. Sometimes, drawing that line is a tough choice to make, since these "boundaries…. have been moving targets for several generations."[571] To engage with this analysis one first needs to know: what is privacy?

6.1 Conceptualization of privacy

Privacy is broadly defined in many disciplines, taking different approaches. Privacy also means many things for different people and different things for the same person in different

[570] Onyshko, "The FCC & ATIA", supra note 244 at 102.
[571] Anne Wells Branscomb, *Who Owns Information? From Privacy to Public Access* (New York: BasicBooks, 1994) at 8 [Branscomb].

contexts. Indeed, as BeVier argues "Privacy is a chameleon-like word, used denotatively to designate a range a wildly disparate interests."[572] Many scholars and academics have given different definitions on privacy. For instance, going far back to John Locke, he looks at privacy as man having property on his own person and products of his labour.[573] Later on, "The right to Privacy"[574] was a profound beginning toward developing a conception of privacy as the "right to be let alone". Post referred to privacy as a black hole that causes headache to those studying it. He admitted that "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various distinct meanings, so that I sometimes despair whether it can be usefully addressed at all."[575]

In the legal and philosophical discourse privacy is described to be in "chaos".[576] In the legal context, Hulett argues that "the greatest difficulty in this area is the ambiguous nature of privacy."[577] He talks about the existence of a constitutional right to privacy, and refers to privacy as a newly emerging constitutional right (although not included in the Constitution) without a clear legal definition. Although Hulett writes on the American context, the same situation applies in Canada regarding the constitutional status of privacy. Privacy is not explicitly mentioned in the Canadian Constitution, although it is recognized to have a constitutional status.

Some Canadian scholars have contributed to the legal discourse on privacy. For instance, Bruyer introduced an innovative idea on addressing privacy issues. He argues that "Privacy… is conceived as an equality issue, not a liberty issue. Perhaps at its core privacy protects and ensures equality in the sense that we are all entitled to equal concern and respect as individuals, and not that we are entitled to do as we please."[578] This idea is especially compelling if we

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[572] Lillian R. BeVier, "Information about individuals in the hands of Government: Some reflections on Mechanisms for privacy protection" (1995-1996) 4 Wm. & Mary Bill Rts. J. 455 at 458 [BeVier].
[573] John Locke, *Second Treatise of Government*, Edited with an Introduction by C.B. Macpherson (Indianapolis, Ind.: Hackett Pub. Co., 1980) at 19 [Locke].
[574] Samuel D. Warren & Louis D. Brandeis, "The right to Privacy" (1890) 4 Harv. L. Rev. 193 [Warren & Brandeis].
[575] Robert C. Post, "Three Concepts of Privacy" (2001) 89 Geo. L.J. 2087, 2087 at 2087 [Post].
[576] Julie C. Innes, *Privacy, Intimacy and Isolation* (New York; Oxford: Oxford University Press, 1992) at 3 [Innes, *Privacy*].
[577] M Hulett, "Privacy and the Freedom of Information Act" (1975) 27 Administrative Law Review, 275 at 276 [Hulett].
[578] Richard Bruyer, "Privacy: A Review and Critique of the Literature" (2006) 43:3 Alberta Law Review 553 at 587 [Bruyer].

consider privacy a societal rather than an individual value, an approach taken by some authors mentioned in this article. Another Canadian scholar, Brown, recognizes the chaos that exists in the legal literature around privacy by emphasizing the consequences in understanding cases when privacy is invaded. He writes: "Because no single version can possibly claim common assent…. We have no reference point to determine whether "privacy" has been "breached"[579]. This is a concern for the public officials dealing with privacy cases, and as I will explain later in this article, a challenge for the courts as well.

According to Solove, "Privacy is a sweeping concept encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations."[580] Solove adds a very interesting facet to the definition of privacy. He goes further of what people think about their own privacy saying that "Privacy…is not simply a matter of individual prerogative; it is also an issue of what society deems appropriate to protect."[581] Similarly, he argues that privacy "is an aspect of social structure, an architecture of information regulation."[582]. A comparable approach was taken by Allen-Castellito who also argues that "Privacy involves not only individual control, but also the social regulation of information."[583] Another scholar, Penney, offers a taxonomy in studying privacy focusing in economic and moral aspects of the term. Penney argues that "privacy is described in relation to the discrete interests that it protects."[584]

Solove advances a theory on how to reconcile the tension between transparency and privacy. He contends that information privacy must be re-conceptualized in the context of public records.[585] What he offers is a taxonomy of privacy which serves the purpose of studying and approaching privacy while competing with other values such as ATI.

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[579] Russell Brown, "Rethinking Privacy: Exclusivity, Private Relation and Tort Law" (2006) 43:3 Alberta Law Review 589 at 592 [Brown].
[580] Daniel J. Solove, "Conceptualizing privacy" (2002) 90 Cal. L. Rev. 1087, at 1087 [Solove, "Conceptualizing"].
[581] Ibid at 1111.
[582] Ibid at 1115.
[583] Anita Allen-Castellito, "Coercing Privacy" (1999) 40 Wm & Mary L. Rev. 723 at 723 [Allen-Catellino].
[584] Steven Penney, "Conceptions of Privacy: A Comment on R .v. Kang-Brown and R. v. A.M. (2008) 46:1 Alberta Law Review 203 at 203 [Penney].
[585] Daniel J. Solove, "Access and Aggregation: Public Records, Privacy and the Constitution" (2002) 86 Minn. L. Rev. 1137 [Solove, "Access"].

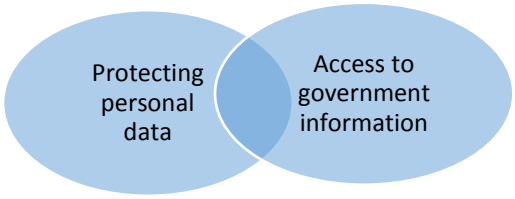
For the purpose of this chapter I focus on a particular aspect of privacy, one that encapsulates its meaning in the *Privacy Act*[586] and *ATIA*[587] – the informational privacy. This term is first introduced by Westin in 1967 and describes privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[588] Similarly, the Canadian Federal Privacy Commissioner (PCC) defines informational privacy as "the right of an individual to exercise control over the collection, use, and disclosure of his or her personal information."[589]

6.2 Debates on the dichotomy access to information-privacy

At the first sight, it seems like the rights of ATI and personal privacy are always in conflict since the former gives the right to ATI held by the government and the latter prevents the ATI pertaining to individuals held by the government. However, these two rights in most of the cases complement each other. There are many scholars who support this argument. Banisar argues that "RTI [right to information] and Privacy often play complementary roles. Both are focused on ensuring the accountability of powerful institutions to individuals in the information age."[590] O'Brien contends that "although informational privacy and access to governmental information appear contrary and point in opposite directions, they are conceptually complementary and the nexus between the two is information flow."[591] Indeed, the purpose of privacy provisions is to protect the privacy and provide individuals with a right of access to their information held by the government. In this context, Julie Innes discusses, "Privacy might not necessarily be opposed to publicity; its function might be to provide the individual with control over certain aspects of her life."[592] However, it is not uncommon that privacy and access rights may come into conflict with each other. As Ann Cavoukian, former Information and Privacy Commissioner of Ontario (IPCO), contends "Government-held public data may contain the personal information that

[586] *Privacy Act*, RSC 1985, c. P-21
[587] *Access to Information Act*, RSC, 1985, c. A-1.
[588] Alan W. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 7 [Westin].
[589] Ann Cavoukian, "Privacy and Government 2.0: The implications of an Open World" (May 2009) Information and Privacy Commissioner Ontario at 3 [Cavoukian, "Privacy"].
[590] David Banisar, "The right to Information and Privacy: Balancing Rights and Managing Conflicts" (2011) World Bank Institute-Governance Working Papers Series at 9 [Banisar, "RTI"].
[591] David M. O'Brien, "Privacy and the right of access: Purposes and Paradoxes of Information Control" (1978) 30 Administrative Law Review 45 at 84 [O'Brien, "Privacy"].
[592] Innes, *Privacy*, supra note 576 at 6.

relates to businesses, or may contain the personal information of identifiable individuals."[593] Both business and personal information cannot be disclosed unless there is a public interest that overrides the private one. In these circumstances conflicts are expected to arise. The graph below simplifies the relationship between the rights of privacy and ATI, and the situation when they collide



Source: David Banisar, The right to Information and Privacy: Balancing Rights and Managing Conflicts, World Bank Institute-Governance Working Papers Series, 2011, Figure 3.1, at 9.

Some misperceptions on the use of these two pieces of legislation have created tension in the application of their provisions. Carlson and Miller argue that "FOIAs create a presumption that all public records, including those containing personal information, shall be available for public inspection."[594] In addition, some arguments arise in relation to the reasonable expectation of privacy. According to the IPCO "Many would argue that once personal information has been made public, there can be no reasonable expectation of privacy relating to that information, and therefore, privacy protection rules no longer apply."[595] Solove talks in this sense about a "secrecy paradigm" drawing attention to the assertion that "private" means "secret" (which he criticizes). He urges for an abandonment of the "longstanding notion that there is no claim to privacy when information appears in a public record."[596] In this context he calls for a reconceptualization of informational privacy.

This problem is reduced with the inclusion of exemptions in both Acts. For instance, Onyshko

[593] Ann Cavoukian, "Balancing Access and Privacy: How Publicly Available Personal Information is Handled in Ontario" (October 2000), Canada, Symposium on the Protection of Information in Local Governments: The Administration and Use of Personally Identifiable Information in a Global Society, Information and Privacy Commissioner Ontario, Tokyo at 1 [Cavoukian, "Balancing Access"].
[594] Steven C. Carlson & Ernest D. Miller, "Comment: Public Data and Personal Privacy" (1999) 16 Santa Clara Computer & High Tech. L.J. 83 at 89 [Carlson & Miller].
[595] Cavoukian, "Balancing Access", supra note 593 at 1.
[596] Solove, "Access", supra note 585 at 1140.

observes that in the *ATIA* "The personal information exemption seeks to reconcile the claim of individual privacy with the benefit of broad public access."[597] O'Brien argues in this regard that "Privacy Act allows for disclosure in the public interest of only certain kinds of information, while the Freedom of Information Act allows for invasions of privacy by disclosures of personal information if a public need is established."[598]

An important principle of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information concerns. However, in many cases personal information finds its way out to the public domain by different means. This can become unpredictable since, as O'Brien argues, the problem is exacerbated "by the ambiguous nature of the information control and the absence of any specific constitutional guarantee of either personal privacy or right of access."[599] Furthermore, with the use of technology being significantly intensified, information has become a commodity in the market of goods and ideas. The IPCO contends that "Personal information has become a commodity that is being bought and sold by companies, almost entirely at the expense of personal privacy."[600] This is a non-anticipated consequence of access laws because, as Branscomb puts it, "Commercialization of the information is in conflict with established notions about the right of individuals to privacy."[601]

These situations are not easy to manage by the public officials[602] in charge of handling information requests. They often find themselves in the middle of two fires. O'Brien observes that in some cases "Administrators have two options: they may refuse to disclose information and risk a lawsuit under FOI by the party denied access, or they may disclose the information and risk a suit under the Privacy Act by the individual whose file was released."[603] This is not a

[597] Onyshko, "The FC & ATIA", supra note 244 at 102.
[598] O'Brien, "Privacy", supra note 591at 89.
[599] Ibid at 45-46.
[600] Ann Cavoukian, "Privacy as a Fundamental Human Right vs. an Economic Right: An Attempt at Conciliation" (September 1999) Information and Privacy Commissioner Ontario at i [Cavoukian, "Privacy as a HR"].
[601] Branscomb, supra note 571 at 3.
[602] In Canada these officials are called Access to Information and Privacy Coordinators (ATIP Coordinators). They can be found at every governmental department at the federal and provincial level.
[603] O'Brien, "Privacy", supra note 591 at 89.

comfortable position to be in, especially if someone is making decisions on these grounds on a daily basis. In order to make fair decisions one needs to have detailed guidelines in the laws/policies/regulations or some sort of directions which should be unified across all government departments to assure consistency. I will return to this problem later in section III when I analyse the legal framework.

More than three decades ago, in 1982, McCamus identified a problem with the balance between between privacy and ATI. He asked "If, at all, can these two conflicting values be reconciled?"[604], and answered that under the Canadian federal legislation reconciliation of access and privacy values is left essentially to the discretion of public officials.[605] McCamus found it problematic that the Canadian law addressed the conflict between access and privacy by simply subduing it to the administrative discretion. He argued that in following this approach, the Canadian scheme risked to undermine both the access rights conferred by the *ATIA* and the degree of privacy protection afforded by the *Privacy Act.* Indeed, in applying this scheme it is expected that the resolution of conflicts between privacy and access rights will not be consistent throughout government administration since different public officials will decide differently based on their perception of the value of these rights. In my view, this inconsistency stems from the conceptual chaos that exists in the Canadian legal framework where privacy and information may take many faces. McCamus further argues that the situation becomes even riskier when public officials find themselves in a situation of a conflict of interest when they are asked to disclose information about their offices or colleagues which might enable tangible public assessment of their performance.[606] In this context, it is anticipated that access to records will be denied in order to prevent appropriate scrutiny of public affairs on the excuse that disclosure will unfairly violate the privacy of the individuals involved. Similar assertion was made by Banisar about 30 years later who observed that "A conflict sometimes arises when government officials attempt to shield their decision-making from scrutiny by misinterpreting their demand for secrecy as a privacy interest."[607]

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[604] John D. McCamus, "The delicate balance: Reconciling privacy protection with the freedom of Information principle" (1982) 3:1 Government Information Quarterly 49, at 51 [McCamus, "The delicate balance"].
[605] Ibid at 52.
[606] Ibid at 51.
[607] Banisar, "RTI", supra note 590 at 16.

McCamus raised two important questions: First, one of institutional design: In what institutional forum should conflicts of access and privacy be resolved - courts, legislature or bureaucracy? Second, what guidance should be given to those dealing with the resolution of such conflicts? He points out that the American response to the first question is: the courts through judicial review. However, the Canadian response has been to rely on administrative discretion.[608] McCamus identifies a significant problem with this response – the bureaucrats having a lot of discretion and not much guidance do not provide an adequate institutional design to maintain the "delicate balance" between the two rights. To address McCamus's concerns a careful analysis of the available legal provisions is necessary.

6.3 Legal framework of privacy in Canada

6.3.1 Charter Status of Privacy

Canadians do not enjoy an explicit constitutional right to privacy since the *Charter* does not specifically include such right. There have been some early unsuccessful attempts to include privacy in the *Charter*. For instance, in the Special Joint Senate-House of Commons Committee on the Constitution in 1981, the Honorable David Crombie proposed the inclusion of a constitutional right of privacy in the Canadian Charter. This amendment was defeated by a vote of fourteen to ten.[609] Nevertheless, a whole body of case law has developed in Canada around the status of privacy which recognizes that privacy is protected under the *Charter* indirectly through sections 7[610] and 8[611]. Many Supreme Court of Canada decisions acknowledge that privacy is protected under the *Charter*. According to Khullar and Cosco "The Supreme Court has … linked the right to privacy with human dignity, liberty and security in its reflections on the s. 7 of the *Charter*."[612]

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[608] McCamus, "The delicate balance", supra note 604 at 53.
[609] Parliament of Canada, "Minutes of Proceeding and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada", (January 22, 1981) Issue No.43 at 7, 55-6.
[610] Charter, supra note 5 at s. 7 says "Everyone has a right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[611] Ibid, at s. 8 says "Everyone has the right to be secure against unreasonable search or seizure."
[612] Ritu Khullar & Vanessa Cosco, "Conceptualizing the Right to Privacy in Canada", (November 26-27, 2010) Prepared for: Canadian Bar Association, National Administrative Law, Labour & Employment Law and Privacy & Access Law PD Conference, Ottawa, Ontario at 3 [Khullar & Cosco].

The cases discussed below make the assertion that privacy is a constitutional right. In *Beare*[613], Justice LaForest expressed "considerable sympathy"[614] for the proposition that section 7 includes a right to privacy. The same approach was taken by Justice Wilson in *Morgentaler*[615] where section 7 was recognized to grant "the individual a degree of autonomy in making decisions of fundamental personal importance."[616] Justice McLachlin (dissenting) in *Rodriguez*[617] acknowledged that "security of the person, [is] a concept which encompasses the notions of dignity and the right to privacy."[618] In addition, he argued that "Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body."[619]

Justice LaForest again in *Godbout*[620]emphasized his position held in *Beare,* and reiterated his general view that "the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[621] Same observations about privacy as reflected in s. 7 of the *Charter* are made in *Children's Aid Society*[622] where the Court recognized that "In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[623]

Section 7 of the *Charter* protects informational privacy which means that the liberty and security interests are related to the freedom to engage on private and personal communications

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[613] *R. v Beare; R. v Higgins,* [1988] 2 SCR 387 [Beare].
[614] Ibid at para 58.
[615] *R. v Morgentaler,* [1988] 1 SCR 30 at 166-167.[Morgentaler].
[616] Ibid at 166.
[617] *Rodriguez v British Columbia* [1993] 3 SCR 519 [Rodriguez].
[618] Ibid at 340.
[619] Ibid at 345.
[620] *Godbout v Longueuil (City),* [1997] 3 SCR 844, [1997] SCJ No.95 at paras 63-69 [Godbout].
[621] Ibid at 66.
[622] *B. (R.) v Children's Aid Society of Metropolitan Toronto,* [1995] 1 SCR 315 at 368-369 [Children's Aid Society].
[623] Ibid at 368.

without being observed upon. This association was made clear in *O'Connor*[624] in which Chief Justice Lamer and Justice Sopinka referred to the "constitutional right to privacy" in information stating that "a constitutional right to privacy extends to information contained in many forms of third party records."[625] Justice L'Heureux-Dubé, specifically located the reasonable expectation of privacy in the liberty and security interest in section 7 of the *Charter.* She made a good analysis of the "Right to Privacy" in paragraphs 110-199 and explained that "Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society."[626] The Supreme Court of Canada has discussed the "reasonable expectation of privacy" in its decision in the case of *Hunter*[627]. Similar observation was made in *Ryan*[628], where the court recognized that the liberty and security protected in section 7 encompasses the right to privacy. The court reiterated that "In its s. 7 jurisprudence, it has expressed great sympathy with the notion that liberty and security of the person involve privacy interests. That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized."[629] When addressing privacy and access legislation in *Dagg*[630] Justice LaForest explained the importance of privacy describing it as a "fundamental value….grounded on physical and moral autonomy- freedom to engage on one's own thoughts, actions and decisions."[631] Furthermore, in *Lavigne*[632] the Court recognized the constitutional value of privacy and the quasi-constitutional status of the *Privacy Act*.

All the above cases acknowledged that section 7 protects the right of privacy. In addition, there are other cases that recognize privacy as a constitutional right protected under section 8. Khullar and Cosco argue that "The right of privacy is not only a human right, it is a human right protected by the Charter....The right to privacy, particularly informational privacy, is frequently

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[624] *R. v O'Connor,* [1995] 4 SCR 411, [1995] SCJ No. 68 [O'Connor].
[625] Ibid at para 17.
[626] Ibid at para 113.
[627] *Hunter v Southam* (1984) 2 SCR 145 at p. 159-160, see also *James Richardson and Sons v Ministers of National Revenue* (1984) 1 SCR 614 [Hunter].
[628] *M. (A.) v Ryan*, [1997] 1 SCR 157 [Ryan].
[629] Ibid at para 80.
[630] *Dagg v Canada (Minister of Finance),* [1997] 2 SCR 403, [1997] SCJ No. 63 [Dagg].
[631] Ibid at para 65.
[632] *Lavigne v Canada*, supra note 512.

addressed under section 8 of the *Charter*."[633] In *Hunter*[634], the Supreme Court made it clear that section 8 protection against unreasonable search and seizure includes the right to privacy.[635] In *Dyment*[636] Justice LaForest held that the underlying purpose of the section 8 is to protect the right to privacy which is more than just a physical right as it includes the privacy in information about oneself. He states that there are "reasonable expectations of the individual that the information shall remain confidential to the persons."[637] Furthermore in *Tessling*[638] the Supreme Court confirmed that privacy is the "dominate organizing principle"[639] in an analysis under section 8 of the *Charter,* and distinguished between three kinds of privacy "personal privacy, territorial privacy and informational privacy."[640] In *Mills*[641] the Court refers to *Hunter* as the first case to recognize that section 8 protects the right to privacy[642], and makes an analysis of privacy in paragraphs 77-89. In *Duarte*[643] the Supreme Court also recognized that section 8 promotes values by protecting the right to control the dissemination of information about oneself. Moreover, in *Dagg* the Court refers to privacy as "worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8."[644]

As noted in Chapter 5, ATI is not protected under the *Charter,* and except for a limited recognition under section 2(b) there is no agreement in the case law that suggests that such protection exists. On the contrary, the right of privacy is widely recognized by the Supreme Court of Canada jurisprudence that it is protected under sections 7 and 8 of the *Charter*. This observation of the constitutional status of the two rights is significant since it helps to understand which of them will take precedence in cases of conflict. The uneven protection of the rights of ATI and privacy in Canada has its ramifications in the implementation of the respective Acts.

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[633] Khullar and Cosco, supra note 612 at 1.
[634] *Hunter,* supra note 627.
[635] Ibid at 159.
[636] *R. v Dyment,* [1988] 2 SCR 417 [Dyment].
[637] Ibid at para 22.
[638] *R. v Tessling,* [2004] 3 SCR 432, [2004] SCJ No. 63 at paras 19-28 [Tessling].
[639] Ibid at para 19.
[640] Ibid at para 20.
[641] *R. v Mills,* [1999] 3 SCR 668, [1999] SCJ No. 68 [Mills].
[642] Ibid at para 77.
[643] R. v Duarte, [1990] 1 SCR 30 [Duarte].
[644] *Dagg,* supra note 630 at para 66.

6.3.2 Exploring the Privacy Act and its interaction with the Access to Information Act

The Canadian *Privacy Act* and the *ATIA* were part of the same Bill (C-43) and both came into effect at the same time in 1983. The Supreme Court in has characterized both acts as "quasi-constitutional" because of the role they play in the preservation of a free and democratic society.

The purpose of the Privacy Act, as it is enshrined in section 2, is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information."[645] The Act does not contain any definition of "privacy". Instead, it defines "personal information" as "information about an identifiable individual that is recorded in any form"[646]. This definition is broad and contains examples of personal information. Obviously, this definition does not offer a good reference to understand the complexity of privacy, and its interactions with other rights. This was noticed shortly after the law was passed. The Report of the Standing Committee on Justice and Solicitor General in 1987 recognized that "This problem of lack of definition of the central concept of privacy is endemic in data protection legislation."[647] The definition of "personal information" is followed by a lengthy list (twelve elements) of what constitutes personal information for the purpose of this legislation. This list cannot encompass all cases of personal information the governments deal with in their everyday operations. However, information not specifically mentioned in the list but clearly covered by the broad definition, is to be considered personal information.

The *Privacy Act* imposes obligations on how the government must handle personal information. As the PCC puts it "The Privacy Act ….imposes obligations on some 250 federal government departments and agencies to respect privacy rights by limiting the collection, use and disclosure of personal information."[648] There is another act on privacy in Canada, PIPEDA

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[645] *Privacy Act*, RSC 1985, c. P-21, at s 2.
[646] Section 3 of the Privacy Act.
[647] Open and shut, supra note 272 at 58 ["Open and shut"].
[648] Office of the Privacy Commissioner of Canada, Legal information related to the Privacy Act: The Privacy Act, online: Office of the Privacy Commissioner of Canada < http://www.priv.gc.ca/leg_c/leg_c_a_e.asp>.

(*Personal Information Protection and Electronic Documents Act*)[649] , which regulates privacy in the private sector. This Chapter does not engage with *PIPEDA*.

If we now look at the *ATIA*, personal information is part of the mandatory exemptions, and found in section 19, which states: "the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*."[650] However, this section allows for information to be disclosed if it is requested by the person to whom it relates; it is publically available, and in accordance to section 8 of the *Privacy Act*.[651] The purpose of section 19 of the *ATIA* is to strike a balance between the right of ATI in records under the control of a government institution and the right of each individual to his or her privacy. Section 19 incorporates by reference section 3 and 8 of the Privacy Act, which are essential for the interpretation and application of this exemption. According to the TBS, the application of section 19 of the *ATIA* requires a three-step process:

1. Establish that the information falls within the definition of personal information found in section 3 of the *Privacy Act*.
2. Ensure that paragraphs 3(*j*), (*k*), (*l*) and (*m*) of the definition of personal information do not apply to permit the disclosure of the personal information.
3. Exercise discretion as to whether the information may nonetheless be disclosed under subsection 19(2) of the *ATIA*[652]

Subsection 19(1) is a mandatory exemption based on a class test that provides that, subject to the three exceptions in subsection 19(2), the head of a government institution shall refuse to disclose any record requested under the *ATIA* containing personal information as defined in section 3 of the Privacy Act.

Just like in the *ATIA*, there are a few exemptions in the *Privacy Act, as well.* They are listed in section 8, and permit disclosure for eleven exceptions. The last one, section 8(2)(m)(i) includes

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[649] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5
[650] Ibid at s 19.
[651] Ibid at s 19.
[652] Treasury Board of Canada Secretariat, Access to Information Manual, 11.13 Section 19 – Personal information, online: <https://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp>

the public interest, which allows for disclosure of personal information by the head of the institution if "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure."[653] Regarding this section, the PCC clarifies that "The provision is applied in unique, fact-specific situations. It is not designed to deal with the disclosure of personal information on a systematic or routine basis. Rather, it is an important section in the Act which provides institutions with a tool they may need to effectively balance an individual's right to privacy with the public's need to know."[654] This argument is premised on the idea that the two Acts complement each other, no one takes precedent over the other, and they are to be read together.

Indeed, section 8(2)(m)(i) is a very significant provision that deals with balancing the right of privacy against access when a public interest is involved. The principle of "public interest override" takes precedence over the protection of privacy when the two conflict each other. This demonstrates the importance of these two values in the Canadian legal system. But, establishing a "public interest" may become problematic since has to satisfy two criteria: first it has to be proven it exits, and second, it has to outweigh privacy. According to the subsection (m) of section 8 of the *Privacy Act*, this responsibility falls on the head of the institution. Even if the public interest is evident, how can one say when it outweighs privacy? There clearly is a need for a balancing exercise in these circumstances, so the question to ask is: how will the process of balancing be pursued? There are no additional provisions in either acts on how this process happens, and what rules should be taken into account when deciding on the "public interest". Therefore, the decision on the "public interest override" falls under the discretion of the head of the institution processing requests. As Karzmieski argued "government officials exercise discretion at almost every stage of the access process."[655]

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[653] *Privacy Act*, RSC 1985, c. P-21, at s. 8(m)(i)

[654] Office of the Privacy Commissioner of Canada, "Facts Sheets: The Privacy Act: Not an excuse to promote secrecy" (April 2006). Online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/resource/fs-fi/02_05_d_29_e.asp>.

[655] Vincent Kazmierski, "Lights, Judges, Access: How Active Judicial Review of Discretionary Decisions Protects Access to Government Information" (2013) 51:1 Alberta Law Review 49 at 50 [Kazmierski].

The Supreme Court has described the two Acts as a "seamless code with complementary provisions that can and should be interpreted harmoniously."[656] This means that neither Act can be read without the other. In other words, privacy provisions have exceptions about information that falls under *ATIA*, and the ATIA provisions have exceptions about information that falls under the *Privacy Act.* The complexity of these exceptions in both statutes is not always easy to disentangle. It is challenging to classify information that is covered under the *ATIA* if it falls under any of the exceptions, including privacy. That is the reason some scholars have debated on the complexity of ATI Acts. For instance, Antonia Scalia has labelled FOI laws as the Taj Mahal of the Doctrine of Unanticipated Consequences.[657] Similarly, Beall argued that "one of the continuing themes spicing the reams of literature on FOIA has been the view that the Act opened a Pandora's jar of unintended consequences."[658]

The leading case regarding the interaction between the two rights is Dagg, a the Supreme Court case, which ruled that once it is determined that a record falls within the definition of "personal information" in s. 3 of the Privacy Act, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paragraphs (a) to (i).[659] However, in some cases, it is necessary to refer to paragraphs (*a*) to (*i*) of the definition to determine to whom the personal information belongs – for example, views and opinions of individuals, which are discussed in paragraphs (*e*), (*g*) and (*h*) of the definition.

6.4 The legal framework of privacy in the EU

The current EU privacy rules originate from Convention No. 108, adopted within the Council of Europe in Strasbourg in 1981[660]. This Convention has proved to be very influential in the

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[656] *Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at para 22, [2003] 1 SCR 66, at para 22 [RCMP]. The Supreme Court noted in this case that *the Privacy Act* and *the Access to Information Act* contain: "a seamless code with complementary provisions that can and should be interpreted harmoniously".

[657] Antonio Scalia, "The Freedom of Information has no Clothes" (March/April 1982) 6:2 Regulation: AEI Journal of Government and Society 14 at 15 [Scalia].

[658] Christopher P. Beall, "The exaltation of Privacy Doctrines over Public Information Law" (1995-1996) 45 Duke Law Journal 1249 at 1253 [Beall].

[659] *Dagg*, supra note 630.

[660] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (*European Treaty Series*, No. 108).

shaping of data protection law at domestic level in Europe and it is still the only international treaty on data protection. The Convention is currently ratified by all EU Member States. Europeans value their privacy as one of the most important individual rights. The Eurobarometer survey, conducted in March 2015, asked 28,000 EU citizens what they think about the protection of their personal data. The survey showed that the protection of personal data remains a very important concern for citizens.[661] Based on this incentive, an entire edifice of privacy protection was built to improve the information flow between Member States. In 1995, the EU adopted Directive 95/46[662]. This is the equivalent of the PIPEDA in Canada and deals with information processed by private companies. Pursuant to Article 286 EC, Directive 95/46 was transposed in 2001 into a regulation on the processing of personal data, Regulation 45/2001[663]. This is the equivalent of the Canadian Privacy Act and governs the information processed by the EU institutions.

6.4.1 The Charter status of privacy and Treaty provisions

Protection of informational privacy in Europe is dealt with primarily by means of data protection laws, the purpose of which is to set standards for the handling of personal information. Privacy and data protection are however distinguishable. They are protected by separate provisions in the EU Charter. Privacy falls under Article 7 of the Charter "Respect for private and family life" which states "Everyone has the right to respect for his or her private and family life, home and communications." Data protection falls under Article 8 "Protection of personal data" which states "Everyone has the right to the protection of personal data concerning him or her" (Article 8.1). Additionally, the European Convention on Human Rights (ECHR) protects the right of privacy under Article 8 "Right to respect for private and family life" which states "Everyone has the right to respect for his private and family life, his home and his correspondence." (Article 8.1). Furthermore, data protection also received a major boost from the

[661] European Commission, Public Opinion. Online: <http://ec.europa.eu/public_opinion/index_en.htm>.
[662] Directive 95/46 of the European Parliament and the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31.
[663] Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.01.2001.

inclusion in the Lisbon treaty, and then Article 16 of the TFEU, which provides that "everyone has the right to the protection of personal data concerning them."[664]

However, the distinction between data protection and privacy is often blurred in practice, since both rights are closely connected and even overlap each other to a very high extent. The courts have opted for a broad scope of the right of privacy which extends further than the notion of respect for private and family life of Article 7 of the Charter. The jurisprudence of the European Court of Human Rights (ECtHR), for example, though it is based on the right to respect for private life found in Article 8 of the ECHR[665], has sometimes relied on data protection instruments. They include Convention No.108 and the Directive to determine the scope of that right in the information privacy context. Indeed, according to Krananborg, the scope of "private life" in Article 8 "seems to be on a par with the scope of data protection"[666].

Decisions involving a conflict of ATI and privacy in the EU have as their starting point the relevant articles of the Charter, which include not just Article 42 (regarding the right of ATD of the EU institutions) and Articles 7 (concerning the protection of private life/privacy), but also Article 8 (concerning data protection). They must also take account of the requirement of Article 52(3)[667] of the Charter to interpret those rights from the point of view of their ECHR counterparts thus requiring an examination of the Charter rights from the point of view of both Article 8 (privacy) and Article 10 (FOI found under the Freedom of expression) of the ECHR.

A recent example in the EU where an extensive exercise of balancing the right of privacy and the right to know is the Google case.[668] The CJEU upheld that internet companies like Google

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[664] TEU, supra note 58.
[665] See *Rotaru v Romania* [2000] ECHR 192 (4 May 2000) at paba.43 where the Court said (obiter) that "there is no reason in principle to justify excluding activities of a professional or business nature from the notion of private life".
[666] H. Kranenborg, "Access to Documents and Data Protection in the European Union: On the Public Nature of Personal Data" (2008) *Common Market Law Review* 45, 1092 [Kranenborg].
[667] Subsection 52(3) of the Charter states: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."
[668] Case C-131/12. Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González [Google Spain and Google], online: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-131/12&td=ALLDaniel>.

have to accommodate requests to remove certain personal information from their search engine results.[669] In this case, the information was picked by Google from the website of a Spanish public body regarding two legitimate announcements for insolvency. In its reasoning of the case, the Court made several references to Articles 7 (Private and family life) and 8 (Protection of personal data) of the EU Charter. This served as a reminder "about the value of information in society, which…. help us make informed decisions in our public and private lives."[670]

6.4.2 Exploring Regulation 45 and its interactions with Regulation 1049

Regulation 45 was adopted with a clear objective, laid out in Article 1 as having two purposes:

- for the institutions and bodies [...] to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data,
- to neither restrict, nor prohibit the free flow of personal data between themselves or to recipients subject to [the principles of the data protection directive.

There are several articles in the Regulation 45 that might have a strong effect in their application when they are cross-referenced with the provisions of Regulation 1049. First, Article 5 has four requirements which state:

Personal data may be processed only if:
(a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties
(b) processing is necessary for compliance with a legal obligation to which the controller is subject, or
(c) processing is necessary for the performance of a contract to which the data subject is party
(d) the data subject has unambiguously given his or her consent

This article plays an instrumental role when it comes to public disclosure of personal data as it defines whether such an act may be legitimate or not. The two first elements of the Article (a and b) recognize the fact that a public administration or body is sometimes obliged to disclose personal data. Therefore, the data protection regulation opens up to an interpretation according to

[669] Court of Justice of the European Union, Press Release No 70/74, Luxemburg, 13 May 2014.
[670] Irma Spahiu, "Between the right to know and the right to forget: looking beyond the Google case" (2015) 6:2 European Journal of Law and Technology at 18 [Spahiu, "RTK"].

Regulation 1049. In case Regulation 1049 requires disclosure, Article 5 does not constitute an obstacle.

Second, Article 8 requires that personal data shall only be transferred to recipients subject to the national law:

> (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or
> (b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Article 8(b) is an illustration of the tension between the data protection regulation and the public access regulation, and moreover between the different objectives of the two regulations. A literal interpretation of the text would lead to a result which seriously impairs the effectiveness of the Regulation 1049. Such a result could not have been envisaged by the Community legislature. This subsection presupposes that the recipient of a document containing personal data establishes why he needs access to it. However, ATD is given to enable citizens to participate more closely in the democratic process. As such, it is essential to this objective that the citizen does not have to establish any specific interest in the disclosure of a document.

Therefore, subsection sub-section 8(b) has to be interpreted in the light of the objectives of the relevant provisions of both the Regulation 45 and the Regulation 1049. On the one hand, Article 2 of the Regulation 1049 gives the EU citizens a legally enforceable right to ATD. On the other hand, Article 8(b), merely envisages the protection of the data subject, in cases when the disclosure of the data is in itself allowed according to the provisions of Community law on data processing. In such cases the transfer of the data in itself would normally not prejudice a persons's legitimate interests. In other words, if the transfer of personal data is allowed by the other provisions of Regulation 45, Article 8(b) cannot restrict disclosure.

These considerations lead to the following interpretation: in cases where data are transferred to give effect to Article 2 of the Regulation 1049, and provided that the disclosure of the data is allowed according to the provisions of Community law on data processing, the necessity of having the data transferred is by definition established. Moreover, such a transfer cannot prejudice the legitimate interest of the data subject. In other words, a necessary transfer cannot

prejudice legitimate interests, taken into account the conditions and safeguards provided by Regulation 1049.

If we now look at Regulation 1049, Article 4 (1) (b) is cross-referenced with Regulation 45 because the relevant rules on data protection referred to in this provision are laid down in Regulation 45. Article 4(1)(b) provides that:

> "1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
> (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

This provision must be analyzed on a case-by-case basis, where three elements need to be taken into account:

1- the mere fact that a document mentions personal data does not automatically mean that the privacy and integrity of a person are affected. It should be proved that the privacy and the integrity of the data subject must be at stake.
2- the words "would undermine" imply that the protection of the privacy and integrity of an individual must be harmed. The level of harm needed for the applicability of the exception to public access is not mentioned. However, the wording "undermining" implies that the effect on the interest of the data subject should be substantial. Hence, it should be proved that the public access must substantially affect the data subject.
3- the harm done to a person's privacy and integrity should be examined in accordance with community legislation regarding the protection of personal data. The prime sources of community legislation regarding the protection of personal data are Directive 95/46/EC and Regulation (EC) 45/2001. Hence, public access can only be given if this is allowed by the data protection legislation.

The interaction between Article 4(1)(b) of Regulation 1049 and Article 8(b) of Regulation 45 has been extensively interpreted in the Bavarian Lager[671], a guiding privacy case of the CJEU.

[671] European Commission v The Bavarian Lager Co. Ltd., Case C-28/08 P, 2010 I-06055 [Bavarian Lager].

The decision clarified the meaning of Article 4(1)(b) of Regulation 1049 which must be interpreted as a direct referral to the data protection regulation, without any threshold. Moreover, the Court is clear about the fact that names may be regarded as "personal data" and that the communication of such data falls within the definition of "processing" in the sense of Regulation 45. In case of a public access request for a document containing personal data, such as in the Bavarian Lager case, the rules on data protection are entirely applicable, with Article 8(b) having crucial importance.

6.5 Comparisons and conclusions

The comparisons of the rights of privacy and ATI in Canada and the EU demonstrate the tensions and the challenges that exist in implementing ATI laws. In Canada, ATI and privacy do conflict each other on a regularly basis as the data shows. Over the years the number of privacy exemptions under the *ATIA* has grown exponentially (see Tables 4 and 5).

Scholarly debates describe privacy as an individual right rooted in traditional liberal thought[672], based upon premises of individualism existing to promote the worth and the dignity of the individual.[673] Similarly, privacy has been described as inherently personal and as a right which recognizes the sovereignty of the individual[674]. As such, the rationale for information privacy, is most commonly articulated in terms of personal rights. It is often conceived of as a civil liberty of negative nature and as human right which protects individual autonomy and/or human dignity[675]. Such categorization of the right of privacy makes it a strong competitor to the right of ATI.

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[672] Priscilla P Regan, "Privacy as a Common Good in the Digital World" (2002) 5 Information, Communication and Society 382, at 397 [Regan].
[673] Thomas Emerson, *The System of Freedom of Expression* (1970) 545, 549, cited in Daniel Solove, "I've Got Nothing to Hide' and Other Misunderstandings of Privacy" (2007) 44 *San Diego Law Review* 745, 760.
[674] Daniel Solove, "I've Got Nothing to Hide' and Other Misunderstandings of Privacy" (2007) 44 *San Diego Law Review 745, at* 761 [Solove, "Nothing to hide"].
[675] Privacy is explicitly recognized as a human right in Article 17 of the International Covenant of Civil and Political Rights and also in Article 8 of the European Human Rights Conventions. The former has been interpreted by the Human Rights Committee as requiring, inter alia, the implementation of basic data protection principles: See General Comment 16, issued 23 March 1998, at 7 and 10.

A conceptual analysis of the notions of privacy and information validates the concerns of the legal practitioners. Chief Justice of Canada McLachlin admitted that "it is logically impossible to give both rights a dominant position. On the one hand, as a 'right', one would expect the right to personal privacy to be understood broadly. On the other hand, because personal privacy is cast as an exception to the right of access to government information, it must be interpreted narrowly".[676] In Canada, the structure of the *ATIA* and *Privacy Act* mirrors the inherent tension between the public's right to ATI, and the individual's right to restrict the disclosure of information for privacy reasons. Indeed, the legislator's choice to enact these two pieces of legislation together, to draft them so that they share definitions and exemptions, to design them as a "seamless code", places this tension at the heart of any interpretative exercise of the *Acts*[677].

The Canadian legal framework has established a constitutional privacy right, but does not grant such status to the right of ATI. This right has been slower to develop in that direction, and it has not yet reached the same degree of acceptance constitutionally. The statutory scheme establishes a far-reaching domain of discretionary power which creates the risk that access to records will be denied in order to preclude appropriate scrutiny of public affairs on the pretext that disclosure will unfairly invade the privacy of data subjects[678]. The three-step test applied to the section 19 of the ATIA, include discretion as the last step of the test. Therefore, the dominant approach in Canada will be to deny requests if there is even a small risk that disclosure of the information may cause even minor harm to a protected interest. The requirement of harm to a protected interest is not interpreted rigorously, as it should be to override a fundamental human right. The public interest override in section 19 is applied only where there is a clearly dominant interest in the information in question, and not at all for exceptions such as privacy. For this reason Canada, has been criticized of going "far beyond keeping private lives private…. This slavish devotion to privacy chokes off information that really should be public."[679]

In the EU, both privacy and ATI rights have a constitutional status recognized in treaties, the Charter and the Convention. This gives them equal footing when conflicting with each other. The

[676] McLachlin, "ATI", supra note 228 at 8.
[677] Ibid, at 7.
[678] McCamus, "The delicate balance", supra note 604 at 54.
[679] Fred Vallance-Jones, "Let's keep it a secret", Media-The Canadian Association of Journalists, Fall 2004, 10(4), at 37 [Vallance-Jones, "Let's keep"].

two Regulation governing each rights have a wider and more complex relationship with each other, with manyArticles referring to each other. The three-part test applied for the section 4(1)(b) of the Regulation 1049 when is cross-referenced with Regulation 45, does not include a discretion step. However, even in the EU, it seems that privacy has preference over access, because of the value embedded in it as an individual value. I will look further into the privacy-ATI dichotomy when I explore the courts jurisprudence and the legal discourse that surrounds it.

Although, the prevailing view is that ATI and privacy are inherently contradictory, their interrelationship is in fact a complex one. ATI is concerned with the transparency and access, while privacy with secrecy and protecting information from disclosure. However, the rights of privacy and ATI may overlap in a complementary manner. First, privacy laws may have important transparency dimensions. Rights of access under privacy laws may overlap with ATI rights to the extent that individuals are able to use ATI laws to access their own personal data. Hence "an individual should be able to use them to access his or her own personal information unless the FOI or privacy law specifically precludes this."[680] Second, privacy regimes require the granting of access to personal information and ATI regimes include privacy provisions exempting personal information from access. Third, both regimes rely on effective information management to be able to operate appropriately. Solove (2003) argues that "information flow and privacy are both extremely important values; finding the right balance will be critical to shaping the future of a world increasingly driven by information."[681]

Table 4 below provides information regarding the times ATI requests have been rejected in Canada because of privacy exemptions. The numbers suggest that it happens quite often. Table 5 illustrates in a graph the rejections for privacy reasons (blue line) in relation to the total number of rejections (orange line). The numbers show that privacy rejections constitute a considerable amount when compared to the total number (always over 30%), and they keep increasing.

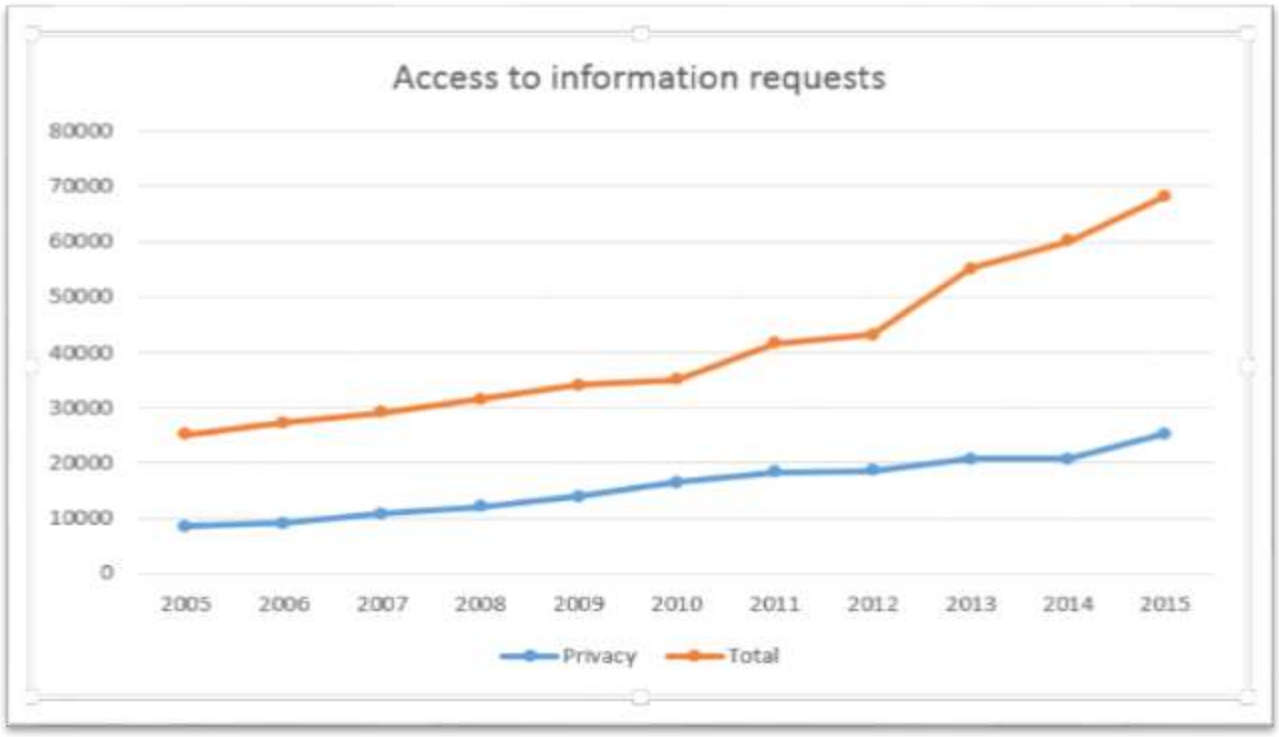
[680] Maeve McDonagh & Moira Paterson, Freedom of Information: Taking Account of the Circumstances of Individual Applicants (2010) Public Law, at 505 [McDonagh & Paterson].
[681] Solove, D. (2003) 'The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure' 53 (3) Duke Law Journal 1039, at 1065 [Solove, "The vitues"].

Table 4: Exemptions applied under ATIA

	2013-14	2012-13	2011-12	2010-11	2009-10	2008-09	2007-08	2007-08	2006-07	2005-06
sec.19	20,702	20,797	18,665	18,392 (36.5%)	16,544 (34%)	13,985 (31.2%)	12,119 (29.5%)	10,755 (30.2%)	9,098 (30.5%)	8,499 (32.1%)

Source: Data of the Government of Canada at InfoSource. Available at http://www.infosource.gc.ca/index-eng.asp

Table 5: Access to Information and privacy requests



Source: Table drawn by author using data of the Government of Canada at InfoSource. Available at http://www.infosource.gc.ca/index-eng.asp

PART III

THE DYNAMICS OF TRANSPARENCY AND ACCESS TO INFORMATION: ACTORS AND PRACTICES

CHAPTER 7: THE ADMINISTRATIVE MANAGEMENT SYSTEM OF ACCESS TO INFORMATION

In this chapter I look at the administrative system of management of ATI laws, government institutions responsible, their mandate and practices. As I have argued in the previous chapter, the disclosure of information heavily depends on the public officials holding the information. Many scholars have paid close attention to this challenge and have emphasized the critical role of implementation of ATI laws plays for an effective ATI regime. The purpose of this chapter is to examine how the practices of government institutions affect the ATI regimes in both Canada and the EU, and what are the implications of discretionary powers on transparency and ATI. To do so, I play close attention to the institutions responsible for the administration of the ATI laws. Their practices are indicators of how governments perceive and value ATI as a right. Statistics, policies, and guidelines of some of these institutions will be studied to understand the dynamics of the ATI regime.

In addition, I look at the role of the public official assigned to deal with ATI requests, the ATIP Coordinators. To complement the study of ATI practices, I have prepared a questionnaire that asks ATIP coordinators a few questions about the value of ATI laws. Then, I compare the data gathered in this chapter with the information I received from the interviews with the some representatives of the media and the NGOs. By doing so, I examine ATI processes both from an "insider" (looking at those responsible for the management of the ATI system) and an "outsider" perspective (looking at the users of the right of ATI). Berzins draws attention that the analysis of the issues may suffer from lack of familiarity with the internal working of the access process. Also, an insider's view could be of value to those outside the process since it helps them empathize with ATI's objectives and dynamics and understand how the system works better.[682]

[682] Christopher Berzins, "Ontario's Freedom of Information Access Process: 'A view from the Inside'" (2002) 26:1&2 Advocates Quarterly 1 at 2 [Berzins].

7.1 Looking at access to information from a political and cultural institutional perspective

The contextual factor which matters most for understanding variations in the design and implementation of ATI laws is the institutional structure of political power, understood in the broad sense as including both the formal rules governing relations between important actors, and the organisational forms those actors take.[683] In countries where there are centralised institutions enjoying a formal monopoly over representation in the policymaking process, ATI laws tend to be weaker than in countries where there are more veto points which tend to compete with one another. This is because, in the former case, political groups who hold the monopoly enjoy privileged access to a good deal of official information without the need for general access laws. In fact, their privileged access is likely to be threatened by such laws, and they are likely to share a preference for secrecy with the bureaucracy.

According to Larsen and Walby, the debate about government transparency takes place in two interconnected realms. The first is the political realm and it focuses on participatory democracy and the constitutional state. The second is the administrative realm and it focuses on managerial concerns related to the idea of good governance[684]. Especially in governmental systems, where the political power is highly concentrated in the executive branch, the relationship between the two realms has a strong bond of a subjugatory nature. In these systems, the political realm seems to dictate "the urge to regulate the flow of information"[685], as Savoie puts it. First-past-the-post parliamentary systems such as Australia or Canada, which produce frequent majority governments, have systematically resisted calls to overhaul their FOI laws[686]. This is explained with the political traditions of the monarchy, which allowed for the concentration of power on the monarch's hands. Political control is exacerbated even more in systems with little checks and

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[683] Paul Pierson, *Politics in Time. History, Institutions and Social Analysis* (Princeton: Princeton University Press, 2006) at 104 [Pierson]; James March & Johan Olsen, "Elaborating the 'New Institutionalism'", In *The* Rod Rhodes, Sarah Binder & Bert Rockman, eds, Oxford Handbook of Political Institutions (Oxford: Oxford University Press, 2008) 3-20 at 3 [March & Olsen].
[684] Meijer et al, "Assessing Government Transparency", supra note 114 at 3.
[685] Donald Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999) [Savoie, "Governing"]; Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2001) [Simpson].
[686] Gregory Michener, "How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws" (January 2015) 28:1 Governance: An International Journal of Policy, Administration, and Institutions 77–94, at 79 [Michener].

balances on executive power. Looking at the factors that affected ATI legislation in Canada, McCamus noted:

> The Canadian system of government places effective control over both the executive and legislative branches of government in the hands of the Prime Minister and Cabinet. If the enactment of freedom of information legislation ….is to be explained in part by the existence of tension between executive and legislative branches of government, such tension normally is absent in the Canadian context.[687]

McCamus countered these arguments by saying that, in a system which emphasizes party discipline, access legislation is needed to restore accountability.[688]

> The Westminster system of government had always been criticized for the degree to which it concentrates political authority in the hands of Cabinet ministers and bureaucrats. The long tradition of this monopoly has resulted in a political apathy of the citizens. Chambers rightfully argued long time ago that "In parliamentary systems based on the British model, citizens are more likely to defer to the judgment of their representatives, rather than having power in their hands, because their democratic institutions were added onto an aristocratic institution - the British monarchy.[689]

Another important factor which determines how ATI is perceived, debated and implemented is the political and administrative culture dominant in the institutional settings. ATI laws are only the tip of the iceberg in the enormous ATI edifice. Base on his experience with ATI, former Information Commissioner Michinson argued that:

> FOI laws are not fundamentally flawed. There are areas that need to be amended or updated to reflect experience and societal progress, but the laws do a pretty good job of reflecting the underlying value of open and transparent government. The main difficulty is a cultural one. Unless there is a culture of transparency within government, the legislation will never work to its optimum potential.[690]

Similarly, Larsen and Walby contended that "The dysfunctionalities of the current ATI framework are by no means reducible to problems with the law, 'techniques of opacity' are tied

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[687] McCamus, "FOI in Canada", supra note 283 at 51.
[688] Ibid, at 54.
[689] Elizabeth Chambers, "*The Referendum and the Plebiscite",* in Norman Ward & Duff. Spafford eds, *Politics in Saskatchewan* 59, 62 (1968) [Chambers].
[690] Tom Michinson, "Access, Transparency and Democracy: Looking Back, Looking Forward: Remarks by Tom Mitchinson, Office of Ontario, September 20, 2002, at 2, online: < https://www.ipc.on.ca/images/Resources/up-092002tm.pdf> [Michinson, "Access"].

to political and administrative cultures."[691] Indeed, as I have discussed in Chapter 4, with the notable exception of the Nordic countries, until recently a strong anti-transparency tradition characterised both the Canadian and the EU legal orders.

Many scholars argue that there is a strong association between transparency, ATI and democracy. Yet, international developments demonstrate that the idea that stronger democracies are more favourable to transparency and ATI, is not necessarily true. Indeed, countries like the UK and Germany, which were democratic throughout the post–war era and have older traditions of parliamentary governments, have only adopted ATI laws in 2000 and 2005[692] respectively, while former communist East European countries, like Albania, did so before them.

This behaviour has been explained by evidence in comparative contexts which reinforces the observation, anticipated by Roberts[693], that transparency can be expected to weaken confidence in government because, first, it offers a drum-beat of scandal, and second because the discretionary decisions over the release of information itself, reinforces the public's view that the government has something to hide[694]. Speaking about the US on the difficulties of achieving a fully transparent state, Fenster argued that formal legal rights have failed to overcome the political, practical, and bureaucratic obstacles that obstruct the state's visibility to the public[695].

A politically sensitive area with respect to the ATI right is national security. There is a danger that claims of national security may unduly limit the openness and transparency needed in a democratic society.[696] Edward Snowden, a former U.S. National Security Agency contractor who made possible the leaking of classified documents about the NSA's surveillance programs,

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[691] Larsen & Walby, supra note 267 at 17.
[692] The Freedom of Information Act 2000, c.36, online: <http://www.legislation.gov.uk/ukpga/2000/36/contents>; Federal Act Governing Access to Information held by the Federal Government, 5 September 2005, online: <http://www.gesetze-im-internet.de/englisch_ifg/index.html>.
[693] Roberts, "Free to distrust", supra note 266.
[694] Worthy, "More Open", supra note 92.
[695] Fenster, "Seeing the State", supra note 49.
[696] McLachlin, "ATI", supra note 228 at 8.

argued that "Terrorism is 'an extraordinarily rare natural disaster' and should not be used as an excuse by government to pass laws that limit our rights and freedoms."[697]

7.2 Government approaches to access to information in Canada

7.2.1 The Canadian political environment on transparency and access to information

The Canadian government has a long history of promises for improving transparency and enhancing the public's right to know. When the Liberals introduced the ATIA in 1980 they claimed that the Act would be "one of the cornerstones of Canadian democracy."[698] However, John Crosbie, the first Justice Minister to be responsible for the Act, dismissed it as a tool for "mischief-makers" whose objective is to "embarrass political leaders and titillate the public."[699] Again, in its 1993 election platform, the opposition Liberal party complained that "the people are irritated with governments . . . that try to conduct key parts of the public business behind closed doors". They promised that open government would be "the watchword of the Liberal program."[700] However, in the 2000s Canada's government was involved in many scandals, with the sponsorship scandal in 2004 being one of the biggest for misuse of public funds. This meant that the culture of secrecy was still resilient in Canadian politics, and that ATI was a necessary tool against this culture.

At the electoral campaign in 2005, Stephen Harper affirmed that "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."[701] When the Conservative government came to power in 2006 Harper promised to include the changes recommended by the

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[697] Adam Miller, Freedom and liberty are worth some level of risk, says Edward Snowden, The Canadian Press, 4 Mars, 2015, online: <https://ca.news.yahoo.com/online-database-leaked-edward-snowden-documents-now-available-170939521.html>.
[698] House of Commons Debates, (29 January 1981) at 6689; See also Drapeau & Racicot, supra note 274 at 161-162, 179.
[699] Rankin, "ATIA 25 years later", supra note 113 at 4.
[700] Liberal Party of Canada, *Creating opportunity: The Liberal plan for Canada* (Ottawa: Liberal Party of Canada, 1993) at 91-92.
[701] Stephen Harper, "Cleaning up the Mess in Ottawa: Transparency is Key to Preventing Scandal", Montreal Gazette, 7 June 2005, A 21.

ICC into his first bill "The Federal Accountability Act". Instead, the government announced that the ATIA reforms were going to be sent separately to a Parliamentary committee for review, reportedly due to pressure from the bureaucracy. The proposed changes were strongly criticized by the ICC as reducing ATI[702]. The Harper government was later highly criticized to have "failed to champion access to information"[703] and also for imposing "new gag rules on officials speaking to the media or releasing information without permission."[704] In addition, the Harper government according to the Globe and Mail, used amber-lighting protocols to ensure that all potentially sensitive requests were sent to the Privy Council Office and Prime Minister's Office for review.[705] Furthermore, in 2012, the Harper government was involved in the Senate expenses scandal when several senators were accused of spending public money for personal expenses, hence, pointing on matters of accountability and transparency.

The current Liberal government of Canada, elected in October, 2015 made big promises on improving openness as part of an effort to restore popular faith in the government that was thought to have become remote and unresponsive. Before coming to power Liberal leader Trudeau introduced a Bill in 2014[706] for an overhaul of the *ATIA*, which was defeated in Parliament in 2015 (See Chapter 4.2.2). Time will tell whether and how these electoral promises will be fulfilled.

Despite all the promises, ATI in Canada has been kept hostage of political indifference towards transparency. The repetitive failure to truly commit to transparency has strong roots in Canada's Westminster model of government. This model is supported by the legal structure in place which keeps transparency away from the Cabinet confidences. The Supreme Court of Canada explained that "the process of democratic government works best when Cabinet members charged with government policy and decision-making are free to express themselves around Cabinet table unreservedly."[707] Cabinet confidences are currently excluded from the

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[702] Office of the Information Commissioner of Canada, Response to the Government's Action Plan for Reform of the Access to Information Act, April 2006, online: <http://www.infocom.gc.ca/specialreports/2006special-e.asp>.
[703] McKie, supra note 511 at 318.
[704] Harper restricts ministers' message, Globe and Mail, 17 March 2006.
[705] Gloria Galloway, "Pattern of Delay: Ottawas's Information Denial" Globe and Mail, 3 February, 2010. A4.
[706] Bill C-613, An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency), online: <https://openparliament.ca/bills/41-2/C-613/>.
[707] Babcock, supra note 496 at para 19.

application of the *ATIA* and the Privacy Act, and the government believes this should continue. "The fear is that if Cabinet discussions were made public, ministers would censor themselves, refraining from unpopular opinions or making politically incorrect comments, thus compromising the value of the discussions."[708] However, in 2005, the Department of Justice proposed a modification to the current scheme. If the proposal were considered, the Government would have enshrined in the legislation the right of the ICC and the IPC to go to court to challenge definitional issues (if information constitutes a confidence). The proposal would have also allowed the ICC to ask the Federal Court to review the government's determination that information sought under an access request, fell within the definition of a Cabinet confidence and, for that reason, was properly not accessible pursuant to the Act. If the Court would not agree with the determination made by the government, then the information would have no longer been excluded from the application of the Act.[709] No action has been pursued following this proposal, which demonstrates the difficulty of changing the status quo of the Cabinet confidences.

The Canadian ATI regime took a step back in May 2008 when cancelled CAIRS - a centralized tracking system. This was in contradiction with the inspiration of the *ATIA*. The development of CAIRS was approved by Cabinet in 1988 and became operational in 1990. The system was substantially upgraded in 2001 to enable the government to monitor the progress of ATI requests and facilitate the coordination of responses to requests.[710]According to the Canadian Bar Association "CAIRS provided a central repository of information on all current and past requests and an opportunity for enhanced proactive disclosure under the ATIA."[711] One of the reasons for the scrapping of CAIRS was its cost. The government argued that it "was no longer useful and too expensive to manage".[712] According to Roberts, in 2000 the Canadian government estimated that the annual cost of administering the ATIA was US $ 19.4 million or about US $ 1,340 for each information request received that year[713]. According to the TBS, the

[708] Tolga R. Yalkin & Michelle Blooworth, "Cabinet Confidential: Limiting Freedom of Information" (March 2012) 30 National Journal of Constitutional Law at 87 [Yalkin & Blooworth].
[709] The Department of Justice, "A Comprehensive Framework for Access to Information Reform, A Discussion Paper" April 2005 at 14. Online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/ati-aai/ati-aai.pdf>
[710] Roberts, "Spin control", supra note 169 at 10.
[711] The Canadian Bar Association, "Access to Information Act Reform", May 2009, at 2, online: <https://www.cba.org/CBA/submissions/pdf/09-25-eng.pdf>.
[712] McKie, supra note 511 at 328.
[713] Roberts 2010, at 114.

total cost of operations relating to ATI requests from 1983 to 2014 was $670,470,779 which represents an average cost of $1,077 per request completed.[714] These expenses seem high, and I am not sure whether the numbers are realistic or what kind of expenses they include. However, they cannot be a reason for dismantling good tracking systems as CAIRS. Especially now, the advancements in information technology offer better data management.

The general rule in the *ATIA* is that "government information should be available to the public," and that "necessary exceptions to the right of access should be limited and specific.[715]" Justice La Forest in its 2005 report on the *ATIA* review, advised that if this legal principle is to have its full effect, the bureaucracy must experience a profound cultural shift."[716] To achieve this shift government must do much more to foster a "culture of compliance" by making it clear to officials that access should be provided unless there is a clear and compelling reason not to do so; developing better information management systems; ensuring adequate training for access officials; and providing adequate incentives for compliance[717]. The persistence in preserving rules that limit transparency, directly affects the working of the entire machinery of the government, the politically elected ministers and bureaucrats supporting them. According to Sossin:

> Elected officials are supposed to maintain the fundamental values of responsible government, which guarantees that a cabinet minister maintains political responsibility for the actions of his or her ministry. This legal fiction holds that bureaucratic actors work in the loyal service of government, thus ensuring a hierarchal line of accountability between elected ministers and unelected bureaucrats.[718]

Hence, for the change to occur, it has to start from above at the polical level, and spill over the bureaucratic machinery. Especially in a system with strong party discipline as Canada, a top-down approach would be a more viable option.

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[714] Treasury Board Secretariat, Info Source Bulletin Number 37B – Statistical Reporting, online: <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37b02-eng.asp#aia>.
[715] Section 2(1) in the ATIA.
[716] Justice Gérard V. La Forest, "The offices of the Information and Privacy Commissioners: The merger and related issues", Report of the Special Advisor to the Minister of Justice, November 15, 2005, at 46. Online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/ip/rep-rap.pdf>.
[717] Ibid, at 55-56.
[718] Lorne Sossin & Charles W. Smith, "Hard choices and soft law: Ethical codes, policy guidelines and the role of the courts in regulating government", (2003) 40:4 Alberta Law Review at 878 [Sossin & Smith].

7.2.2 Government practices affecting the Access to Information Act implementation

Having a piece of legislation in place does not translate to an effective ATI regime. In the case of ATI, Roberts has argued that "Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation."[719] Indeed, several practices exist in Canada that limit the scope of the *ATIA.* First, there are some internal departmental procedures, described by Roberts as the "hidden law" on ATI, or "internal routines and technologies."[720] They can substantially restrict statutory rights for certain kinds of requesters[721]. This "hidden law" is built upon the development of sophisticated procedures within federal institutions for managing politically sensitive requests for information.[722]

Second, there is potential for differential treatment of requesters, depending on their status. The *ATIA* provides that individuals making requests should identify themselves. This provision poses risks for any potential discrimination based on the status of the individual. For instance, the results of a study conducted by Roberts at the Human Resource and Development Canada for requests in 1999-2001 showed that "requests that came from the media and political parties had significantly longer processing times and the probability that such requests would exceed statutory response times was significantly higher."[723] This study suggests that while the *ATIA* mandates that all requesters be treated equally, some requests coming from specific subjects are, in practice, often treated differently. Roberts also reports that at the Citizenship and Immigration Canada (CIC), there is a procedure for handling politically sensitive requests, which is known within CIC as the "amber light process". An amber light is a warning to officials to proceed with caution in their handling of an ATI request. The complete "disclosure package", including documents which are to be released to the requester, along with the "communications products" is sent to the Minister's Office for review.[724] According to Roberts, comparable amber light procedures have been adopted within other major departments such as Department of Foreign

[719] Roberts, "Administrative discretion and ATIA", supra note 5 at 176.
[720] Roberts, "Spin control", supra note 169 at 1.
[721] Ibid, at 17.
[722] Roberts, "Two Challenges", supra note 463 *at* 119.
[723] Roberts, "Administrative discretion and ATIA", supra note 5 at 176.
[724] Roberts, "Spin control", supra note 169 at 7.

Affairs and International Trade (DFAIT), the Department of National Defence (DND), the Treasury Board Secretariat (TBS), Department of Justice[725].

In support of the differential treatment of requests, Roberts observed that federal departments and agencies deployed software systems for tracking information requests such as the ATIPflow. This was a case-management software program to manage the workload and collect data. It allowed ATIP officers to categorize incoming requests by level of sensitivity. Roberts criticized this system for being a clear violation of the *ATIA,* since the practice of categorizing requests by sensitivity is not sanctioned anywhere in the Act.[726] Because of the controversy it attracted, the ATIPflow tracking system was replaced with the new AccessPro Case Management System software[727] in 2009.

The differential treatment based on the content of a request was analyzed in a report on the *ATIA* administration completed for TBS in February 2002. The report found that in some departments, "senior management required weekly updates as to the content of requests. This would allow them to highlight areas of interest/sensitivity for close monitoring. Other departments were requested to give senior management this type of information on an as-and-when required basis."[728] The report confirmed that the differential treatment did exist in ATI administration, and it was against the requirement of the ATIA that all requests should receive equal treatment.

Third, blame-avoidance policy-strategy responses accompany transparency. These strategies typically involve a more active and defensive central management of information than before, with the intention to lower political risks of blame. According to Hood, they may consist of charges for information that had previously been freely supplied, price levels not likely to be readily affordable by ordinary citizens or even the abandonment of services, where blame might ensue. There is good evidence that large fee estimates will cause requesters to narrow or abandon

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[725] Ibid, at 8.
[726] Roberts, "Administrative discretion and ATIA", supra note 5 at 181.
[727] Public Service Commission of Canada, **"**Access to Information Act**:** Annual Report - April 1, 2009 to March 31, 2010. Online: <http://www.psc-cfp.gc.ca/abt-aps/atip-aiprp/2010/aia-lai/index-eng.htm#part2-2.4>
[728] Goss Gilroy Inc., *New Reporting Framework for Assessing the Performance of the Access* to *Information Program* (Ottawa: Access to Information Act Review Task Force, 2002), section 3.

their requests.[729].To the extent that blame-avoidance prompts policy strategy responses of this type, the result is likely to be at least jeopardy and, perversity. Hood claimed that, while FOI measures are almost invariably introduced with the promise that they will produce a new culture of openness in executive government, the effect in practice tends to be the opposite, in the form of a climate of tighter central management of politically sensitive information.[730] It is in these situations when, in Heremans's words, "too much transparency can kill transparency by triggering a variety of evasive practices."[731]

Fourth, there is a chance of abandonment, tweaking, or redundancy of record-keeping. Some practices in bureaucratic behaviour involve a risk of shifting from written deliberation or recorded phone conversations, to informal face-to-face discussions, whenever civil servants or policy-makers want such debates to take place in secret.[732] It has been argued that ATI triggers a chilling effect whereby the record is either reduced or exists "off paper," a process labeled as "empty archives" phenomenon in Sweden.[733] In many cases erasure of records takes place, which is the worst thing, because an erasure of records means erasure of history. Vallance-Jones alleged that "A lot of time you can't prove that the reason you got a response of 'no records' wasn't because nothing existed, but because perhaps the records were destroyed."[734] Certain practices aim at derailing the disclosure of information by producing documents which are difficult to find and make sense of. Fenster argued that "when an agency or an individual government official prefers to protect information from disclosure, then the agency or official is more likely to produce it in a form, circulate it by a method, and/or maintain or destroy it so that the information will either fall outside disclosure requirements or avoid detection."[735] For instance, the Senate expense scandal left no public paper trail in the Prime Minister's own

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[729]Roberts, "Administrative discretion and ATIA", supra note 5 at 188.
[730] Hood, "What happens", supra note 76 at 205-206.
[731] Heremans, "Public Access to Documents", supra note 31 at 12.
[732] Axel Gosseries, "Debate: Transparency - Democracy and Transparency" (2006) 12:3 Swiss Political Science Review 83-133, at 85 [Gosseries].
[733] K. Ostberg & F. Erikkson, "The problematic freedom of information principle: The Swedish experience", in A. Flinn & H. Jones, eds, Freedom of information: Open access, empty archives? (London: Palgrave, 2009) 113-125 at 118-119 [Ostberg & Erikkson].
[734] Jason Proctor, "Freedom of information laws a poor match for secretive governments, advocates say", CBC News, May 30, 2015, online: <http://www.cbc.ca/news/canada/british-columbia/freedom-of-information-laws-a-poor-match-for-secretive-governments-advocates-say-1.3093471>.
[735] Fenster, "Opacity", supra note 50 at 924.

bureaucracy, not an email, memo or even a sticky note, according to CBC News. According to Weston "The PM's public service, claimed ….that it had no documents of any kind related to the scandal nor anyone involved in it, including Harper's former chief of staff, Nigel Wright. The federal Justice Department made a similar claim".[736]

Another way to circumvent responses to transparency measures is producing so much data that only the most persistent and knowledgeable individuals can effectively distinguish signal from noise. Hood mentions "snowing" as a procedure in which the pursuit of blame-avoidance leads to so much data being produced with so little interpretation or quality control that it has the effect of reducing rather than increasing effective openness and information.[737]

Information technology represents great opportunities for the dissemination of data, but also a greater challenge for the preservation of information. We are now at the age of electronics, internet, emails, virtual clouds, online social networks, and so on, which were foreign to human communication in the 80s. Much of government business is now done by emails. Electronic communication cannot be recorded properly and in many cases gets lost. This loss could occur either purposely or involuntarily, but both ways can have a major repercussion on access rights.

Fifth, sometimes selective proactive disclosure is introduced as an improvement of ATI. Politicians and officials often strategically choose to disclose "information" through coordinated public relations campaigns that produce pre-packaged, tightly controlled "news". In this institutional process, the texts of government information are edited, explained, de- and re-contextualized, and interpreted.[738] For instance, considering Canada's commitment to the OGP and the Action Plan to honor it, the government has taken pride of the achievements. In the debates that took place at the House of Commons for the Justin Trudeau's Bill C-613 (amending the *ATIA),* Dan Albas, Parliamentary Secretary to the President of the Treasury Board, maintained that under the Conservative government, Canadians were accessing more information from the government than ever before. In support of this statement he referred to the increased

[736] Greg Weston, "Senate expense scandal left no paper trail, really?", CBC News, September 2, 2013. Online: <http://www.cbc.ca/news/politics/senate-expense-scandal-left-no-paper-trail-really-1.1344795>.
[737] Hood, "What happens", supra note 76 at 204.
[738] Fenster, "Opacity", supra note 50 at 926-927.

number of the pages of released information from the government (6 million pages in 2012-2013). [739] But, is open data the same as open government? Responding to these comments, Geist critically argued that "An open government plan that only addresses the information that government wants to make available, rather than all of the information to which the public is entitled, is not an open plan."[740] Of course, providing more data can improve transparency, but data alone cannot be a substitute for ATI since it fails to honor the right of the public in getting the information it needs, instead of what is being offered selectively.

Sixth, delays and the creation of backlogs can become commonplace. Backlogs can develop for several reasons. A simple answer can be a shortage of resources that prevents from responding on time. Another is the lack of experience in handling a large number of requests. A toothless ICC also creates backlogs since it cannot order public officials to release information. In that case, bureaucratic incentives to comply with the law become weaker, creating another backlog at the ICC office, those of complaints and appeals.[741] The Globe and Mail experience with an information request in 2009 discovered two years later that departments try to get as many requests as possible out the door within the legally mandated timeframe. That way, they can claim they adequately processed a number of requests. The files left sitting in the system have already been deemed to be failures and no amount of work can restore their status – so they may sit there for a long time. According to a civil servant "Once a file is late, it's late. There is nothing that can change that. A day late, a month late, a year late, it's all the same. It's late."[742] Since there is no sanction for late responses, the incentive to respond to them is missing. This situation brings the creation of huge backlogs and extended delays. It is obviously a hole in the *ATIA* that needs to be fixed.

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[739] Parliament of Canada, 41st Parliament, 2nd Session, Bill C-613. An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency), online: <https://openparliament.ca/bills/41-2/C-613/>.
[740] Michael Geist, "What open government hides", November 28, 2014. The Star, online: <http://www.thestar.com/business/tech_news/2014/11/28/what_open_government_hides_geist.html>.
[741] Alasdair Roberts, "Accountability Forum: Connecting stakeholders in state accountability", 13 January 2010, online: <http://accountabilityindia.blogspot.ca/2010/01/right-to-information-need-for.html> [Roberts, "Accountability Forum"].
[742] Daniel LeBlanc, "Access-to-information woes grow ever more absurd", The Globe and Mail, March 8 2011. Online: <http://www.theglobeandmail.com/news/politics/ottawa-notebook/access-to-information-woes-grow-ever-more-absurd/article612344/>.

Seventh, reducing resources available for the administration of the *ATIA* can affect its implementation. According to the TBS, in the 90s federal departments and agencies reduced resources for FOI administration and enforcement, as part of a broader restraint exercise that was intended to trim "non-essential spending" within the public service[743]. Some central agencies explored the possibility of increasing ATI fees[744] to recoup the cost administering ATI, but there was no action on that idea. For some officials, the resources dedicated to ATI administration could not be defended as essential spending; on the contrary, FOI requirements were viewed as a "disruptive and costly" imposition[745]. Budget reductions have certainly lengthened processing time for FOI requests and increased the inclination of departments and agencies to withhold requested information. Cutting off resources is against the spirit of the *ATIA* - it deeply affects its practices. It is obvious, according to Vallance-Jones, that "the act cannot function as it was intended to if officials aren't given enough people to do the job."[746]

Most of these practices surfaced during the Inquiry on the Sponsorship Scandal. Referring to the Inquiry, ICC John Reid explained that witnesses in the Gomery Commission gave plenty of evidence about the abuse of power. He said:

> We have heard evidence about deliberate attempts to avoid keeping a paper trail of decisions, recommendations and actions…We have seen how access requests are stonewalled and ignored, and ATIP coordinators bullied, in order to save ministers and departments from embarrassment. And, most troubling of all, we have seen evidence that, in times of a perceived national unity crisis, governments may feel that the obligation to be law abiding is optional and that ends come to justify any means.[747]

All these examples demonstrate how much power rests on the hands of the political leadership and their bureaucratic machinery, and how this power can be detrimental to the proper implementation of an ATI law.

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[743] Treasury Board Secretariat, "Getting Government Right: Governing For Canadians", February 1997 at 5.
[744] Treasury Board Secretariat, "Review of costs associated with administration of ATIP legislation," April 1996.
[745] KPMG, "Thoughts on openness as applied to the review function." Discussion paper prepared for Treasury Board Secretariat, Government of Canada, 1996.
[746] Fred Vallance-Jones, "Access, Administration, and Democratic Intent" in Brokering Access: Power, Politics, and Freedom of Information Process in Canada, Edited by Mike Larsen and Kevin Walby, (UBC Press: Vancouver, 2012) at 307 [Vallance-Jones, "Access"].
[747] John Reid, Information Commissioner of Canada, "A Commissioner's Perspective: Then and Now", October 6, 2005, online: <http://www.oic-ci.gc.ca/eng/media_room-speeches-2005-october_6.aspx>.

A. Institutions responsible for the administration of the Access to Information Act

In Canada, three different central agencies have specific roles and responsibilities under the *ATIA*: the Treasury Board Secretariat (TBS), the Department of Justice (DJ) and the Privy Council Office (PCO). Two ministers share responsibilities for ATI, the President of the TBS Board, and the Minister of Justice. The TBS supports the President of the Treasury Board in his duty as designated Minister responsible for the administrative oversight of the Act. He is responsible for issuing policy instruments to the ATI and Privacy community and other federal institutions with respect to the administration of the Act and advising, training, and guidance. TBS publishes InfoSource[748], a compilation of statistical information about the *ATIA* administration of institutions, their programs and information holdings to assist individuals exercising rights under the legislation. It also collects annual statistics on the administration of the Act.

The Minister of Justice is also a designated minister for the *ATIA* and responsible for the legislation. He deals with issues such as the extension of the right of access, the designation of the head of a government institution, specifying investigative bodies and classes of investigations and amending schedule I which enumerates the institutions covered by the Act. Institutions receive legal advice on ATI from the DJ through in-house legal services units or from its Information Law and Privacy Unit.

Finally, the Clerk of the Privy Council is responsible for policies on the administration of Confidences of the Queen's Privy Council for Canada and determines what information constitutes a Confidence of the Queen's Privy Council for Canada. Cabinet Confidences are excluded from the application of the Act, according to section 69. The Act lists a number of examples[749] of records that may be excluded including: Cabinet memoranda, discussion papers, agendas, records of discussions and communications between Ministers on matters relating to the making of government decisions or the formulation of government policy; pre-Cabinet briefings

[748] See <www.infosource.gc.ca>.
[749] Section 69 (1) of the *ATIA.*

of Ministers and draft legislation. This list indicates that the workings of the Canadian government is immune from transparency rules.

The everyday administration of the *ATIA* is carried out by the head of each institution, ATIP coordinators and occasionally other public officials. The head of each institution is responsible for the administration of the Act within the respective institution. The "head of a government institution" is the elected Minister responsible for a department or agency, an appointed public office holder or the chief executive officer of an organization. Their responsibilities include the processing of access requests, the designation of a delegate, the exercise of discretion and ATI awareness. There are more than forty powers, duties and functions in the Act that can be delegated. Many models of delegations exist across the federal government.[750]

The *ATIA* establishes an annual reporting requirement for all departments and agencies under the Act, based on which they are required to report to Parliament of their administration of the Act. This is a good practice, especially if the legislature has some level of political competition between parties which would put those reports in good use to control government. But, in case of a majority government the reports go unnoticed.

After joining the OGP in 2012, Canada committed to intensify its efforts towards better transparency, and learn from international best practices.[751] A series of projects were introduced and implemented following the OGP. In 2013, the government announced an Access to Information and Privacy Online Request Pilot Project[752]. Three departments participated in the one-year pilot project, the Citizenship and Immigration Canada, the Shared Services Canada and the TBS. Now the list has extended to 31 institutions that offer their services on line through a common portal.[753] Through this service people may submit their request on line and pay online as well. The common practice to make a request for information under *ATIA* has been to write a letter and a

[750] Josée Villeneuve, "Assessment of public institutions' performance in access to information: The Canadian experience", Office of the Information Commissioner at 9.
[751] Government of Canada, "Canada's Action Plan on Open Government 2014-16", online: <http://open.canada.ca/en/content/canadas-action-plan-open-government-2014-16>.
[752] Treasury Board of Canada Secretariat, "Access to Information and Privacy Online Request Pilot Project", online: <https://www.tbs-sct.gc.ca/atip-aiprp/tools/request-demande-eng.asp>.
[753] Government of Canada, "Access to Information and Privacy (ATIP) Online Request", online: <https://atip-aiprp.apps.gc.ca/atip/contactUs.do?caller=/atip/welcome.do>.

check in the amount of the application fee. This was a substantial barrier to ATI usage, considering that many other services now are provided online. The online service will certainly improve the process of preparing and submitting a request, but that alone will not change much in terms of how request will be administered upon submission.

Another initiative that took place in 2013 was the launch of the open data portal.[754] It contains datasets compiled by over 20 departments and agencies[755], covering a broad range of topics. By accessing the portal, people may explore different kinds of data from housing to health and environmental data. Furthermore, in 2014, the TBS issued the *Directive on Open Government*, which established an open by default position and required institutions to maximize the release of data and information, with a goal to effect a fundamental change in government culture[756]. This directive includes commitments falling in three streams: Open Data (aimed at better use of new technologies), Open Dialogue (aimed at citizen participation), and Open Information (aimed at increasing professional integrity).[757] Since this is a recent initiative there are not enough data available to assess its effectiveness. It certainly has the potential to serve as a bridge to link citizens and government.

Certainly, these achievements are a step forward towards more transparency, but the open data movement has failed to confront the problems in the *ATIA* regime in Canada. Government commitments to the OGP have been silent on any action that may address the weakness in the law or the practices that are governed by the *ATIA.*

B. Public Officials – Access to information and Privacy Coordinators

The central point of service for the day-to-day administration of the *ATIA* are the ATIP coordinators. They generally have delegated authority for responding to requests. Depending upon the size of the institution and the volume of requests it receives, a coordinator may be supported by a team of specialized analysts. Coordinators establish procedures for providing

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[754] The portal can be found at <http://open.canada.ca/en>.
[755] Government of Canada, "Minister Clement Launches Next Generation Open Data Portal", News Release, June 2013, online: <http://news.gc.ca/web/article-en.do?nid=750989>.
[756] Treasury Board of Canada Secretariat. Directive on Open Government, October 9, 2014, Section 5.1. online: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=28108>.
[757] For more details see Canada's Action Plan 2014-16, Chapter IV, online: <http://open.canada.ca/en/content/canadas-action-plan-open-government-2014-16#ch4-1>.

responses to access requests, ensure that all records relevant to the request are identified and reviewed, determine whether any exemptions or exclusions must be invoked, conduct consultations and apply the principles found in the *ATIA*.

The TBS has a list available on line with the names of all ATIP coordinators across the federal government, including their addresses, emails and telephone numbers. There are 260 ATIP coordinators at the federal level. I have drawn information from the TBS list to prepare my questionnaire for the ATIP coordinators.

To recognize the work that the ATIP coordinators do for the administration of the *ATIA*, one has to understand the position they hold in the structure of the institutions they are part of. Their position in the public office requires them to adequately respond to public's information requests while protecting the interests of their institutions. Regarding this delicate balance they have to strike, Mann argued long time ago that "Access coordinators represent the 'meat in the sandwich', positioned between a suspicious requesting public and a distrustful bureaucracy, and are further positioned in a confrontational role with oversight bodies."[758]. There is no doubt that officials dealing with the *ATIA* are subject to continuing pressure from other officials to adopt restrictive understandings of an institution's obligations under the law. Only a few years after the law's adoption, a TBS survey found that many ATIP coordinators felt significant cross-pressures between their obligations under the law and career considerations within their department.[759] Recent studies show that these cross-pressures continue to operate. In 2002, The Review Task Force reported that it had a "number of very frank discussions" in which coordinators "talked about the stress involved in dealing with sensitive files and difficult requests."[760] The coordinator role is almost always at a fairly junior level in the bureaucratic hierarchy. Having this position, Flaherty argued "they rarely have the clout to make a significant difference in their agency. In fact, even a Chief Privacy Officer would have problems making his or her own voice heard in

[758] Bruce Mann, "The Federal Information Coordinator as Meat in the Sandwich," (1986) 29:4 Canadian Public Administration 579-82 at 580 [Mann].
[759] Treasury Board Secretariat, Review of Access to Information and Privacy Coordination in Government Institutions (Ottawa: Treasury Board Secretariat, 1986).
[760] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 126.

such hierarchical power structures."[761] Very recently, a story from British Columbia, which emerged in the media in May 2015, revealed that "a BC former bureaucrat came forward to claim he was told to delete messages someone else might want to see."[762] Such story is a clear indication of the tension that exists inside the *ATIA* machinery.

Referring to such a weak position of the *ATIA* officials, Savoie acknowledged that the bottom line for the average public servant is to not embarrass the minister, because that is the surest way to have the career stopped or slowed down.[763] To do so, they have to pursue instructions from above in the bureaucratic hierarchy, and in many cases engage in practices that limit ATI rights. For instance, a survey of ATIP coordinators in thirteen large federal departments, conducted for the ATI Task Force in 2001 revealed that "Additional attention is often given to requests that originate from the media, political parties or other high profile categories of requesters…. The complexity of these requests are heightened as institutions attempt to prepare for any possible questions or potential for any public scrutiny which may arise as a result of the release of records."[764]

The work of the ATIP coordinators is to reveal the workings of politically elected or other bureaucrats in their offices. As such, they are part of a larger bureaucratic machinery. One of the reasons they resist the idea of ATI is blame-avoidance. Weber argues that concealment insulates bureaucracies from criticism and interference; it allows them to correct mistakes and to reverse direction without costly, often embarrassing explanations; and it permits them to cut corners with no questions being asked.[765] Hood described blame-avoidance as a descriptive account of a force that is often said to underlie much of political and institutional behaviour in practice.[766] He asked a question: what happens when the supposedly irresistible force of transparency as a doctrine of

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[761] David H. Flaherty, "Reflections on Reform of the Federal *Privacy Act",* June 2008, Office of the Privacy Commissioner of Canada.at 22 .online: <https://www.priv.gc.ca/information/pub/pa_ref_df_e.pdf>.
[762] Jason Proctor, "Freedom of information laws a poor match for secretive governments, advocates say", CBC News, May 30, 2015, online: <http://www.cbc.ca/news/canada/british-columbia/freedom-of-information-laws-a-poor-match-for-secretive-governments-advocates-say-1.3093471>.
[763] Savoie, *Breaking the Bargain,* supra note 280 at 50.
[764] Yvon Gauthier Inc., "Access to Information Review survey of ATI Units. Report 22", Access to Information Review Task Force (2002), online: <http://www.atirtf-geai.gc.ca/>.
[765] Max Weber, "Bureaucracy", in H.H. Gerth & C. Wright Mills, eds, *Essays in Sociology* (Oxford: Oxford University Press, 1946) [Weber, "Bureaucracy"].
[766] Hood, "What happens", supra note 76 at 192.

better governance meets the apparently immovable object of blame-avoiding behaviour in political and institutional affairs?[767] Hood's response is that blame-avoidance can lead to the banalization of transparency.

Another reason for bureaucratic resistance to ATI is the control of information and knowledge. Max Weber explained the function and logic of bureaucratic administration as resting in part on the production and hoarding of information. According to Weber, keeping secret its knowledge and intentions from competing organizations and from the public[768] is embedded in the bureaucratic ethics. Hence, it is not a surprise that "Officials are well versed in the code of silence and under gag orders"[769], according to Rubin, because the motive to engage in secrecy is partly inherent to bureaucratic organisations. Weber has recognized that bureaucracies are machines for controlling information and for controlling through information[770]. This is such a powerful revelation to which I will expand on developing my theory of ATI as a human right, a right which contributes to the acquiring of knowledge through controlling government information.

Similar arguments on information as knowledge are made by Fenster. He maintains that state institutions know what information they have produced and where such information is stored and, through that monopoly of knowledge about their own information, retain significant discretion over the existence and ultimate release of documents.[771] Because they have the monopoly in their hands, producers or custodians of information shift the medium, classification, or content of information they prefer to keep secret towards the safe harbors provided under the exceptions to disclosure laws.[772] In doing so, public officials become a "law unto themselves" within the limits clearly stated in the statute[773]. At times that can stretch the limits of law to the point that it allows to engage in practices that are not obviously a violation of the law, or to the

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[767] Ibid.
[768] Weber, Max [1922] *Economy and Society: An Outline of Interpretive Sociology*, Guenther Roth & Claus Wittich eds., *Volume I*. (Los Angeles: University of California Press, 1978) 992 1968) [Weber, Economy].
[769] Ken Rubin, "The myth of access to information", The Hill Times, January 31, 2011, online: <http://www.kenrubin.ca/articles/myth-of-access-to-information.pdf>.
[770] Weber, *Economy*, supra note 768 at 225.
[771] Fenster, "Opacity", supra note 50 at 920.
[772] Ibid, at 922.
[773] David Dyzenhaus, "The rule of (administrative) Law in International Law" (Summer/Autumn 2005) Law and Contemporary problems at 131 [Dyzenhaus].

point that the law is silent. In this sense, they operate at the limits of the law. Roberts recognized such tension and maintained that "Statutory entitlements could be diminished or obliterated by the informal norms and routines that govern the work of officials responsible for administering the law."[774]

C. The Exercise of discretion and its implications

It is widely accepted that government officials exercise discretion at almost every stage of the access process. When the statutory provisions give discretionary power to the bureaucrats to make their own decisions, it represents an opening for them to engage in practices "inherently embedded in their culture", in Habermas's words.

Despite the risks it represents, discretionary power may be necessary for many reasons. For instance, the law cannot regulate all scenarios of real life, it is designed for a general application. As such it is difficult to produce a rule that is applicable to all cases. There will always be complex cases for which it is difficult identifying all the factors to be applied, and weighing those factors.[775] This is the reason why the law allows for discretionary powers, so that the public officials have space and freedom to apply the general rule. For the discretion to be applied within legitimate limits, there should be enough guidelines to make the exercise of discretion easier and allow for consistency within the institutions. To facilitate this process Sossin and Smith advised that every time a specific discretion has been granted by law, it should be followed by guidelines from the institutions that are assigned with the law's application. These guidelines should be broad enough to be applied across departments or institutions, and allow space for use of judgement or options for choice, but narrow enough to "set out the various factors which may not be considered by decision-makers."[776]

Sossin made a careful analysis of discretion and described it as having different faces. It could be an exercise of authority, an act of choice, a social judgement shaped by organizational

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[774]Roberts, "Administrative discretion and ATIA", supra note 5 at 178.
[775] David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 4eds, (Scarborough: Thomson Canada Limited, 2004) at 86 [Jones & Villars].
[776] Sossin & Smith, 718 at 893.

boundaries inside the bureaucracy, and by the need to attain the results desired by others.[777] This description fully captures the tensions that are embedded in the exercise of every discretion which encapsulates the pressures that exist in public administration. The ATI system of management certainly suffers from the same tensions which define and shape how the access rights will be implemented in practice. This is one of the main concerns throughout this research, one that focuses on the huge impact that the discretion has on restricting or expanding the rights granted by statute. Unfortunately, the restriction of rights happens way too often. Davis asserts that "Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth form rules."[778] In the case of ATI rights this holds much truth, as scholars and practitioners have recognized. Roberts has continuously argued that "internal bureaucratic procedures play an important role in defining what the right to information means in practice"[779], or that the right of ATI "depends heavily on the predispositions of the political executives and officials who are required to administer it."[780]The Office of the ICC has often experienced that the public officials in Canada tend to operate on the restrictive side of discretion, where exemptions are the norm, rather than exception. Michinson explained that more alarming instances are those "where government organizations try to push the scope of an exemption beyond the stated legislative intent."[781]

To prevent cases of injustices from happening, Sossin suggested that there is a need for a legitimation of discretion by the wider public. This could minimize the suspicions about any abuse of power by the public officials. Sossin advocates for a form of administration sufficiently democratic as to engage the population in the administrative process[782] by validating the discretion publically on the basis of its substantive content.[783] This translates into a decision-making that is supported by reasoning which is opened for scrutiny by the public. Instead of just giving the outcome of their decisions, the public officials have to explain in detail how and why

[777] Lorne Sossin, "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement" (1994) 26 Ottawa L. Rev. at 10-11 [Sossin, "Redestributing"].
[778] K.C. Davis, Discretionary Justice: A preliminary Inquiry (Baton Rouge: Louisiana State University Press, 1969) at 25 [Davis, Discretionary Justice].
[779] Roberts, "Administrative discretion and ATIA", supra note 5 at 175.
[780] Ibid, at 176.
[781] Michinson, "Access", supra note 690 at 3.
[782] Sossin, "Redestributing", supra note 777 at 8.
[783] Ibid, at 3.

they reached that outcome, by listing all factors that influenced the decisions. Only this way, according to Sossin, the exercise of discretion by public officials will be accepted as both legitimate and just. Otherwise, a suspicious shadow will accompany every decision-making. Sossin's suggestion for a legitimation of discretion offers a tangible solution for the establishment of a credible public administration. However, applying Sossin's suggestion to the ATI regime means to be transparent about transparency, and this is what public officials are trying to avoid in the first place.

7.2.3 Studies and official data on access to information requests

There have been several studies concerned with exploring the tensions and constraints within the ATI system in Canada. They focused on different problems with ATI taking various approaches. Most of them have produced valuable data about ATI requests.

A major study on ATI in Canada was conducted by Alasdair Roberts in 2001. He used a novel approach to study ATI by examining the different procedural treatment of information requests. He looked for evidence in internal routines that govern the administration of the *ATIA.* Roberts analyzed data collected within an administrative database of one major Canadian department – Human Resources Development Canada (HRDC) - relating to the processing of 2,120 ATI requests for three years between 1999 and 2001.[784] According to the study, the delays occur because of the involvement of higher up authorities and the need to contemplate the political and personal relations angles when deciding whether or not to disclose the information. The study discovered that requests from journalists and political parties require more time to be responded to and are more likely to be deemed refusal. It confirmed the role of internal practices in the way in which legislation is implemented and understood by government officials.

Roberts described the procedure that the request had to follow if it was spotted to come from journalists. It was considered an "amber light" request, and identified as sensitive. In that case, the request had to be sent to the minister's office and to the communications department. These two would work together with the office that possessed the information to develop a media

[784]Roberts, "Administrative discretion and ATIA", supra note 5 at 176.

strategy. This strategy together with the document were finally sent to the minister for approval, and only then could they be made available to the applicant.[785]

The "amber light" practice seem to have become common place in the Canadian public offices. It is obvious that going through an "amber light" procedure requires time and resources. To examine the cost of ATI procedures, a study was conducted by the TBS in 1996. It found that "one-third of total FOI costs could be attributed to time spent in determining whether material should be withheld from requesters."[786] This could explain, in part, the big costs associated with keeping in place an ATI system.

Attallah and Pyman conducted a study in 2001 on the use of the *ATIA*. Using official statistics, they discovered that between 1985 and 2000 around 10% of the information requests received by the Canadian government were made by journalists[787]. They found that the nature of the stories had changed over time. In the first stage of the law's implementation, the pieces were very specific or they were part of more extensive stories that belonged to the genre of investigative journalism. Later, they became more complex, based on more sophisticated questions and following-up on previous work. The stories had varied apparent intentions, such as exposing clientelism or showing inefficiency and the waste of resources, although in the majority of situations the requests, and the stories aimed to describe the work of governmental agencies.

- **InfoSource Data**

Using the InfoSource from the TBS website, I looked at some of the statistical data and developed my own tables. The tables contain statistics for a period of 10 years, from 2004-2014. Table 6 looks at the source of ATI requests. The data includes 5 categories of requesters, business, public, media, organization, and academia. The trend shows that ATI in Canada is dominated by business as a category. Public also occupies a significant space of ATI requests. In the last two years is has overpassed business and has a steady progress. The numbers confirm

[785] Roberts, "Spin control", supra note 169.
[786] Canada Treasury Board Secretariat, Review of the cost recovery and user fee approval process. Sec 2.1. (Ottawa: Treasury Board Secretariat, 1996).
[787] Attallah, P. Y. Pyman, H. "How Journalists Use the Federal Access to Information Act" (2002), online: <www.atirtf-geai.gc.ca/paper-journalist1-e.html>.

that ATI is important for citizens and they are making use of the system, despite the constraints they may face. Contrary to the general belief, and what has been argued by the politicians, media only constitutes a small percentage in ATI requests. Data shows that media requests are also progressing, but with a much smaller pace. The trend demonstrates that ATI is not controlled by the media, and only for journalistic purposes. It is noticeable that ATI request from organizations are declining, and this was explained by the frustration described by the NGOs in my interviews. Many of them admitted that long delays and hefty fees has caused their withdrawal from the ATI system due to the lack of resources. Academia is the category with the fewest requests, and that raises important questions about the use of ATI in research.

Table 7 compiles data on the number of requests and their status (if they were closed, disclosed, exempted, or excluded). The trend shows that while the numbers of exclusions and exemptions have remained steady, the numbers of the documents partly disclosed is progressing much faster than those completely disclosed. And while the total number of requests is climbing at a high rate, the documents disclosed had a decline in 2007-2010, and are progressing slowly in 2011-2014.

Table 8 contains data on the time of reply. While the total number of requests were following the same trend until 2012, this is not the case in 2012-2014. The number of documents disclosed have remained almost steady, although the total number has risen, meaning that more requests are replied late. This confirms the concern regarding delays on ATI request, and there is no measure how late they are replied to, because as one public official admits "once a response is late, it is late" – how late its does not matter.

Table 9 comprises data on the type of exemptions applied under the *ATIA*, according to specific sections. There are 13 categories of exemptions. The trend shows that the most common of exemptions is privacy, with a huge difference with other exemptions. The high number confirms what is argued in Chapter 6, that ATI and privacy collide very often with each other, and that privacy tends to trump ATI rights in Canada. Public officials do not engage in a careful balancing exercise, but play the safe card by declining request every time information may concern personal data. Privacy is followed by International Affairs and defence, and then law

enforcement exemption, which have also come up in the scholarly debates and the interviews, as being often misused to sway from the *ATIA* application.

Table 10 includes data about exclusions applied under the *ATIA*. The numbers in both categories there have remained almost steady, and that is explained with the mandatory nature of these exceptions under the law. The Cabinet confidences have been the source of considerable debate for reform by many actors, including the ICC.

Table 11 lists the top ten institutions receiving most of the requests over the years. Citizenship and Immigration has occupied the first place for ten consecutive years. Also Canada Revenue Agency, Royal Canadian Mounted Police, Canadian Border Services Agency, and National Defence have most of the time occupied the top five places among the institutions receiving more requests. These data are significant because they indicate what matters the most to the Canadians. Areas like immigration, taxes, law enforcement, national defence, health, environment, seems to be hot topics to the public eye.

Table 12 compiles data about the fees and costs of the *ATIA* operations. This is complemented with Table 8 which shows the costs in a graph form for a period of 30 years since 1983 when the ATIA entered into force. The total cost of operations relating to ATI requests since 1983 is $670,470,779 which represents an average cost of $1,077 per request completed. Total fees collected were $6,116,471 which represents an average fee of $9.82 per request completed[788]. The total expenses of processing ATI requests are $664,354,308 which divided with the number of years from 1983 (31 years) represents $ 21,430,784 per year. It is obvious that costs of operations have increased exponentially, while the fees have remained the same. These costs have been the focus of many government decisions, and the main reason for removing CAIRS. While there are financial constraints related to the *ATIA* operations, the costs are not an acceptable excuse if one considers the provision of this service a public good. From this perspective, the focus should not be on the cost, but the efficiency of the service.

[788] Treasury Board Secretariat, Info Source Bulletin Number 37B – Statistical Reporting, online: <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37b02-eng.asp#aia>.

- **Questionnaire of the ATIP coordinators**

As I previously mentioned, there are 260 institutions listed at the TBS webpage. The total number of persons serving as ATIP coordinators is smaller since there is some overlapping where the same persons serve as an ATIP Coordinator in more than one institution. It is interesting that the number of women is about twice the number of men (120 of them are women and 70 are men). Only 31 of them offer online services for requests.

I prepared a three-part questionnaire for the ATIP coordinators with the purpose of understanding the practices of administration of ATI requests, the guiding principles and the value attached to ATI from their institutional perspective. I selected 113 from 260 institutions listed on the website, making a random choice, but paying attention to include those listed in Table 11 containing data about institutions with the most requests. I sent out the questionnaire in April 2015 via email using the contact addresses available at the TBS website, suggesting a period of one month to reply. At the end of the month there was no response.

I sent the questionnaire again in May, and received 2 emails from institutions requesting reassurance that their names and institutions would be kept confidential. From these two institutions only one replied by filling the questionnaire, after I sent another email saying that their names would remain confident, and that they could fill the questionnaire partly, if they were not comfortable of answering all the questions. Soon after my second email I received two more filled questionnaires. Also, five institutions sent emails declining to participate and saying they "could not fill the questionnaire". Furthermore, I received three emails from institutions providing web links with their information (one of them very detailed), and so indirectly responding that they wouldn't fill the questionnaire.

In addition, I received an email from one of my informants saying that the TBS had instructed all ATIP Coordinators not to respond to my questionnaire, and that the TBS was instead going to respond on their behalf. The informants reported that "the policy division of the Treasury Board Secretariat has arbitrarily decided they want to respond on behalf of the entire Government, and have instructed all ATIP Coordinators not to respond to you".

In a hopeless attempt, I sent the questionnaire for the third time and extended the time available for reply till June. However, this attempt yielded no results. In total, for this questionnaire, I received four responses out of 113 requests, five direct and three indirect declines. This is a turnout of 3.5% response rate, and it came as a great disappointment at a time that I was expecting to get some questions answered for my research. However, after reflecting on the research I had done up to that point, I realized that the silence of the ATIP coordinators was an expectable behaviour. In fact, the email I received from my informant, was the confirmation of what it had already surfaced in my literature review, and which often came up in various debates from scholars and practitioners. The TBS instructions were the evidence of a centralized ATI system, which did not allow for much freedom in the work of the ATIP coordinators.

This was not the first time a researcher got a surprisingly low response rate on a project on ATI in Canada. Laverne Jacobs conducted a similar study, and the initial results were disappointing. She writes that "the most striking finding that arose from this study was how few responses were received. Although 33 government departments were approached and all given at least two weeks to respond, with reminders, only one response surfaced."[789] However, at the end of the project the response rate had increased to 12 and the responded pool was qualitatively significant.

Regarding the results of the four responses I got from the questionnaire, some observations are worth pointing out. Some responses drew my attention, due to their deviation from common expectations. There was at least one participant that disagreed to the role of proactive disclosure (Question (Q) 1, Part I) in public information, participation, debate, understanding and trust, and one or two that agreed that proactive disclosure contributes to information overload, reduction of a space to think for public officials and confusion about choices in decision-making. Responses

[789] Laverne Jacobs, "Building on the Ombudsman: Polyjuralism and the Impact of Dispute Resolution in the Canadian Access to Information Context", Prepared for the 1st Global Conference on Transparency Research (Rutgers, May 19-20, 2011); For final results see: Laverne Jacobs, "Evolution of the idiosyncrasy of the role of ombudsman/person in Canada", in Laverne Jacobs & Sasha Baglay, eds., *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate Pub. Company, 2013).

to Q.2 revealed that that sometimes institutions frame information in certain ways which are beneficial to the institutional interests; leave out information details if that information is controversial; choose a technical language that needs a certain level of education to make sense of. Responses to Q.3 disclose that 3 of 4 agencies do not make information available even if there are a lot of ATI requests. There are also indications that agencies do not have policies in place to stimulate proactive disclosure, and that there is not enough number of people dedicated to transparency. Responses to Q.4 reveal that the most common used source to make information available is through the agency's website, and that none of the institutions asks for the public's feedback on the quality of information provided.

Responses to Q.1, Part II, tell that 3 out of 4 agencies disagree that ATI helps in decision-making by providing public input. There are also concerns related to the numbers of people and the budget assigned to the ATI processing. Responses to Q.2 confirms that agencies believe that ATI has a journalistic nature; they do not help fighting corruption; they embarrass government, and do not protect human rights. Responses to Q.3 and 4 reveal that the interactions between their agencies and requesters are either functional or friendly, and that except for media, all other requesters have basic or no knowledge on the ATI legal framework. Responses to Q.5 confirm that responding to ATI requests needs consultation with superiors, and in some cases ATIP coordinators find themselves in troubles trying to respond the sensitive requests. Q.6 reveals that ATIP coordinators use their discretion in responding to ATI requests, but also seek advice from at least another person in their institution.

Part III discloses that most ATIP people have experience in the public office, have an average of 16 hours of training on ATI, and that ATIP offices have 1-3 people working in them.

These results, although limited because of the small number of responses, confirm some of the problems highlighted in the literature review, and reveal important insights of how ATI is understood by the public officials in Canada.

7.2.4 The case of Ontario

I bring now the case of Ontario and present practices that have developed during the FIPPA implementation. Of course, the practices noticed at the federal level are not exclusively applied there. They may be found elsewhere, in Ontario as well. I was focused in bringing here examples that are specific for Ontario.

It is interesting to mention that in Ontario, the service of submitting ATI requests was free until 1995. After the economic crisis in the early 90s, the Ontario's 1995 Savings and Restructuring Act was adopted and introduced a new five-dollar application fee. Additional fees were introduced for processing requests for personal information; and fees for processing all other requests – known as "general record" requests - were extended. New fees for filing complaints to the IPC were also introduced[790].

Defended by the government as a "broadening of the user-pay principle"[791], the changes have already had a dramatic effect on the frequency with which FOI law were used. Between 1995 and 1997, the total number of FOI requests submitted to the provincial government dropped by over thirty percent[792], and appeals to the provincial Information Commissioner dropped by over forty percent[793]. This is an example where fees act as a deterrent to the ATI rights and have an immediate effect on the frequency of ATI usage.

7.3 Institutional approaches to transparency and access to documents in the EU

7.3.1 The EU political environment on transparency and access to documents

As mentioned previously, a reason behind the movement towards the adoption of an ATD law in the EU was to overcome the "democratic deficit" which characterizes EU governance[794]. The

[790] These were not the only legislative amendments made by the Harris government. The 1995 Labour Relations Act (S.O. 1995, c. 1, ss. 82 and 83) also amended FOIPPA to exclude records relating to labour relations and employment-related matters. The effect of this provision is to deny a right of access to many records relating to collective bargaining, as well as information relating to a specific individual's employment history.
[791] Canadian Press Newswire, "Ontario information access fees to be highest in Canada: Commissioner Tom Wright." Canadian Press Newswire, Toronto. December 4, 1995.
[792] This data is taken from annual reports provided by provincial institutions to the Office of the Information and Privacy Commissioner.
[793] Roberts, "Less government", supra note 796 at 25.
[794] Patrick Birkinshaw, "Freedom of information and its impact in the United Kingdom" (2010) 27 Government Information Quarterly 312–321 at 319 [Birkinshaw, "FOI & UK"].

EU is a supranational organization, which, by its very nature, is more distant from the populace than a national government. Because of this structure, Leino argues "often the right of public access turns into institutional politics with the institutions and the Member States in fact buttressing their own interests."[795]

Moreover, there is a general lack of knowledge about Brussels politics, resulting in a perception of the EP Members as being more removed from their constituents. Another feature of the EU politics and representative system is the absence of true European parties. All of these factors combined make constituencies quite weak and furthers the distance between the EU and its citizens. Eurobarometer data shows a sharp decline in trust in national and European political institutions since the advent of the financial crisis.[796] Transparency plays a significant role in restoring the public's trust in the EU institutions. According to Birkinshaw, within the EU legal discourse, transparency has a specific meaning: it is placed against the so-called lack of democracy of the EU that is the reality of the complexity of the European construct[797]. The EP has recognized that "transparency is essential to a democratic political union of citizens, in which citizens can fully participate in the democratic process. Secrecy and discretion belong to an era when Europe was built by diplomats and civil servants."[798]

In the EU, the most prominent aspect of transparency is the right of ATD which is part of an actual legal framework, including treaties, the Charter and the Convention of Human Rights. Other aspects of transparency, such as the transparency of conducting consultations, the register of experts and of interest representatives, have been dealt with by the EU institutions. In the case of the Commission, it has declared that it "believes that high standards of transparency are part of the legitimacy of any modern administration."[799] Consultations and dialogue are the main

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[795] Päivi Leino, "Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible'", EUI Working Papers, March 2014, at 2, online:<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416242>.
[796] European Commission, *Eurobarometer 76: Public Opinion in the European Union* (Brussels: European Commission, 2011), at 3.
[797] Birkinshaw, "FOI and Openness", supra note 2 at 189.
[798] The European Parliament, Report on public access to documents (Rule 104(7)) for the years 2011-2013 (2013/2155(INI)) Committee on Civil Liberties, Justice and Home Affairs, 27.2.2014, at 14.
[799] European Commission, "Green Paper. European Transparency Initiative (Brussels: European Commission, 2006) at 2; see also Siim Kallas, "The Need for a European Transparency Initiative", Speech given to the Nottingham

venue though which the Commission achieves its communications with the public.[800] The Commission uses two important policy tools to enable citizen engagement and participation. The first tool was introduced in the follow-up of the White Paper[801] and signed the establishment of an online consultation system, "Your Voice in Europe"[802]. This is the European Commission's "single access point" to a variety of ongoing consultations and feedback opportunities which enable citizens to express their views on EU policies at different stages throughout the policy lifecycle. While this system is a venue for public participation, it only gives a limited and indirect right to citizens to decide on important public matters. The formal right for policy initiation and decision-making remains in the hands of the Commission. Hence, such policy tool has its limitations.

The second policy tool originates in the Treaty of Lisbon, which introduced a new instrument to involve citizens directly. The European's Citizens' Initiative[803] (ECI), operational since April 2012, creates for the first time an instrument for citizens to call on the Commission to initiate legislation.[804] It allows one million EU citizens from at least seven Member states to participate directly in the development of EU policies, by calling on the European Commission to make a legislative proposal. The precise rules for submitting an initiative successfully are laid down in the Regulation on the Citizens' Initiative.[805] Once having met all requirements for submitting an initiative, the organizers of an initiative meet the Commission representatives in person and have the opportunity to present their initiative at a public hearing in the EP. The Commission has to decide whether to act on it within three months and has to publish a reasoned response. While this venue for public participation may represent opportunities to engage in EU law-making, it is

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Business School, 3rd March 2005, online: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/130>.

[800] Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission COM (2002) 704 final.

[801] European Commission, "European governance: A white paper", COM(2001) 428, 25.7.2001, online: <http://europa.eu/rapid/press-release_DOC-01-10_en.htm>.

[802] European Commission, "Your Voice in Europe", online: <http://ec.europa.eu/yourvoice/index_en.htm>.

[803] European Commission, "The European's Citizen Initiative, online: <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing>.

[804] Eva G. Heidbreder, "Civil society participation in EU governance" (2012) 7:2 Living Reviews in European Governance at 10, online: <http://www.livingreviews.org/lreg-2012-2> [Heidbreder].

[805] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65/1, 11.03.2011. online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:en:PDF>.

still up to the Commission to take the initiatives seriously. For instance, in 2014, the European Commission rejected a European-wide citizens' initiative on the controversial trade deal of Canada-EU CETA. The initiative was supported by 230 organizations, with 3,284,289 signatures[806] from 21 EU members. The Commission refused to register the initiative, claiming that the proposed citizens' initiative falls manifestly outside the framework of the Commission's powers.[807] This example demonstrates how vulnerable this forms of participation are to the political will. While they may have potential, they are no substitution for other forms of transparency.

In addition to these policy tools, the Commission, together with other EU institutions, engages in dialogue with interest groups which through lobbying and consultation push their agendas in the EU's political process. This is part of the ETI[808] which makes an effort to regulate lobbying and other consultation standards in the EU. In the course of the ETI, the European Commission and the EP, integrated their registers in one "Transparency Register" on 23 June 2011, thus establishing a joint framework for relations with interest representatives for both institutions. This Joint Register constitutes a single database that lists all individuals or organizations that take part in EU policy-making.[809]

It is widely accepted that the Commission is dependent upon its exchanges with organized civil society, because of their expertise in many policy areas. So, an increase of legitimacy is expected, because all kinds of interest groups will seek to represent their interest at EU level.[810] The fact that the European Commission has no direct mandate by the citizens makes exchanges with interest representatives necessary to close the gap between the Commission and the citizens. However, there are concerns about these negotiations taking place away for the wider public.

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[806] European Initiative against TTIP and CETA. <https://stop-ttip.org/>.
[807] Scott Harris, "European Commission rejects citizens' initiative on CETA", The Council of Canadians Acting for Social Justice, September 11, 2014. Online: <http://canadians.org/blog/european-commission-rejects-citizens-initiative-ceta>.
[808] ETI: A framework for relations with interest representatives COM (2008) 323 final
[809] On the merger of the EP and Commission registers see European Commission, Commission and European Parliament launch Joint Transparency Register to shed light on all those seeking to influence European policy. Online: http://europa.eu/rapid/press-release_IP-11-773_en.htm.
[810] Irina Michalowitz, "The Transparency Initiative - Barking up the Wrong Tree?", SciencesPo, Centre de Recherches Internationale (2007) at 7. Online: <http://www.sciencespo.fr/ceri/en/content/transparency-initiative-barking-wrong-tree>.

According to Michalowitz "there is …. no guarantee that all stakeholders are included and included equally.[811] Greenwood argues that the solution for equality and inclusion is transparency which "should enable wider civil society to control these exchanges."[812]

Looking at the ETI, it outlines that transparency provisions are principally inclusive and in respect of political equality. However, at the end, it is up to the EU institutions to decide upon whom to consult. In addition, the publicity enforcement on lobby organizations in the registers is fairly weak, since it takes a laissez-faire approach. Furthermore, organizations themselves cannot be sure that they are equally heard nor listened to by the EU institutions, nor is the public able to scrutinize the contacts of EU civil servants and lobby organizations. Greenwood observed that the analysis of ETI related documents definitely shows a justificatory rhetoric towards the pursuit of the normative goal of participatory legitimacy[813]. Indeed, the normative dimension of transparency is traceable in the public discourse surrounding the ETI, but it seems that the political will to act accordingly is not yet sufficiently strong to make even more use of the democratic potential of transparency and transparent governance.

Apart from the Commission, the EP has regular and intensive contacts to various interest groups.[814] According to Rasmussen, lobbying the EP is a "necessary evil"[815] because it is essential to the functioning of the EP, particularly when MEPs are attempting to gauge the impact of policies on specific sectors. Interest groups provide information and technical expertise to MEPs, which ensures more informed policy formulation. In addition, the principle of openness is firmly applied by the EP, because the internal rules of procedure stipulate that both the plenary and the committee sessions be public[816]. This was realized only recently with regards to the Council, as only after the entry into force of the Treaty of Lisbon a provision was introduced

[811] Ibid.
[812] Justin Greenwood, "The lobby regulation element of the European Transparency Initiative: Between liberal and deliberative models of democracy" (2011) 9:3 Comparative European Politics 317–343 at 319.
[813] Ibid, at 318.
[814] Heidbreder, supra note 804 at 14.
[815] Maja Kluger Rasmussen, "Lobbying the European Parliament: A necessary evil", CEPS Policy Brief, No. 242, May 2011, at 2. http://aei.pitt.edu/31864/1/No_242_Rasmussen_on_EP_Lobbying_final.pdf
[816] See Article 103 (transparency of Parliament's Activities) of European Parliament's Rule of Procedure.

stating that the Council shall meet in public[817] when it deliberates and votes on a draft legislative act. The EP took a step forward in 2014 to bring greater transparency to its decision making by recording and publishing records of final voting in committee. Previously most committee votes were taken by a simple show of hands and were not recorded. The decision[818], adopted on 26 February 2014, applies to all final votes on resolutions and legislation. It also makes it compulsory to record and publish the final votes by MEPs in plenary on non-binding resolutions.

All three EU institutions, conforming to the requirements of Regulation 1049, have now established specific information catalogues called the "register" of official documents covering all information that has been processed or collected by government agencies. Many of the documents produced are automatically recorded on the registers after processing. The registers are published on line with many documents available for searching and downloading freely. The registers also enables citizens to make ATD requests by filling an online form. The Council[819], the Commission[820], and the EP[821] have all operated a register that contains documents dating from at least 2001, date of the Regulation 1049.

7.3.2 Institutional practices affecting the right of access to documents

In the EU, the path towards transparency and the right of ATD encompasses a contradiction – the progress in the legal recognition of a treaty transparency principle and a constitutional right of ATD is not accompanied with same progress in practical application of this legal framework. Secrecy was the rule rather than an exception to the workings of the EU institutions until the late 90s. At that time, the idea was that if the Council were to deliberate in public, "progress would either be blocked because delegations would be forced to take an immovable position, or the

[817] It is worth mentioning that since June 2006 Council deliberations on legislative acts to be adopted under co-decision procedure take place in public. (See Article 8 of Council' s Rules of Procedure of 15 September 2006, 2006/683/EC, OJ 2006., l. 285/47).
[818] European Parliament, On Amendment of Rule 166 of Parliament's Rule of Procedure concerning the final vote and rule 195(3) concerning voting in Committee 2014/2001(REG). online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0035+0+DOC+XML+V0//EN&language=en>.
[819] European Council, Document Register. Online: <http://www.consilium.europa.eu/en/documents-publications/public-register/>.
[820] European Commission, Register of Commission Documents. Online: <https://ec.europa.eu/transparency/regdoc/>.
[821] European Parliament, Register of Documents. Online: <http://www.europarl.europa.eu/RegistreWeb/search/simpleSearchHome.htm>.

public proceedings would be theatre, with the real business being done by officials behind closed doors"[822]. Although, in 2000 the legal framework on transparency transformed significantly, the culture of secrecy still finds its way in the everyday operations of the EU institutions and agencies. Data of the European Ombudsman shows that complaints relating to lack of transparency within the EU institutions continue to top the list of complaints, occupying 20% to 30% of the total complaints that the Ombudsman's office. The most common transparency issues raised are the institutions' refusal to grant access to documents and/or information.[823]

The experience with transparency and ATD in the EU demonstrates some practices that indicate resistance towards openness. Especially in the phase when specific issues among the myriad of possible issues are chosen for the agenda of the European decision-making bodies, access is narrowed down drastically. Heritier argues that the phase of policy preparation where proposals on specific issues are being drafted allows for access offered through public hearings, formal consultations and the use of Commission Green and White Papers, but deliberation and bargaining is insulated[824]. Even the EP, which is considered the most opened among the EU governing bodies, engages in secrecy practices. EP committee process is open to the public[825]. However, many pre-conciliation negotiations between the Council and the EP are removed from the public[826]. In addition, the EP engages in practices where exceptions are used to deny ATD requests. The rate of use of exclusions for the EP shows that for the last three years, 2012 (32%), 2013 (50%) and 2014 (39%), privacy is the most common of the exceptions laid out in Article 4 of the Regulation 1049.[827]

The internal dialogues between the three main EU institutions, known as "trilogues", are usually covered in secrecy. Trilogues are informal negotiations between the EP, the Council and the Commission aimed at reaching early agreements on new EU legislation. Currently trilogue

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[822] Curtin, "Betwixt and Between", supra note 393 at 85.
[823] European Ombudsman, Annual Report 2014. Online: <http://www.ombudsman.europa.eu/activities/annualreport.faces/en/59959/html.bookmark#hl3>.
[824] Héritier, "Composite democracy in Europe", supra note 3 at 827.
[825] M. Shackleton, (2001) "Co-decision since Amsterdam. A laboratory for institutional innovation and change'" ECSA Seventh Biennial International Conference, 31May–2 June, at 10.
[826] Héritier, "Composite democracy in Europe", supra note 3 at 827.
[827] European Parliament, "Public access to documents 2014", March 2015, at 11. Online: <http://www.europarl.europa.eu/RegData/PDF/rapport2014/original_EN.pdf>.

negotiations are not regulated, and meetings have an informal and ad-hoc nature. In spite of their crucial role in the legislative process, trilogues are closed meetings, and there is a severe lack of access to key information such as participants, agendas, minutes or documents considered. Hence, it is difficult for citizens to follow specific legislative processes during trilogues. Concerned about this weakness, the European Ombudsman, Emily O'Reilly, opened an investigation into the transparency of trilogues with a view to boosting transparent law-making in the EU. The Ombudsman asked the three institutions for information about their disclosure policies on trilogue documents, including details of meetings, documents relating to ongoing trilogues, minutes or notes drawn up after such meetings, as well as lists of participants.[828]

Regarding the operations of the Commission, they expose practices that limit transparency and ATD. Requests of ATD are often rejected under many exceptions. The privacy exception is the third most frequently invoked exception used by the European Commission when denying requests[829], and the numbers reveal that its use is increasing. The Commission in 2014 denied Access Info a breakdown of Commissioners expenses on official travel and hospitality on grounds of privacy.[830] Another exception used to justify the rejection of disclosing information is the international relations. Civil society has raised concerns about the way in which the international relations exception is applied to matters of high public interest. There is still controversy around the lack of openness of trade negotiations with the United States (TTIP negotiations) and Canada (CETA negotiations), where a culture of secretive diplomacy rather than of democratic transparency persists.

A recent decision of the European Commission is impeding the public's right to submit ATD online requiring a valid postal address for an ATD request. In April 2014 the European Commission introduced a new requirement[831] that asked all requesters to provide a postal

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[828] European Ombudsman, Ombudsman opens investigation to promote transparency of "trilogues", Press release no. 9, 28 May 2015. Online: <http://www.ombudsman.europa.eu/en/press/release.faces/en/59975/html.bookmark>.

[829] See Report of the Commission on the application in 2014 of Regulation (EC) No. 1049/2001, COM (2015), 391 final, 6.8.2015, Annex 1, at 3. Online: <http://ec.europa.eu/transparency/access_documents/docs/rapport_2014/com_2015_391_en.pdf>.

[830] Access Info Europe, European Commission urged to act to improve transparency, 24 June 2015. Online: <http://www.access-info.org/frontpage/17207>.

[831] European Commission, "Note to heads of Unit responsible for access to documents", 19.03.2014, online: <http://www.asktheeu.org/en/request/1337/response/4880/attach/2/Notification%20of%20negative%20replies%20Note%20to%20DGs%20signed.pdf>.

address as a precondition for registering their request. In May, the Commission started to send messages to requesters stating that postal address were required for registering and handling requests in line with the procedural requirements. The Commission message stated that "Pending your reply, we reserve the right to refuse the registration of your request."[832] Hence, requests via the AsktheEU.org web portal were refused to be registered by the Commission if they were not accompanied by a postal address.[833] AsktheEU.org, which is run by Access Info Europe, was launched in September 2011 with the aim of making the requesting process more transparent. It is set up to work via email, with requests and responses published online in real time. This kind of practice goes against the spirit of Regulation 1049, since this requirement for postal address is not found in the law.

The workings of the Council have drawn a lot of criticism for failing to comply with EU transparency rules. Most of the critics point to not respecting time frames for responding, applying too many extensions to requests, and not informing all requesters of their right to appeal when information was denied.[834] According to a report of Access Info Europe, an analysis of 50 ATD requests submitted to the Council between 2011 and 2013 via the AsktheEU.org platform, found that the average time for answering was 20 working days, over the maximum 15 working days permitted by EU law. Requests which resulted in partial denials of information were answered in an average of 49 working days[835]. This report also raises concerns about the broad application of exceptions such as privacy and international relations. The privacy exception was used to deny information about the identities of Member State representatives participating in Council meetings, even on legislative negotiations. The international relations exception was invoked to deny public access to multiple documents about the Council's interactions with third countries such as China and Mexico. A further issue was that of record keeping: the Council informed requesters that it does not keep minutes of all working parties and in one instance reported that legal advice had only been delivered to Member State representatives orally.[836]

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[832] Access Info Europe, "European Commission attempting to block citizens' requests via AsktheEU.org", 2 June 2014. Online: <http://www.access-info.org/eut/12558>.
[833] Access Info Europe, "Activity Report 2014", at 8. Online: <http://www.access-info.org/wp-content/uploads/AIE_Annual_Report_2014.pdf>.
[834] Access Info Europe, "AsktheEU.org Report on Council of the European Union: Transparency problems exposed", 19 May 2014. online:<http://www.access-info.org/eut/12523>.
[835] Ibid.
[836] Ibid.

The discussions over changes in Regulation 1049, have revealed another weakness in the ATD regime in the EU. Member States such as France, Germany and the UK are seeking to limit the public's right of access to EU documents. They are using the reform of the regulation as an opportunity to add new exceptions and to weaken the right of ATD[837]. The influence of these Member States has led to a common Council position, which, if adopted, would increase the opacity of the EU decision-making process, lead to a regression of the right of ATD in the EU and weaken citizens' ability to hold the institutions to account; thus violating the EU and international law.[838]

7.3.3 Official data on transparency and access to documents requests

- Data from the Register of Documents of the EP, Commission and Council

Using data from the Annual Reports on ATD from these three institutions, I developed my own tables. The tables contain statistics for a period of 10 years, from 2005-2014. Tables 15, 18 and 21 look at the source of ATD requests, respectively for the Commission, the Council and the EP. The data includes the same or similar categories of requesters for all three institutions, such as academics, public authorities, lawyers, journalists, civil society, other EU institutions and an unspecified category which includes mainly the public. The tables share some interesting trends. The most requests are submitted by the public (others or unspecified) and the academics, followed by the civil society. There is a significant gap in numbers for these categories compared to other ones. This trend is distinguishable from that in Canada, where academia requests are insignificant. Another difference with Canada is the number of civil society requests which comes third in the list of categories. In Canada, this number kept declining despite the rise on total requests. Journalists, for all three institutions, just as in Canada, have kept a low profile, and only occupy a small percentage of requests. These numbers, again, confirm that ATI should not be associated with the media.

[837] Council of the European Union, Interinstitutional File: 8410/12, online: <http://www.access-info.org/wp-content/uploads/Outcome_from_proceedings_notes_30_March_2012-2.pdf>.
[838] Access Info Europe, "EU decision-makers push for less transparency", 5 June 2012. Online: <http://www.access-info.org/eut/11652>.

Tables 16, and 19 compile data on the number of requests and their status (if they were disclosed fully, partially or refused). The numbers indicate that requests disclosed outnumber significantly those refused, although the Commissioner's data are steadier than those of the Council.[839]

Tables 17, 20 and 22 contain data on the refusals made based on exceptions for all three institutions. Privacy is the second largest reason for refusals for the Commission (tab 17) and the EP (tab 22), and the decision-making is the first reason for refusals in the Council (tab 20) and the EP (tab 22), and the third for the Commission (tab 17). These data demonstrate that the decision-making process in the EU happens away from the public eye, and is protected by a veil of secrecy. In this approach, the EU does not differ much from Canada, where also the Cabinet confidences are fanatically preserved from being affected by the *ATIA* provisions. Also, privacy exceptions prevail in both jurisdictions as one of the main reasons for declining requests for ATI.

- **Questionnaire for the Transparency Units**

I delivered the same questionnaire (as the one used in Canada) to the EU institutions and agencies. However, the steps were different from what I did for Canada. The EU does not have a government body assigned to manage the administration of the ATD. As a result, it does not have a central database that gives the names or contacts of the persons that process ATD requests. The EU does not have ATIP coordinators, but the main institutions have "Transparency Units". Hence, I had to search each of the EU agencies' website, for information on where to send my questionnaire.

The EU has 42 agencies: 2 EUROATOM agencies, 6 executive agencies, 37 decentralized agencies including three Agencies under Common Security and Defense Policy to which Regulation 1049 does not apply. Only 10 of these agencies have a designated space in their website for Access to Documents or Transparency, but only 4 of them have email addresses to contact these Units. Most agencies have forms in their websites that could only be completed on line. Many agencies do not even have a general email contact, but just phone numbers and

[839] Note that this kind of data for the EP are not available, because the data was not clear or missing at the EP Register.

addresses. I could find the email contacts of 23 agencies and sent the questionnaire to all 23 out of 42 agencies. In addition, I sent the email to the EP, the Commission, and the Council. The requests were sent at the same time, following the same procedure as in Canada.

One agency sent links of websites instead of completing the questionnaire and suggested to file an ATD request in case I don't find the information needed. Two agencies declined to complete the questionnaire. One explained that the agency was not in a position to participate in my project "at the current juncture, due to a stress on resources coupled with urgent work in the field of its competence". The other declined saying that since my request did not constitute a request to ATD, they would not consider to fill the questionnaire. I have received six completed questionnaires in total, which constitutes a 23% response rate. This rate is also low, but it is significantly higher than what I got for Canada.

The results are worth of observations, and reveal interesting trends, especially if compared to the Canadian counterparts. Most of the answers to Q.1, Part I, are positive to the role of the proactive disclosure. However, four participants agreed that early proactive disclosure leads to a public information overload, and that increases the workload and expenses of the institution. Responses to Q.2 revealed that most of the agencies admit that depending on the issue, they leave out information details if that information is controversial; frame information in certain ways which are beneficial to the institutional interests, and choose a technical language that needs a certain level of education to make sense of. Responses to Q.3 inform that agencies do not have enough people dedicated to transparency. Responses to Q.4 inform that agencies use all sorts of means to make information available, such as social and traditional media, press, and open meeting. In addition, they do ask for the public's feedback on the quality of information provided.

Responses to Q.1, Part II, inform that all agencies agree on the value of ATD. The only concern is on the numbers of people and the budget assigned to ATD processing. Responses to Q.2 confirms that only sometimes ATI has the purpose to protect human rights; make institutions accountable; participate in decision-making; stimulate transparency, or prevent corruption. However, differently from Canada, agencies rarely believe that ATI has a journalistic nature. Q.3

and 4 inform that academia has the closest relationship with the agencies. The other interactions are either functional or friendly. Also, they reveal that mostly media and organizations have either a strong or a basic knowledge. Responses to Q.5 confirms that, sometimes, responding to ATI requests needs consultation with superiors, and that information benefits certain groups rather than the general public. In addition, responses assert that information only rarely helps requesters advance some other human rights it. Q.6 reveals that none of the ATD people use their discretion in responding to ATD requests. Instead, they seek advice from at least another person in their institution.

Part III discloses that most ATD people have experience in public office (mostly 5-10 years), mostly have an average of 1-5 hours of training on ATD, and that most agencies have either none or over five people working assigned with ATD requests.

The results of this questionnaire inform a lot about how EU institutions and agencies perceive and value ATD, which is an important indicator of how they implement ATD rules in practice.

7.3.4 The case of Albania

Albania represents an interesting case of an advanced legal framework on ATI, but that lacks proper implementation. This case is a perfect example of a failure to live up to the requirements of the law, and even worse to the acknowledgement of its importance. I have argued elsewhere that "Some of the main problems with the transparency regime in Albania have to do with the legislation, but more importantly with the practices related to it, with the administrative culture of the civil servants and with the awareness of the citizens."[840]

The main problem in Albania is that the administration does not have the necessary knowledge about this legislation, nor the capacity to carry on its requirements. In many cases the public offices do not have the will to respond to requests for reasons of neglect or purposely to hide information. One of Article 19's regional partner organizations, the Centre for Development and Democratisation of the Institutions, reported in 2003 that 87% of the people surveyed

[840] Spahiu, "Government", supra note 230 at 123.

working in public authorities did not even know that Albania had a FOI law.[841] David Banisar argued that "Some laws are adopted and never implemented. In Albania, there has been little use of the law because neither users nor government officials are aware of it."[842] The US State Department in its 2005 Human Rights Report noted that "this law has not been fully implemented, and limited access to public information for citizens and noncitizens remained a problem. A lack of government information offices and limited understanding of the law by government officials contributed to the problem."[843]

The facts point to an immediate need for awareness and training in public administration. What happens very often is that civil servants do not comply with the procedural requirements for a transparent administrative activity either because they do not have enough knowledge or resist it. The assessment of the NGOs in Albania demonstrate the very limited knowledge of the law by public officials at all levels of the administration[844]. The image of a public official is not very highly regarded in Albania. Part of the administration still reflects a secret culture where information is considered to be in the ownership of the institution if not of the person holding the information. There is certainly need for training of public officials to improve the understanding and knowledge of the legal provisions, since its lack may bring serious impediments to the realisation of the right of ATI.

Often, the release of information becomes a commodity which is sold to the citizens at a hefty price. As Szekely puts it "Another current problem is the cost of public information – both its official and black market price. The black market price (the price of information obtained through bribery) is not common knowledge."[845]This mentality is embedded in the culture of

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[841] Article 19, Memorandum on the Albanian Law on the Right to Information on Official Documents, 2. Global Campaign for Free Expression (Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe).London (September 2004).

[842] D. Banisar, "The Freedominfo.org Global Survey Freedom of Information and Access to Government Record Laws Around the World" (May 2004) at 7. Online: <http://www.freedominfo.org/wp-content/uploads/documents/global_survey2006.pdf>.

[843] See US State Department, Country Reports on Human Rights Practices – 2005, Government corruption and Transparency, (March 2005) at para , online: <http://www.state.gov/j/drl/rls/hrrpt/2005/61633.htm>.

[844] Article 19, "Promoting practical access to democracy: A survey of freedom of information in Central and Eastern Europe", October 2002, at 32. Online: <https://www.article19.org/data/files/pdfs/publications/freedom-of-information-survey-of-central-and-e.pdf>.[Article 19].

[845] Szekely, at 131.

secrecy that has predominated the Albanian administration for many years. Szekely argues that "For decades, information handling was a party-state monopoly . . . the provision and the content of information were subordinated to a centralized political will."[846]

To explain the problems in ATI implementation it is important to consider that the government has changed several times since the FOI law was adopted in 1999, and each change normally leads to the reorganization or abolishment of various ministries, with senior public officials being replaced. It is a common practice in Albania that every time a party comes to power, most of the public officials are replaced with militants as a reward of their support during electoral campaign. Appointments of people in offices based on party politics and not on personal merits demeans the image of the public official in Albania. This practice causes politicization or bad management of administration. This is a fundamental problem for the whole process of legal and administrative reform in Albania.

Another reason for the failure of the ATI regime in Albania is an uneducated public. There is a concerning lack of awareness regarding the law at all levels of the Albanian society, from civil society to ordinary citizens. According to Article 19, in practice, the law is rarely applied, and most Albanians have little knowledge of its existence[847]. That explains why there are only a few requests for official documents and little use of the FOI Law. The situation is expected to improve with the new law which has introduced better safeguards and high penalties for non-compliance. Gent Ibrahimi, a legal expert who participated in the drafting of the law, said the bill introduced the concept of personal responsibility in the decision-making process of public officials, which is a novelty in Albanian law. Ibrahimi acknowledged that the Albanian legal and administrative culture is such that officials only implement what is prescribed by law.[848]

However, legal safeguards face many obstacles in Albania – a weak judiciary, a strong executive and a politicized administration. This combination is a recipe for failure. The right to judicial review of information refusals has almost never been exercised in Albania, perhaps as a

[846] Ibid, at 118.
[847] Article 19, supra note 844 at 7.
[848] Besar Likmeta, "Albania Rights Groups Hail New FOI Law", BalkanInsight, 1 October, 2014. Online: <http://www.balkaninsight.com/en/article/new-foia-law-could-usher-era-of-transparency-in-albania>.

result of the small numbers of requests made for information, the excessively lengthy time for administrative review, and the lack of confidence in the judiciary due to its reputation for corruption. The courts are usually perceived as not trustworthy to solve conflicts or violation of rights. As "In most East European countries, judges are accustomed to a phone call form a party boss suggesting the dispositions of a case."[849]. In one case, the newspaper Republika was threatened by a body guard of the Minister of Health, following publication of an article reporting on the ongoing problem of unlicensed dental clinics[850]. Stories like this are a clear indicator of a weak system of government which is unable to protect those who exercise their legitimate rights recognized by the law and the Constitution.

The paradox of Albania stands on the disaccord between the quality of the legislation, and the practices of the administration of the law. Albania has one of the best laws in the world, which has so far failed to be properly implemented. So, how can this disaccord be explained? One strong stimulus for improving the legal framework, not only on ATI, but also more broadly, has been the Albanian aspiration for a membership status in the EU. Just like in other countries of Central and Eastern Europe, political elites in Albania have been willing to support ATI legislation, because they are "eager to boost their democratic credentials in order to be considered as possible members of the European Union"[851]. Elsewhere, I have called this process of adapting to the rules of accession of the EU "Europeanization by convenience."[852] This is a demonstration of the dichotomy that exists between the ATI rules and practices. These practices are shaped by the political environment in a given country, but also other inside and outside political pressures, which dictate to a certain degree, the path of transparency and ATI.

7.4 Comparisons and Conclusions

The analysis in this chapter shows how a statutory right can be shaped through the exercise of administrative discretion, an observation made by Roberts[853] more than a decade ago. The practices in all jurisdictions expose how everyday operations of public administration are

[849] T. Rosenberg, "Overcoming the Legacies of Dictatorship" (1995) 74:3 Foreign Affairs 134,141 [Rosenberg].
[850] Article 19, supra note 844 at 45.
[851] Article 19, supra note 844 at 3.
[852] Irma Spahiu, "Exploring the 'faces' of Europeanization from an Albanian perspective", (2015) 11:4 European Journal of Contemporary Research at 354 [Spahiu, "Exploring"].
[853] Roberts, "Administrative discretion and ATIA", supra note 5 at 176.

continuously trying to circumvent legal requirements by giving life to new rules on ATI. Having a good ATI law in place is the first step to building an effective ATI regime because, as Berliner argues, it institutionalizes transparency and "makes…promises of transparency more credible."[854] However, this institutionalization does not happen in vacuum, but it builds upon existing institutional culture and rules. In the Canadian context, Bazillion has argued that "Administrative secrecy is endemic in the Canadian political system."[855] The same is true for the EU, where Pasquier and Villeneuve have pointed to the cultures of transparency and secrecy, rooted in historical traditions and traditional state-society relations.[856] When considering that the ATI regime in the EU is tempered through a battle of interests between Member States, the cultural explanation becomes clear. This battle reflects a divide between pro-transparency members and other members who oppose it.

The application of ATI laws requires considerations of broad principles of public interest, harm, balancing of rights, and generally, government agencies have a tendency to neglect these broader considerations. They worry mainly about the narrower interests that are tied to their agency's mission. For instance, according to the ICC, government departments do not take seriously their obligations to undertake a two-step process before applying discretionary exemptions. Too often departments are content with addressing only the question: "May the requested records be kept secret?" Instead, they should be asking: "Even if they may, why should the records be kept secret?"[857] However, as one cross-national study reveals, there can be high costs for setting up the necessary infrastructure for the implementation of ATI laws[858] which can act as an impediment for having an effective ATI regime. Financial constraints demonstrate that ATI does not operate in a tension-free environment, but in one where priorities should be picked and choices should be made. Of course, this is not to say that lack of resources justify restrictions in ATI, especially if they are made in an arbitrary manner. In any case, the development of Internet offers great opportunities for cutting costs on disseminating information.

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[854] Berliner, "Institutionalizing Transparency", supra note 227 at 50.
[855] R. Bazillion, "Freedom of Information: A Canadian Dilemma" (1983) 288 Round Table 382-94 at 382.
[856] Pasquier & Villeneuve, "Organizational Barriers", supra note 30 at 157.
[857] Information Commissioner, "Annual Report, 1994-95" (Ottawa: Department of Public Works and Government Services, 1995) at 8.
[858] Jeannine E. Relly & Meghna Sabharwal, "Perceptions of transparency of government policymaking: A cross-national study", (2009) 26 Government Information Quarterly 148–157 at 154 [Relly & Sabharwal].

The comparison of ATI trends in practices between Canada and the EU offers some interesting insights. While the legal protection they offer to transparency and ATI is different (with the EU being much more progressive), the practices demonstrate a similar trend – there is a tendency towards a restriction of the right of ATI. The decline in Canada is more prevalent, and is mostly a result of administrative practices. In the EU, the analysis reveal similar practices. Lieno argues that "In today's Europe, there seems to be nothing shameful in arguing that citizens are outsiders, and that openness and citizen participation distract efficient decision-making in the institutions."[859] In addition, there is an attempt to restrict the right of ATI through both practical and legal venues by trying to limit the scope of the Regulation 1049. The case of Albania depicts a similar picture where the government has improved the ATI legal environment due to international pressures without paying much attention to improvements in practice.

The data on the tables presented for both Canada and the EU represent attention-grabbing trends on the ATI practices and dynamics. The ATI right is expansively used by the public in Canada and the EU. Also, media requests are not significant in both jurisdictions. However, other actors are different. In the EU, a significant part of the ATI space is occupied by the academia, while in Canada it is occupied by business. The NGOs are much more active in the EU than in Canada.

The question that is naturally raised when looking at these cases is: Why are government not very keen of an expansion of the right to ATI? Ackerman and Sandoval-Ballasteros offer an explanation for this trend by taking an international approach. They argue that FOI laws do not represent an immediate benefit for those in power. FOI laws open the government to external scrutiny, making elites much more vulnerable to outside criticism and significantly empowering civil society.[860] Flaherty makes similar claims arguing that FOI "only appeals to Opposition politicians, not to politicians in power. It has no appeal, and is only a bother, if not a threat, to the government and public servants and their control of access to general information."[861] As a

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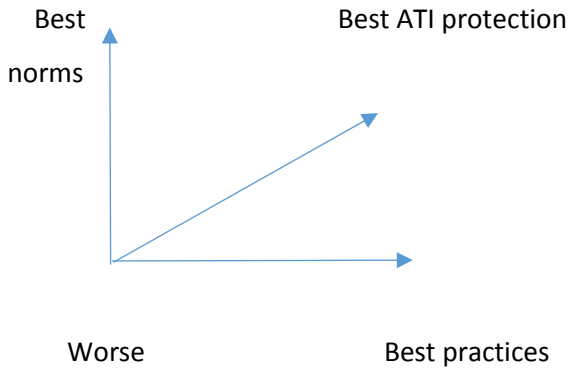
[859] Päivi Leino, "Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible', EUI Working Papers, March 2014, at 2, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416242>. [Leino]

[860] John Ackerman & Irma Sandoval-Ballesteros, "The Global Explosion of Freedom of Information Laws." (2006) 58:1Administrative Law Review 85–130, at 121 [Ackerman & Sandoval-Ballesteros].

[861] David H. Flaherty, "Reflections on Reform of the Federal Privacy Act", June 2008, Office of the Privacy Commissioner of Canada, at 36. Online: <https://www.priv.gc.ca/information/pub/pa_ref_df_e.pdf> [Flaherty].

result, one should always expect some level of resistance from the part of government when dealing with transparency and ATI. When the FOI laws were expanding in the 70s, it was argued that they represented a "certain kind of public myth" because there was a strong belief that the "So-called liberal democratic governments keep a lot of information secret"[862]. This lack of belief in FOI laws has accompanied any FOI laws, and continues to date. According to Woodbury "if governments were serious about information access, then information acts would have teeth to them, providing punitive damages, the disciplines or dismissal of employees".[863]

There is a close relationship between law, practice and ATI protection. Below, I offer a diagram which simplifies this relationship, but also describes how it works, with law and practice being two variables that determine the ATI protection progression line. Canada, the EU and Albania occupy different spaces in the diagram depending on the expansion or restriction in the two variables.



As I have argued above there are many reasons why governments resist the idea of ATI. Power and control are two of the most prevailing incentives for such resistance. The cliché about information being power has much truth to it. As Max Weber explained, the logic of bureaucratic administration rests in part on producing information and "keeping secret its knowledge and intentions" from competing organizations and from the public[864]. Pasquier and Villeneuve observed that those in power tend to consider public information their own property.[865]. The

[862] Murray Edelman, Politics as Symbolic Action (Chicago: Markham, 1971); Scalia, supra note 657 at 14-19; Henry Tudor, Political Myth (New York: Praeger1972); Marsha Woodbury, "Clinton, Reno, and Freedom of Information: From Waldheim to Whitewater" (1995) 22 Social Justice 49-66; Yeager, FOIA, supra note 138 at 169.
[863] Woodbury, Ibid, at 51.
[864] Weber, Economy, supra note 768, at 992.
[865] Pasquier & Villeneuve, "Organizational Barriers", supra note 30 at 157.

analysis in this chapter validates such claims. In most of the cases there are state institutions who have exclusive knowledge on the information they produce and where such information is stored, hence possessing a "monopoly of knowledge". They also retain significant discretion over the release of documents they prefer to keep secret and shift this discretion towards the safe harbors provided under the exceptions to disclosure laws.[866] This tight control over knowledge gives them a big amount of power over citizens. As such, governments are rarely willing to share this power in the absence of compelling incentives,[867] according to Florini. Hence, governments have a free hand to control the public space in which debates occur and ideas are shaped. This could lead to alienation of the citizenry from public discourse.

Considering all above, ATI becomes a powerful tool for providing a rich public space which enables individuals to become citizens and be part of debating, shaping and steering the direction of their countries. In the Canadian context, Curry argues that there is a certain David versus Goliath aspect every time someone files an ATI – common citizens can obtain some of the most sensitive documents held by some of the most powerful people in the country.[868] At first sight, this seems like an unequal playfield for the citizenry. However, as the analysis in this chapter indicated, governments have a culture of secrecy embedded in them, but also some incentives, and pressures to act accordingly to the ATI requirements. ATI regimes involve many other actors, such as information commissioners, courts and NGO-s, whose role is important in shaping directions of the right of ATI in a given jurisdiction. They have the potential to promote compliance with existing laws and policies, and encourage governments to revise laws, policies, and practices[869]. I study the role of these other actors in the next chapter of this research.

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[866] Fenster, "Opacity", supra note 50 at 920-924.
[867] Ann M. Florini, "Increasing transparency in government" (September 2002)19:3 International Journal on World Peace, 19:3 3-37 at 32 [Florini, "Increasing transparency"].
[868] Bill Curry, There's a good reason why David fights Goliath, The Globe and Mail, September 22, 2007, online: <http://www.theglobeandmail.com/news/national/theres-a-good-reason-why-david-fights-goliath/article1082984/> [Curry].
[869] Alasdair Roberts, "Retrenchment and freedom of information: Recent experience under federal, Ontario and British Columbia law" (1999) at 29, online: <http://ssrn.com/abstract=1308990> [Roberts, "Retrenchment"]

CHAPTER 8: MEDIA AND THE NGOs – LOOKING AT ATI FROM A USER'S PERSPECTIVE

ATI regimes in Canada and the EU are advanced by the noteworthy contribution of different NGOs and media working to defend the public's right of ATI. This chapter looks at the media and NGOs for three reasons. First, they are among a few categories of users of ATI rights. Second, and more importantly, they play an essential role in promoting transparency and ATI as fundamental to democracy and good governance. Third, to clarify a point that seems to emerge from the literature for claims (especially from the political class) that the ATI space is occupied by journalists who abuse the system just to embarrass governments. Hazell and Worthy argue that there is sometimes a strained relationship between governments and media - the government feels that information is distorted by the press, and the press feels that there is no information that is not fed or manipulated by the government[870].

The purpose of this Chapter is to look at ATI from a user's perspective. In the previous chapter, I examined ATI from an insider's point of view – that of the government. Now, I turn to examine it from an outsider's standpoint. To understand the outsider's perspective I examine the work of some of the most influential NGOs and media organizations or journalists in Canada and the EU on ATI. In addition, I look at the strategies employed by them for the promotion of transparency and the right of ATI. An analysis of the websites of the some of the newspapers and NGOs was complemented by interviews with the representatives of some of them. The interviewees in this research were chosen among important persons who have been part of different deliberations on issues of transparency and ATI.

The traditions role of the media is investigatory journalism and breaking story. Walby and Larsen see a connection between ATI and breaking news. He argued that "ATI/FOI requests are associated with the breaking of a big story that is the golden goose of investigative journalism.[871]" In addition, McCamus recognized the role of the press as "a prime mover in

[870] Robert Hazell & Ben Worthy (September 2009), "Impact of FOI on central government", University College London [Hazell & Worthy, "Impact"].
[871] Kevin Walby & Mike Larsen, Access to Information and Freedom of Information Requests: Neglected Means of Data Production in the Social Sciences, Qualitative Inquiry 2011 18(1) 31-42, at 32 [Walby & Larsen].

working for freedom of information legislation."[872] The work of the media and NGOs has enriched the understanding of the principle of transparency and has stretched the right of ATI to the limits of legal recognition. The relationship between ATI and media has been twofold. On one hand, media has helped giving life to the right of ATI by using its breaking stories. On the other hand, ATI has "helped the media become much more aware of how government works and to identify administrative miscues."[873]

The NGOs, or more widely civil society has also been closely associated with the immense work on ATI. Schutter addresses the "promise of participatory democracy" in his account of civil society in EU governance and maintains that interest groups and citizens' initiatives "participate in public information and communication processes, so helping to create a general perception of the common good."[874] In addition, Curtin refers to the same concept when assigning civil society the function of establishing a space for the public deliberation of values and policies.[875] Eriksen argues that democracy at the level of the EU requires a "single overarching communicative space accessible for all, in which proponents and opponents can voice and justify opinions and claims, and mobilize support in order to sluice them into decision-making units via social movements and political parties."[876] Usually the relationship of the NGOs with the government is less confrontational than that of the media. In an Interview with Viola Aliaj, lawyer at the QZHDI, she admitted that "The interaction with ATI officials in Albania has an investigative nature, but

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[872] McCamus, "FOI in Canada", supra note 283 at 52.
[873] Savoie, *Breaking the Bargain,* supra note 280 at 51.
[874] See Olivier, De Schutter, Notis Lebessis & John Paterson, eds, "Governance in the European Union" (2001) Forward Studies Series, Office for Official Publications of the European Communities, Luxembourg at 202, online: <http://www.forumpartnerships.zsi.at/attach/TND_01_S_EC_GovernanceintheEU.pdf> [Olivier, et al, "Governance"]; David Dunkerley & Shane Fudge, "The Role of Civil Society in European Integration" (2004) 6:2 European Societies, 237–254 [Dunkerley & Fudge].
[875] Deirdre Curtin, "Private interest representation or civil society deliberation? A contemporary dilemma for European Union governance" (2003) 12:1 Social & Legal Studies, 55–75 at 55 [Curtin, "Private interests"].
[876] Erik Oddvar Eriksen, "An Emerging European Public Sphere" (2005) 8:3 European Journal of Social Theory, 341–363 at 355 [Eriksen, "Emerging"]; Erik Oddvar Eriksen, "Deliberation and the problem of democratic legitimacy in the EU: Are working agreements the most that can be expected?" (2006) 8 ARENA Working Paper, (ARENA - Centre for European Studies, University of Oslo, Oslo), online: <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2006/wp06_08.xml> [Eriksen, "Deliberation"]; John Erik Fossum & Hans-J¨org Trenz, "The EU's fledging society: From deafening silence to critical voice in European constitution-making" (2006) 2:1 Journal of Civil Society 57–77 [Fossum & Trenz, "The EU"].

not adversarial or conflictual. The administration usually asks why the centre wants information, how is it going to use it and for what reasons."[877]

Media and NGOs' approach to ATI rights could be seen in a spectrum – from human rights advocacy to association of ATI with broader themes such as equality, development or justice. According to Access Info Europe, "The right of information is a fundamental right in itself….It is also an instrumental right, essential for the protection of other human rights."[878] At a broader scope, part of aspirations of the UN Sustainable Development Goals from an NGO's perspective is that human development in the coming decades will depend on people's ATI.[879]

Below, I discuss some of the strategies that the NGOs and media use to promote transparency and ATI. These strategies are diverse and range from whistleblowing to advocacy to litigation. They demonstrate the potential of the media and NGOs for ATI rights promotion and protection.

8.1 Raising public awareness and revealing scandals

8.1.1 Canada's activism on access to information

Generally, NGOs and media are good advocates when it comes to protecting and promoting important values in democratic societies - ATI - being one of them. They have demonstrated a firm determination to explore the loopholes and weaknesses of the current operational systems on ATI legal provisions and their implementation. According to Sulyok and Pap, an NGO's impact is twofold. First of all, they serve as a very powerful source of information, raise awareness, and initiate public debate on issues formerly unknown. Second, they perform an

[877] Interview with Viola Aliaj, QZHDI, May 8, 2015.
[878] Access Info Europe, "Rendition in record: Using the right to access to information to unveil the paths of illegal prisoners transfer flights", 15 December 2011, at 24, online: <http://www.access-info.org/wp-content/uploads/Rendition_on_Record_19_December_2011.pdf>.
[879] A statement signed by various Organizations forming an Open Working Group, calling to fully integrate the governance recommendations of the UN High Level Panel of Eminent Persons Report into the proposed Post-2015 Sustainable Development Goals. See: Article 19, Post-2015: Access to information and independent media essential to development. 3 Feb 2014. Online: <http://www.article19.org/resources.php/resource/37435/en/post-2015:-access-to-information-and-independent-media-essential-to-development>.

investigative role on sensitive issues.[880] Similarly, media is one of the most passionate and public advocates of access rights today.[881]

Indeed, people get most of their information from the news in TV, radio or newspapers. With the advancement of technology we can hear or read about breaking news wherever we are through our devices. As such, media's reach to people extends limitless. This role not only brings public's attention to the importance of ATI, but also creates the public space to think about, initiate or join debates of public importance. It is not novel to say that governments are not particularly sympathetic to being opened when it comes to decision making. In this context, NGOs and media that engage in access rights advocacy are not always very welcome to be part of deliberations of public importance. Their role is often perceived as taking advantage of transparency by revealing information that bears on others' performance.[882] Speaking about the EU, Kohl-Koch argues that 'empirical research documents that civil society involvement in EU governance ensures neither equal nor effective representation of stakeholders[883]. This situation stands in contrast to the role that NGOs should play in democratic governance – participating in political processes and holding governments accountable.

In Canada, many NGOs criticize the ATI regime for being subject to significant exceptions and the costly, time-consuming and frustrating process for obtaining information. Most NGOs are concerned about the delays and costs associated with the Canadian ATI system and dispute that the presumption of openness and transparency is being seriously undermined. They hold that Canada is falling behind internationally[884] at a time when governments all over the world are increasingly being more proactive about disclosing information to the public. The Canadian

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[880] Márton Sulyok & András László Pap, "The role of the NGOs in the Access to Public Information: Issues Related to Extraordinary Renditions in Absence of Transparent Public Power:, in Mark B. Salter, ed, *Mapping Transatlantic Security Relations. The EU, Canada and the War on Terror* (London: Routledge, 2010) 162- 197 at 22 [Sulyok & Pap].

[881] Annual Report to Parliament by the Information Commissioner , June 1992

[882] O'Neill, "Transparency and Ethics", supra note 97 at 88.

[883] See B. Kohler-Koch, "If participation does not do the job, will accountability make a difference? The Potential of Civil Society Organizations in democractizing the EU", CGES Working Papers, WP 2011-05 [Kohler-Koch]; Kohler-Koch & B. Finke, "The institutional Shaping of EU-Society Relations: A Contribution to Democracy via Participation?" (2007) 3 Journal of Civil Society 205 [Kohler-Koch & Finke].

[884] See for example: Stanley Tromp, "Fallen Behind: Canada's Access to Information Act in the World Context", Report, September 2008, online: <http://www3.telus.net/index100/report>. [Tromp]

NGOs' approach towards the current system of ATI, especially at the federal level, is a strong critique of the law and its implementation. The pervasive opinion of the NGOs is that the system is out-dated and weak at best and broken at worst. Vincent Gogolek, executive director of the B.C. Freedom of Information and Privacy Association (FIPA) reported that game playing, delays and workarounds are nothing new to advocates.[885] In an interview with me he said that his centre uses ATI requests to test the state of the law, and learn what is going on in the government. He raised two issues regarding ATI implementation, first – information not being recorded, and second - the high fees imposed on the requesters. He illustrated these problems with examples. First, the Ministry of Citizenship replied to a FIPA request about records of a Conference they had with the US trade representative, that they did not write anything down. In another instance, the fee for a request, sent by the centre about the correspondence between the BC government and the Governor's Office in Washington State, was estimated over $600 in BC, while in the Washington state costed only $5. The request was the same. When the centre went public with the difference in cost, the Deputy Minister sent a letter to them saying that fee was reduced to zero. Gogolek explained that "they were clearly using fees to delay and discourage."[886]

In addition, the Centre for Law and Democracy (CLD) states that "It is neither revolutionary nor even controversial to note that Canada's right to information system is broken."[887] According to them, "the problem has become entrenched at many levels in Canada: problematic legal rules, negative official attitudes towards disclosure, an adversarial approach on the part of many civil society groups and actors, and general public apathy on this issue."[888]. In an interview with Michael Karanicolas, Legal Officer at the CLD, he stated that "the ATIA is 30 years old, and there is presumably an entire generation of bureucrats that have spent their entire careers under the ATI law, and there is still not a culture of openness by default."[889] He considered this

[885] Jason Proctor, "Freedom of information laws a poor match for secretive governments, advocates say", CBC News, May 30, 2015, online: <http://www.cbc.ca/news/canada/british-columbia/freedom-of-information-laws-a-poor-match-for-secretive-governments-advocates-say-1.3093471>.
[886] Interview with Vincent Gogolek, CEO and Executive Director of BC FIPA, May 15, 2015
[887] Centre for Law and Democracy "Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada", January 2013, at 1. Online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_.Jan13.pdf>.
[888] Ibid, at 4.
[889] Interview with Michael Karanicolas, Legal Officer of the Centre of Law and Democracy, April 14, 2015.

situation troubling and frustrating to deal with. Another issue which he criticised is the latest practice of the government to substitute ATI with open data, claiming that it has been more transparent. Karanicolas said that "Open data is great, and it is great the government is doing that, but open data is not a substitute for access to information, because information about corruption, mismanagement, or information about anything government is embarrassed about, that is never going to get released through open data, or it is very unlikely."[890]

Reporters and editors of Newspapers Canada[891], who have an extensive experience with ATI, had long complained of government restricting information despite legislative guarantees of access. In an interview with John Hinds, President and CEO of Newspapers Canada, he outlined numerous problems with ATI in Canada. Hinds explained that ATI suffers from many problems, it is legalistic in nature (professionals take more advantage), it is complex (one should know how to navigate the system), it is resource dependent (only those who can afford it can pay for it), it is forgotten into public's memory (not enough promotion), it is dependent on the institutional culture, governments often play a privacy and security card which trumps ATI[892]. In 2005, the Canadian Newspaper Association presented evidence to the OIC describing a policy of "amber lighting" or "red flagging" that had been detailed by investigative journalists Ann Rees. Thompson describes the amber light process as "a heads up process to advise senior management of upcoming access to information releases that may attract media or political attention."[893] Roberts and Rees described that practice as "a highly sophisticated, government-wide access to information surveillance system."[894]

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[890] Ibid.

[891] Newspapers Canada is a joint initiative of the Canadian Newspaper Association and the Canadian Community Newspapers Association. They consider themselves to be an advocacy group of publishers. They have been actively concerned with the state of Freedom of Information in Canada since 1997, online: <http://www.newspaperscanada.ca/about-us>.

[892] Interview with John Hinds, President and CEO of Newspaper Canada, April 16, 2015.

[893] Elisabeth Thomson 2006 "PS Brass get 'Heads Up' over Access Releases" Ottawa Citizen, 2 October, A3.

[894] See Yavar Hameed & Jeffrey Monaghan, "Accessing Dirty Data: Methodological Strategies for Social Problems Research" in Larsen & Walby, supra note 26 at 148 [Hameed & Monaghan]; Ann Rees 2003 "Red File Alert: Public Access at Risk" Toronto Star, 1 November, A 32; Ann Rees, 2003 "Transparent Government Needs Obstacles Removed" Toronto Star, 6 November, A 11; Roberts, "Spin control", supra note 169.

The Canadian Journalists for Free Expression (CJFE) strongly believes that "without access to information, freedom of expression is a hollow freedom."[895] It writes in its most recent 2014-2015 Report Card that 2014 has been a terrible year and arguing that "Our right to know has never been more threatened. Years of government neglect and political interference have left our Access to Information system an antiquated, ineffective shell of what it is supposed to be."[896] Tom Henheffer, CJEF's Executive Director, expressed his disbelief in the *ATIA* saying that in an interview that our access law has no teeth since the government can deny requests without any consequences. He explained that "because of the government approach, ATI is becoming useless. Many journalists cannot afford to spend a long time following a story …It is a nigh nightmare situation."[897] CJFE also issues Reviews of Free Expression in Canada every year where it also looks at problems with ATI regime. In 2012 CJFE initiated a survey of its online readers seeking input for a dialogue that the OIC was conducting regarding the *ATIA*. CJFE initiated the survey in early December 2012, and received 95 responses to a ten-part questionnaire[898]. A large majority (79%) of those responders were either very or somewhat familiar with the ATI system. Regarding the scope of the *ATIA*'s -what it covers - only 1% of the respondents would keep things the way they are.[899]

CJFE also designs an ATI Annual Public Poll[900] which asks Canadians about their opinions on some of the most important public issues, including government openness and ATI. The most recent Poll demonstrated that Canadians consider ATI important (79%). This is a significant change compared to the last year's Poll, when the response to the question "if Canadians have more access to government information than ever before?" only 36% disagreed and 22% agreed.

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[895] Canadian Journalists for Free Expression, 'A Hollow right: Access to Information in crisis: A Submission by CJFE to the Office of Information Commissioner concerning reform of Canada's Access to Information Act' (January 2013) at 3.

[896] Canadian Journalists for Free Expression. CJFE's Report Card 2014-2015, at 4, online: <https://cjfe.org/sites/default/files/2015Review/2015reportcard.pdf>

[897] Interview with Tom Henheffer, CEO at the Canadian Journalists for free Expression, April 16, 2015.

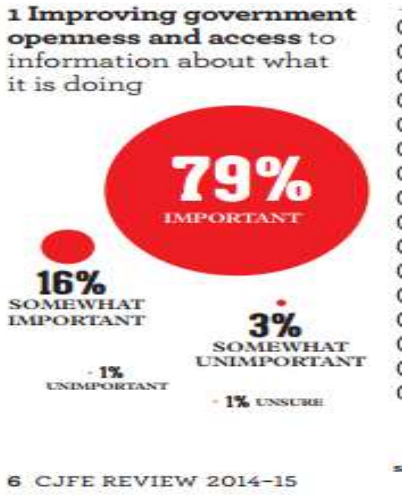
[898] For the questions see: <http://cjfe.org/resources/features/our---right---information---disappearing>.

[899] Canadian Journalists for Free Expression, A hollow right: Access to information in crisis, A submission by Canadian Journalists for Free Expression to the Office of the Information Commissioner concerning reform Of Canada's Access to Information Act, January 2013, at 5.

[900] Note that these polls are partnered with Nanos Research. For the 2015 Poll Nanos conducted a hybrid telephone and online random survey of 1,000 Canadians between Feb. 22 and 27, 2015, as part of an omnibus survey. Participants were randomly recruited by telephone using live agents and administered a survey online. The sample included both land- and cell-lines across Canada. See http://cjfe.org/resources/features/poll-what-do-canadians-think-about-free-expression-issues

These type of polls are very significant not only because they give a sense on how public feels about access rights, but also because they raise public awareness by drawing attention that these issues matter. Henheffer said that these polls take the temperature on a few issues, including ATI and see what Canadians feel in regards to these issues.[901]

Table 23: CJFE Review 2014-2015



Source: CJFE Poll 2015. Gives us back our rights. p. 6. May 5, 2015. Available at http://cjfe.org/sites/default/files/2014review/2014CJFE_Review_Poll.pdf

Table 24: CJFE Poll 2014

Source: CJFE Poll 2014. Do Canadians care about Free Expression?. p. 6. April 30, 2014. Available at http://cjfe.org/sites/default/files/2014-15%20Poll.pdf

The Canadian Civil Liberties Association (CCLA) also uses ATI for monitoring, advocacy and policy implementation purposes. According to Interviewee No.5, the centre uses ATI "to advocate for a particular type of policy to be implemented…, to inform particular projects, but also to get a better sense of how ATI regime works overall."[902] In this interview it was recognized that the *ATIA* is very out of date, there are a lot of exemptions and exclusions, and a lot of them are interpreted very broadly. The interviewee gave an example of request that the centre had filed to the CSE which took a year to get a no answer. The answer was: "we can't tell you if we have it or not, and even if we do have it is exempted under the provisions of the statute." However, the Interviewee also acknowledged that she has met journalists who get a lot

[901] Interview, April 14, 2015.
[902] Interview No.5, June 18, 2015.

of good information using ATI, because they have built some expertise on how to navigate the system. Journalists, especially of the big media, are taken more seriously by the government because "the stakes are higher if they're messing around with the media". Also, the interviewee admitted that the CCLA does not engage with ATI as much as they wanted to, because of the shortage of staff and limited resources which don't allow to go after information that might get long time to generate results.

Another Canadian NGO - Democracy Watch – has also been active in its criticism against the *ATIA* in Canada. It has been advocating for changes in the Law in a public campaign - the Open Government Campaign – trying to inform the public and engage people to participate in putting pressure to the government in this issue. Democracy Watch has prepared a template letter[903] which people can fill and send it directly from their website to key politicians calling for changes in the *ATIA* in Canada. The letter is also an appeal to the government to stop excessive secrecy and protect the whistleblowers. On May 22nd, 2015, the number of letters sent was 75, 382[904] which is an impressive number that speaks directly about the public interest in ATI issues.

A. Breaking Stories of ATI requests in Canada

The so-called sponsorship scandal in Canada began with a single ATI request by The Globe and Mail. The stories that followed the request triggered a public inquiry and a host of reforms to federal ethics rules.[905] The scandal came as a result of a Canadian federal government "sponsorship program" in the province of Quebec and involving the Liberal Party of Canada, in power from 1993 to 2006. Jean Chretien's Liberal government created the sponsorship program in the '90s to promote national unity in Quebec, but the administration of the program became a huge scandal because of corrupt payments to Liberal-friendly advertising firms, sometimes in return for no work.[906] Until the issue hit the front pages in early 2004, the federal government

[903] The letter can be found at Democracy Watch, Open Government Campaign, online: <http://democracywatch.ca/campaigns/open-government-campaign/>.
[904] See their website. Open Government Campaign. Online: <http://democracywatch.ca/campaigns/open-government-campaign/>.
[905] Curry, supra note 868.
[906] Huguette Young & Brian Lilley, Parliamentary Bureau, Supreme Court rules on sponsorship scandal sources, Toronto Sun, October 22, 2010, online: <http://www.torontosun.com/news/canada/2010/10/22/15789446.html>.

sponsorship program had been in operation quietly, but not altogether anonymously, since 1994 because of intensifying media coverage.[907] Government advertising and promotion were on a sharp upward curve, with $111 million spent annually on advertising campaigns by 2003.[908] Daniel Leblanc, a Globe and Mail reporter, helped expose the federal sponsorship scandal using documents obtained under the *ATIA* "to show that three-quarters of the funding was heading into Quebec."[909] He then talked to an anonymous whistleblower in the government who totally exposed the sponsorship scandal. When the matter became a public inquiry LeBlanc was asked in Court to reveal his source. In response, he said that he would rather face jail time than reveal the source of information.[910].

In another case, the Canadian Press journalist Dean Beeby reported in February 2010 that a federal cabinet minister's aide had impeded the release of material – an act for which he had no legal authority. Under the *ATIA*, Beeby had asked for information on the extensive real estate portfolio of the Department of Public Works. His request was tagged as sensitive, put into a purple-coloured folder, and handed to Sebastien Togneri, a political aide to the minister Christian Paradis. The department's ATI officers decided they had no legal basis to withhold the information and ordered 137 pages released to the reporter. Then, at the last minute, Togneri sent an urgent email to a senior access official to "unrelease it" and there was a rush to the mailroom to save the file from being delivered to media hands. Four months later Beeby received only a fraction of the information and it was heavily redacted.[911] The final release was made 82 days later than allowed under the law and included just 30 pages.[912]

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[907] Kirsten Kozolanka, "The Sponsorship Scandal as Communication: The Rise of Politicized and Strategic Communications in the Federal Government" (2006) 31:2 Canadian Journal of Communication [Kozolanka].
[908] Government of Canada, A year in review: Annual report on the government of Canada's advertising 2002/03. Ottawa, ON: Communication Canada, 2003).
[909] Daniel Leblanc, "The secret caller who exposed Adscam, Daniel Leblanc reveals how an anonymous tipster helped him break the federal sponsorship scandal" Toronto Globe and Mail, October 21, 2006, online: <http://www.freerepublic.com/focus/f-news/1723546/posts>.
[910] CBC News, "Won't reveal source, says reporter who helped expose sponsorship scandal", March 2, 2009, online: <http://www.cbc.ca/news/canada/won-t-reveal-source-says-reporter-who-helped-expose-sponsorship-scandal-1.862048>.
[911] Voices-Voix, "Access to Information", June 1, 2011, online: <http://voices-voix.ca/en/facts/profile/access-information>.
[912] Dean Beeby, "Tories blocked full release of sensitive
Public Works report", The Globe and Mail, February 07, 2010, online: <http://www.theglobeandmail.com/news/politics/tories-blocked-full-release-of-sensitive-public-works-report/article1459357/print/>.

Access requests also played a part in The Globe's series on the treatment of detainees in Afghanistan handed over by the Canadian Forces, which led to new transfer rules between Canada and the Afghan government.[913] Documents obtained under the *ATIA* show Canada's Conservative government stopped short of a categorical repudiation of torture. Instead, it issued memos to security and defence agencies permitting the use of information that may have been gathered through coercion. The series of documents, dubbed Canada's torture memos, formed the basis of several exclusive stories, ones that could not have been written without ATI.[914]

It was an access request in the late 1990s by McKie that ultimately made public a key database inside Health Canada chronicling cases of adverse drug reactions. Through negotiations, Health Canada agreed to release most of the database, and the CBC made it available to the public on its website. The data allowed the CBC to report a major rise in adverse drug reactions among youth taking certain antidepressants. A second story using the same database showed that thousands of seniors were dying each year from the drugs prescribed to them by doctors.[915]

Regarding the Senate expense scandal, requests were made from reporters and others using the *ATIA* to obtain all documents relating to the Senate fiasco in the possession of the two departments, the Privy Council Office and the Department of Justice. In total, the departments responded to more than two dozen requests for documents. In every case, the response was the same: The search yielded "zero" pages because the information "did not exist." A subsequent request to the Privy Council Office for "all records related to the expenses of senators" turned up five pages of documents, but the government refused to release them on the grounds they contained confidential advice from lawyers.[916]

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[913] Curry, supra note 868.
[914] Jim Bronskill, "Why Acess to Information is crucial", Canadian Journalists for Free Expression, online: <https://cjfe.org/resources/features/why-access-information-crucial>.
[915] Curry, supra note 868.
[916] Greg Weston, Senate expense scandal left no paper trail, really?, CBC News, September 2, 2013, online: <http://www.cbc.ca/news/politics/senate-expense-scandal-left-no-paper-trail-really-1.1344795>.

In Ontario, the provincial government increased its inspections of daycares after a series of revelations by the Toronto Star, which used provincial and municipal freedom-of-information requests to uncover hundreds of illegal daycares and unsafe conditions at licensed centres.[917]

8.1.2 The EU's activism on access to documents

To understand the NGOs ATI activism in the EU, one should have a general idea about their status in the EU politics. The EU accepts NGO involvement in policy and decision-making as not only a necessity, but as a requirement of the democratic system. Heidbreder acknowledges that "As a basic element of the public sphere, civil society has a sense-making, communicative, and discursive role in shaping the democratic legitimacy of the Union embedded in identity and society formatting processes."[918] Suffering from a general democratic deficit due to its indirect forms of representation and political appointment, the EU includes NGOs in policy processes in order to increase its democratic legitimacy and bring itself closer to its citizens. The EU actively promotes the regular consultation and further involvement of civil society since these organisations have a lot of expertise in particular areas and are involved in implementing and monitoring EU policies.The Commission has formally recognized the contributions NGOs can make through different instruments, such as consultations through Green and White Papers, Communications, advisory committees, business test panels and ad hoc consultations. However, NGOs have better relationship with the members of the EP, up to a point where NGOs will draft legislation on behalf of a parliamentarian. The Commission is somewhat less open, and the Council is the hardest to access.

A scandal broke out in early June 2012 when European Commission spokesman Antonio Gravili was quoted by the EUobserver.com, characterising the debate around the reform of the EU's ATI rules as "infantile". He asserted that most requests for what he called "internal EU documents" came from corporate lawyers and "nutty NGOs" instead of concerned EU citizens. Those targeted by the comments were the Brussels based anti-lobby organisations, who increasingly use ATD, including through the AsktheEU.org website. Civil society organisations and international FOI experts reacted strongly, in a letter to the Commission's Vice-President

[917] Curry, supra note 868.
[918] Heidbreder, supra note 804 at 14.

Maros Sefcovic and to the Commission's President Jose Manuel Barroso calling on them to disown Gravili's comments. The letter was signed by over 50 NGOs, civil society platforms and FOI advocates, and called on the European Commission to publicly affirm that it respects the fundamental right of access to EU documents and the debate about the future of the transparency rules. An apology was received in this regard.[919]

NGOs in the EU have played an important role for the advancement of ATI. Organizations such as, Article 19, the Open Society Justice Initiative, and Access Info Europe (AIE) have urged ratification of the Convention on Access to Official Documents because it sets legally binding, minimum standards for ATI.[920] AIE also intervened in April 2009, when an internal guide from the EU Directorate General for Trade was giving tips to public officials on how to not record information and to avoid providing documents to the public. AIE team filed requests for copies of documents giving staff guidance on how to handle ATD requests. As a result, the matter was pursued by an investigation which produced a report called "Questions to Brussels: How should a citizen request EU documents?"[921]

Another strategy is pursued in regards to access rights – using it as a tool to advance other human rights by gathering empirical data. For instance, AIE considers ATI a tool for defending other civil liberties and human rights,[922] and it has initiated many projects in the EU, in which it has used ATI as a tool to assess human rights. This work confirms what research demonstrates, that "there is the primary objective on their [NGOs] side to promote access to …information as an accessory to evolve the performance of fundamental rights."[923] One such project that will use Europe's ATI laws to get comparative data on civil liberties issues is "Access for Rights."[924]

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[919] Access Info Europe, EU Commission urged to respect right of access, June 2012, online: <http://www.access-info.org/eut/11660>.

[920] Freedominfo.org., 12 countries sign First International Convention on Access to Official Documents, 19 June 2009, online: <http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents/>.

[921] Freedominfo.org, Access Info Unveils Question to Brussels Report on Requesting EU Information, 19 November 2009, online: <http://www.freedominfo.org/2009/11/access-info-unveils-question-to-brussels-report-on-requesting-eu-information/>.

[922] See its Website, Access Info Europe <http://www.access-info.org/>

[923] Sulyok & Pap, supra note 880 at 5.

[924] Access for Rights, Using the Right of Access to Information to protect Human Rights, online: <http://www.access-info.org/access-for-rights/page/2>.

This project is a cooperation with another NGO, Statewatch[925], and intends to generate information that can be used in advocacy. The aim is to address the need for greater transparency of security and counter-terrorism measures in Europe in order to minimise the negative impact of these measures on civil liberties, including the right of ATI. The project produces data that can strengthen the capacity of civil society to use ATI to engage in debate about existing and proposed measures and to evaluate their impact on human rights. AIE observes that national and EU ATI rules are currently underused by civil liberties and human rights organisations in many countries across Europe.[926] In an interview with Darbishire, she stated that ATI is important because it plays a significant role in participation. According to her, participation is not only formal mechanisms, but also engagement via public debate. The presence of media and NGOs is important in lobbying - hence we need to control lobbying. In countries with increased transparency we have increased participation of one kind or another.[927]

Another AIE project is "Access Info Europe and Reprieve" which uses the right of ATI to investigate flights associated with "extraordinary rendition"[928] – the covert transfer of prisoners by the USA from locations in Europe, the Middle East and Asia. The project revealed that the two of the 29 jurisdictions[929] studied, Canada and EuroControl, have taken respectively 1 and 9 days to deny information, and the reason of refusal for both was: "body not covered by law."[930] Information obtained by AIE as part of the Rendition project using ATI in order to get information on secret CIA flights, has been used by REDRESS[931] and the Human Rights Monitoring Institute (HRMI) to bring to court a complaint calling for an investigation into allegations that Mustafa al-Hawsawi was illegally transferred to and secretly detained and

[925] See its website, Support the "Call for an Open Europe" freedom of information in the EU, online: <http://www.statewatch.org/foi/call-2012.htm>.
[926] Access Info Europe. Promoting access to information for defence of civil liberties and human rights, online: <http://www.access-info.org/a4r/10806>.
[927] Interview with Helen Darbishire, Executive Director of Access Info Europe, 10 July 2015.
[928] Access Info Europe, "Rendition in record: Using the right to access to information to unveil the paths of illegal prisoners transfer flights", 15 December 2011, at 7, online: <http://www.access-info.org/wp-content/uploads/Rendition_on_Record_19_December_2011.pdf>.
[929] Ibid, at 5.
[930] Ibid, at 9.
[931] REDRESS is a human rights organisation that helps torture survivors obtain justice and reparation. REDRESS works with survivors to help restore their dignity and to make torturers accountable. See for more details: <http://www.redress.org/about-redress/who-we-are>.

tortured in Lithuania as part of the CIA-led programme.[932] The Global Rendition System database and mapping has been released on the eve of President Obama's major speech on counter-terrorism policy. The mapping is the most comprehensive resource so far visualising the CIA's programme of renditions and secret prisons as part of the "war on terror".

In the "Policing of protests" Project, AIE asked 42 countries through ATI requests about the use of force by police in protest situations. The requests contained five questions designed to obtain the information necessary for public oversight of police action during protests.[933] For the "Detention of Migrants" Program AIE (in cooperation with Global Detention Project) submitted 66 information requests to 33 governments (two requests for each country) about the detention of migrants with the purpose of improving transparency of immigrant detention practices. The information informs statistics regarding the numbers and types of detainees, as well as details about where people are detained for immigration-related reasons.[934] The data also provides evidence for victims and human rights advocates, to inform public debate and policy, and to facilitate comparative study of detention regimes.

In addition to using ATI as a tool to advance human rights by means of data gathering, NGOs may serve intermediaries to facilitate the public's ATD. AIE in cooperation with other civil society organizations have created a portal - AsktheEU.org[935] - to help members of the public get information about the EU institutions. The website facilitates the exchange of information between the public and the EU public officials. On one hand, the EU citizens may ask questions about the EU through this portal using an email that is automatically sent to the correct EU body, which in turn has to answer within three weeks. When the EU replies to one's request, it gets published on this website and the person gets a notification.[936] On the other hand, the EU institutions is less likely to have to answer repeated requests about the same subject. Once a question has been answered everyone will be able to find the information stored on this website.

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[932] Access Info Europe, "Mustafa al-Hawsawi Case", online: <http://www.access-info.org/a4r/11969>.
[933] Access Info Europe, "The Transparency of the Policing of Protests: Using the right of access to information to assess the transparency of police activities during protests", April 2015, at 7. http://www.access-info.org/wp-content/uploads/Police-and-Protest-Report_Final.pdf
[934] Access Info Europe, "Access Info Europe and The Global Detention Project Begin 33-Country Right to Information Investigation", 14 March 2013, online: <http://www.access-info.org/a4r/11941>.
[935] See the Website <http://www.asktheeu.org/>
[936] Access Info Europe. Online: <http://www.asktheeu.org/en/help/about>.

In Albania, although many NGOs have pursued different strategies in advancing ATI right (as I explain in the next sections), some of them still consider the publication of legal acts and legislation as suffering from lack of transparency. In an interview with Shella, he explained that Albanian institutions do not still understand the importance of the publication of the legal acts they produce, and this is why the centre has dedicated a good part of its work to improving this culture.[937] This demonstrates the level of primitivism and the secrecy culture that characterizes the public administration in Albania where information in many cases is still considered a property of the institutions.

8.2 Rating systems of access to information regimes

Another strategy used by NGOs and media for the promotion of ATI is the design of Rating and Grading systems. There are two Rating systems currently operating to evaluate the ATI regimes: one for the legal framework and the other for its implementation.

Regarding the evaluation of the legal framework, AIE and the CLD have created "The Right to Information Rating"[938], known as the RTI project. The RTI Rating analyses the quality of the world's ATI laws by assessing the strength of the legal framework for guaranteeing the right to information in a given country against international standards. The RTI Rating does not measure the quality of implementation, but is limited to a comparative analysis of legal frameworks. One pitfall of this system is that in many cases the law itself does not give the whole picture of an ATI regime. CLD recognizes that "relatively strong laws do not necessarily ensure openness if they are not implemented properly'[939]. However, regardless of these outlying cases, over time a strong ATI law can contribute to advancing openness and help those using it to defend and promote the right of ATI. In an interview with Karanicolas, legal officer at CLD he stated that "The value of the RTI rating project is that it allows for a systemic and objective analysis of

[937] Interview with Gerti Shella, Executive Director, Qendra per Ceshtjet e Informimit Publik (Centre for the Matters of Public Information), Albania, May 8, 2015.
[938] Global Right to Information Rating. <http://www.rti-rating.org/>.
[939] Centre for Law and Democracy & Access Info Europe, "RTI Rating Data Analysis Series: Overview of Results and Trends", 28 September 2013, at 1-2, online: <http://new.rti-rating.org/wp-content/uploads/2014/12/Report.13.09.Overview-of-RTI-Rating.pdf>.

access to information legislation and to allow for comparative analysis. It is very useful from an advocacy perspective. Countries tend to compare themselves to their peer group, how well a country is doing comparing to another worldwide."[940]

The central idea behind the RTI Rating is to provide ATI advocates, reformers, legislators and others with a reliable tool for assessing the overall strength of the legal framework in their country.

Table 25: Right to Information Global Rating

RANKING POSITION	COUNTRY	DATE	RIGHT OF ACCESS	SCOPE	REQUESTING PROCEDURES	EXCEPTIONS & REFUSALS	APPEALS	SANCTIONS & PROTECTIONS	PROMOTIONAL MEASURES	TOTAL	LAW	CSV
1	Serbia	2003	5	30	22	26	29	7	16	135		
2	Slovenia	2003	3	30	26	25	28	4	13	129		
3	India	2005	5	25	25	26	29	5	13	128		
4	Liberia	2010	5	30	19	27	20	7	16	124		
5	El Salvador	2011	6	30	24	22	23	1	16	122		
56	South Korea	1996	4	23	9	20	17	1	8	82		
57	Rwanda	2013	2	30	17	21	9	0	3	82		
58	Mongolia	2011	4	23	18	6	23	2	4	80		
59	Canada	1983	3	13	15	11	22	6	9	79		
60	Norway	1970	5	16	15	16	22	2	2	78		
61	Malta	2008	0	19	21	12	10	2	14	78		
62	Switzerland	2004	3	19	18	13	14	0	10	77		

Source: Global Right to Information Rating, Country Data. 2014. Online: <http://www.rti-rating.org/country-data#>.

As the table 25 above shows, in the 2014 RTI Rating Canada scored 79 /150 (while first country – Serbia - scored 135/150) and ranked 59/102 countries. Based on this ranking, CLD

[940] Interview, 14 April 2015.

argues that "It is tempting to say that, when it comes to the right to information, Canada is a third world country. Unfortunately, this phrasing is far too kind since, as the Global RTI Rating shows, when it comes to the right to information, many third world countries have a lot to teach Canada."[941] This is a very strong critique considering that in 1982, when Canada's national law was first adopted, Canada was among the first countries to boast this important democratic achievement. But while standards around the world have advanced, Canada's access laws have stagnated and sometimes even regressed.[942]

Using the same methodology as the Global RTI Rating, CLD has developed the Canadian RTI Rating which compares all thirteen jurisdictions and the federal jurisdiction in Canada (see Table 26 below). It is evident that the federal law ranks last, confirming the allegations of the NGOs (discussed previously) about a broken system of access in Canada.

Table 26: RTI rating of the Canadian provinces

Name	Right of Access	Scope	Requesting Procedures	Exceptions and Refusals	Appeals	Sanctions and Protections	Promotional Measures	Total
1. British Columbia	3	21	20	20	25	4	4	97
2. Manitoba	4	18	19	16	25	6	6	94
3. Newfoundland	4	20	21	13	20	4	10	92
4. Yukon	4	19	21	16	21	4	6	91
5. Prince Edward Island	3	16	20	15	24	6	6	90
6. Ontario	4	19	14	18	23	5	6	89
7. Nova Scotia	4	23	17	14	18	5	4	85
8. Northwest Territories	4	19	21	12	20	3	3	82
8. Nunavut	4	19	21	12	20	3	3	82
10. Quebec	1	15	19	11	23	6	6	81
11. Saskatchewan	2	17	18	14	19	5	5	80
12. Alberta	3	13	19	12	23	5	4	79
12. Canada (national law)	3	13	15	11	23	5	9	79
12. New Brunswick	3	18	18	11	21	4	4	79

Source: Centre for Law and Democracy, Canadian RTI Rating. 2014 http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/

[941] Centre for Law and Democracy & Access Info Europe, "RTI Rating Data Analysis Series: Overview of Results and Trends", 28 September 2013, at 22, online: <http://new.rti-rating.org/wp-content/uploads/2014/12/Report.13.09.Overview-of-RTI-Rating.pdf>.

[942] Centre for Law and Democracy. 2012. Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions, at 3, online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada-report-on-RTI.pdf>.

Karanicolas mentioned in his interview the impact that the RTI rating had in the case of Bill C-29 in Newfoundland, which aimed to change the ATI law in the province. CLD made a strong opposition to the Bill and produced a report, in which they argued that this Bill was going to harm transparency in the province and used data from the RTI rating to show that after reform the ATI law would be weaker than Uganda, and Moldova. The NDP opposition picked up on the CLD report and cited it in the House of Assembly. This spurred a lot of debate and the Attorney General after calling CLD an "amateurish organization", apologized later.[943] This example demonstrated the potential of the RTI ratings and the advocacy power it may generate.

Another system that is used to assess the implementation of the access laws in Canada is developed by Newspapers Canada. This is a grading system in the form of a survey – the National Freedom of Information (FOI) Audit - which initiated in 2005 and is since then conducted annually. The purpose of the survey is to gather objective information on the health of Canada's ATI regimes and test how readily officials disclose information that should be publicly available on request. The audit reviews the performance of Canadian governments and various public institutions with respect to their ATI regimes. To obtain the data for the audit, a team of researchers requests the same information from the federal and provincial government, as well as a selection of municipalities across the country. Newspaper Canada has been doing so for about ten years now. Vallance-Jones, who leads the Audit every year admitted in an interview with me that "Although the audit is done for journalistic purposes, it is also interested on how law works."[944]

For the 2014 audit, almost 400 requests were sent to 11 federal, provincial and municipal institutions across the country. Identical requests are sent to all government bodies, allowing their responses to be compared both as to how fast they respond and how much information they release. The institutions get graded on the speed and the amount of information released.[945] According to Vallance-Jones, the federal government continues to struggle to produce anything better than a mediocre performance in the Newspapers Canada audit. At the 2014 Annual Audit,

[943] Interview with Michael Karancolas, 14 April, 2015.
[944] Interview with Fred Vallance-Jones, April 23, 2015.
[945] Fred Vallance-Jones, National Freedom of Information Audit 2014, at 2, online: <http://www.newspaperscanada.ca/sites/default/files/FOI2014-FINAL.pdf>.

it received an F for speed of responses and a C for the extent of information disclosed.[946] In the interview I had with Vallance-Jones he explained his experience with the Audit by saying that the federal government is following a tactic of delaying responses, narrowing and changing the scope of the requests by proposing to disclose something else instead of what is initially requested. For the Audit requests he expected a two month delay from the federal government.[947] Table 27 below shows the grades assigned for 2014.

Table 27. Grades for Speed of responses

Province	Government Body	Level	Grade 2014
Fed	Fed govt	Federal	F
NB	Fredericton	Municipal	A
NB	Moncton	Municipal	A
SK	Regina	Municipal	A
NL	St. John's	Municipal	A
MB	Winnipeg	Municipal	A
ON	Ottawa	Municipal	A
ON	Windsor	Municipal	A
QC	Montreal	Municipal	A
PE	Charlottetown	Municipal	B

Source: Newspapers Canada, National Freedom of Information Audit 2014, at 53, online: <http://www.newspaperscanada.ca/sites/default/files/FOI2014-FINAL.pdf>.

The National FOI Audit is the largest and most comprehensive survey of its kind in Canada. With its approach of sending identical requests to governments at all three levels, the study offers the chance to compare jurisdictions against one another and encourage the kind of openness that the authors of FOI legislation seek. The Audit provides the public with the opportunity to see the degree to which governments comply with their own FOI legislation, as well as facilitating comparisons among jurisdictions. As such, the audit represents an important tool for asserting the public's right to ATI. However, according to Hinds "the Audit is most effective at the

[946] Fred Vallance-Jones, National Freedom of Information Audit 2014, at 35, online: <http://www.newspaperscanada.ca/sites/default/files/FOI2014-FINAL.pdf>.
[947] Interview with Fred Vallance-Jones, April 23, 2015.

municipal level…The federal government doesn't really care – the Prime Minister doesn't get embarrassed for getting an F." This quote demonstrates the persistence of the federal government in its attitudes towards ATI. Hinds explains it as a secrecy culture problem. He says "The government is hierarchical – everybody gets everything signed off, and everybody has to let their superiors know everything."[948] Vallance-Jones also expressed concerns about some kind of internal direction that is telling federal institutions to aggressively try to clarify request that are very clear, as a strategy to delay responses.[949] This culture of tight control was evident in the responses to the questionnaire I sent to the ATIP coordinators in Canada.

8.3 Pressuring governments and courts on advancing access to information rights

8.3.1 Engagement in Law reform

In Canada, many NGOs have been engaged in Law Reform at the federal and provincial level. McCamus credited many civil society groups for the passage of the *ATIA* in 1982, among others, "the Canadian Bar Association, the Canadian Civil Liberties Association, associations of academics, public interest groups and the press."[950] While there are several attempts at the federal level to push for Law Reform, they are mostly done through producing policy assessment papers and recommendations. A similar strategy involves supporting the ICC in his/her recommendations for Law Reform.[951]

Similarly, in the EU, the Ombudsman has been supported by NGOs. For instance, Statewatch, which has included the EU's FOI as one of its observatories, has chosen to file complaints to the EU Ombudsman.[952] Statewatch claims that "as a result of Statewatch's complaints, the right of the Ombudsman to investigate secrecy complaints was written into the Amsterdam Treaty together with a commitment to 'enshrine' the public's right of ATI in an EU Regulation."[953]

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[948] Interview with John Hinds, 16 April, 2015.
[949] Interview with Fred Vallance-Jones, 23 April, 2015.
[950] McCamus, "FOI in Canada", supra note 283 at 52.
[951] See Centre for Law and Democracy, "Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada, January 2013, online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_.Jan13.pdf>.
[952] Note that these complaints were made early on, before the introduction of the Regulation 1049. By 1998 it had submitted eight complaints to the EU Ombudsman. See, Statewatch, "FOI in the EU: Working for openness and democracy in the EU since 1992", online: <http://www.statewatch.org/foi.htm>.
[953] Ibid.

In Canada, at the provincial level, it is noteworthy to mention the work of the CLD which has contributed to Law reform by making submissions to the legislative committees and provincial governments. The Centre made a submission on ATI Reform in Quebec in April 2013[954]. The submission was prepared for a general consultation and public hearing held by the Province of Quebec's Committee on Institutions to address the implementation of Quebec's Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information. The CLD made another submission to the Independent Review of the Newfoundland and Labrador Access to Information and Protection of Privacy Act on July 2014.[955]

Newspapers Canada has also been lobbying for reform to the ATI for two decades, but without success. In April 8, 2011 Newspapers Canada , and two other organizations, the Canadian Taxpayers Association, and the BC FIPA asked the political parties in Canada to say what they will do to fix the ATI system to combat an already disastrous situation[956]. Newspapers Canada contributed to the latest recommendations of the ICC for ATI reform, which according to Hinds is long due. For Hinds, in order to makes changes to the system, there is need to give order-making power to the ICC, people need to be afraid of him/her. In fact, for Hinds, the whole law should be modernized.[957]

Another ATI advocate, CJFE supported the amendments proposed in Bill C-613, An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency) proposed by Trudeau in 2014. It argued that "The bill would improve the current failing access to information system and increase government transparency."[958]

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[954] Centre for Law and Democracy, "Submission on Access to Information Reform in Quebec", March 2013, online: <http://www.law-democracy.org/live/wp-content/uploads/2013/04/Quebec.RTI_.Mar13.pdf>.

[955] Centre for Law and Democracy, "Submission to the Independent Review of the Newfoundland and Labrador Access to Information and Protection of Privacy Act", July 2014, online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.Nfld_.RTI_.Jul14.pdf>.

[956] Freedominfo.org, Canadian Political Parties criticized for silence on FOI, 8 April 2011, online: <http://www.freedominfo.org/2011/04/canadian-political-parties-criticized-for-silence-on-foi/>.

[957] Interview with John Hinds, April 16, 2015.

[958] Canadian Journalists for Free Expression, "Bill C-613 would improve access to information in Canada", June 16, 2014, online: <http://cjfe.org/resources/media_releases/bill-c-613-would-improve-access-information-canada>.

In the EU, Statewatch has engaged in Law Reform using public campaigns. During the negotiation of the draft Regulation 1049 on public access to EU documents, Statewatch led a coalition of NGOs in a campaign for openness and citizens' rights - the "Call for an Open Europe". This was launched in 2000 in collaboration with the European Federation of Journalists and was supported by hundreds of groups and individuals across Europe.[959]

Regulation 1049 is under review and the Commission's and Council's proposals are criticized for restricting the ATI rules. As a response, an alliance of 131 groups, including transparency and ATI campaigners and human rights organisations, have called on the EP to prevent going backwards with the proposed legislation. The NGOs warned that European Commission proposals that are set to be approved in the coming weeks will "substantially reduce the number of public documents" available upon request[960]. Under the proposed rules, only documents that are formally transmitted would be made available upon request to a member of the public. As thousands of documents are informally passed between European policymakers, the alliance fears that such papers and emails will now be out of reach to the public. Such language could even encourage policymakers to begin engaging in administrative practices that actively avoid formal transmission of documents so as to prevent the public from gaining access to them.[961]

Some Albanian NGOs have also been engaged in law reform in the country. For instance, in 2012-2013, the "Res Publica" Centre sent 200 requests to various institutions to test the implementation of the ATI law in Albania. The test demonstrated that the law is ineffective and its practice very slow.[962] As the law of 1999 was considered weak and out of date some NGOs gave their contribution in improving the legal structure of ATI. The Soros Foundation in Albania has offered its expertise on the ATI law review, updating it in accordance with the best

[959] International Federation of Journalists. "Report of meeting: Call for an Open Europe: views from civil society on access to EU documents", 27/02/2001, online: <http://www.ifj.org/nc/en/news-single-view/browse/926/backpid/4/article/report-of-meeting-call-for-an-open-europe-views-from-civil-society-on-access-to-eu-documents/>.
[960] Leigh Phillips, "Transparency NGOs call on EU not to restrict document access", The EU Observer. 2 Feb 2011, online: <https://euobserver.com/institutional/31736>.
[961] Ibid.
[962] Res Publica, Sa zbatohet në praktikë e drejta për infomim mbi dokumentat zyrtarë? 12.10.2013, online: <http://www.respublica.org.al/sa-zbatohet-ne-praktike-e-drejta-per-infomim-mbi-dokumentat-zyrtare/>.

international standards in the field.[963] In April 2014, Soros and two other NGOs presented their proposals for the amendament of the ATI law which were reflected in the new law, adopted six months later.[964]

8.3.2 Involvement in litigation

There are many examples of NGOs and media engaging in litigation in defence of the ATI rights in both Canada and the EU. I will briefly mention some of the most important cases, and will look at them again in more detail in Chapter ten where I examine the ATI jurisprudence.

The Canadian Civil Liberties Association (CCLA) has a history in intervening in ATI cases before the Supreme Court. In a recent case - *John Doe v. Ontario (Minister of Finance)*[965]- the Court interpreted and decided on an exception to Ontario's provincial ATI regime for "advice or recommendations" of a public servant. CCLA intervened in the case to argue that the "advice or recommendations" exception should be interpreted narrowly and records should not be shielded from disclosure. CCLA also argued that the interpretation of the legislation should respect the values enshrined in the *Charter* and the global trends towards greater openness and transparency in government. Although, the CCLA was not successful on this intervention, its arguments before the court opened up discussions about the amount of government information that are labelled as "policy options" and therefore inaccessible by the public. The negative decision of the Court demonstrates the justice's system inability to circumvent legislative provisions.

The CCLA intervened in another the case, *Canada (Information Commissioner) v Canada (Minister of National Defence)*[966] which was brought before the Supreme Court to consider whether Minister's offices, including the Prime Minister's Office, are considered "government institutions" for the purposes of the *ATIA.* The Supreme Court found that the meaning of

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[963] Fondacioni Shqiperia a Hapur per Shqiperine, "Diskutimi i projektligjit të ri "Për të drejtën e informimit", 28.03.2013, online: <http://www.osfa.al/njoftime/diskutimi-i-projektligjit-te-ri-per-te-drejten-e-informimit>.
[964] Fondacioni Shqiperia a Hapur per Shqiperine, "Pjesëtarë të shoqërisë civile dhe institucioneve shtetërore diskutojnë mbi përmirësimin e të drejtës së informimit në Shqipëri", 11.04.2014, online: <http://www.osfa.al/ngjarje/pjesetare-te-shoqerise-civile-dhe-institucioneve-shteterore-diskutojne-mbi-permiresimin-e-te>,
[965] John Doe *v.* Ontario (Finance), 2014 SCC 36, [2014] 2 SCR 3 [Doe].
[966] Canada (Information Commissioner) *v* Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 SCR 306 [Minister of National Defence].

"government institution" under the Act did not include ministerial offices and that to expand the scope of the Act in this way was an issue for Parliament and not the courts.[967] The CCLA intervened in this case to argue for a large and liberal interpretation of the ATIA emphasizing its quasi-constitutional[968] and asked from the Court to recognize this status so that it could conduct a broader interpretation of the Act. Once more, the reasoning in this decision confirmed that the Courts can only go that far in the interpretation of the access laws in Canada. According to Interviewee No.5, these cases were brought before the Court to at least make the argument about the link between the freedom of expression and ATI, and push further on what was established before regarding a constitutional status of ATI.

Another Canadian NGO, the Criminal Lawyers' Association (CLA),[969] intervened in in a landmark case of the Supreme Court - Ontario (Public Safety and Security) v Criminal Lawyers' Association[970]. The Court decision recognized a limited right to ATI held by public authorities as part of the freedom of expression of the Canadian Charter.[971] The Supreme Court recognized, albeit in somewhat careful language, that ATI "is a derivative"[972] which may arise in certain conditions. The CLA made a request under Ontario's Freedom of Information and Protection of Privacy Act[973] for documents held by the Ontario Provincial Police which were denied. The case was brought as a constitutional claim and in turn, the Court recognized for the first time in its history the right of ATI as a "derivative right" of the freedom of expression. This recognition, however, was limited to where it is a necessary precondition of meaningful expression on the functioning of government[974]. This case has a meaningful significance since it provides a constitutional framework for ATI laws.

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[967] Ibid, at para 13.
[968] See Factum of the CCLA to the SCC in Canada (Information Commissioner) *v*. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306. .2010, at 3, online: <http://ccla.org/wordpress/wp-content/uploads/2010/09/2011-04-04-Factum-for-Web-Posting.pdf>.
[969] CLA is one of the largest specialty legal organizations in Canada. See http://www.criminallawyers.ca/. According to By-Law No.1, CLA "is an organization of Ontario criminal defence lawyers formed solely for charitable, educational, scientific and legislative purposes". See <http://www.criminallawyers.ca/pdf/bylaws/CLABYLAWS.pdf >.
[970] Ontario Public Safety and Security v Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 SCR 815 [Criminal Lawyers' Association].
[971] Section 2(b).
[972] Criminal Lawyers' Association, supra note 970 at para 29.
[973] Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.
[974] Criminal Lawyers' Association, supra note 970 at para 58.

The European NGOs have also played a significant role in challenging the governments to the courts for breaching ATD rights. A series of cases initiated from the NGOs can be traced in both the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU). In its judgment in *Társaság a Szabadságjogokért v. Hungary*[975], the ECtHR recognised that the public has a right to receive information of general interest. The applicant, the Hungarian Civil Liberties Union, alleged that the Hungarian courts denied it access to the details of a parliamentarian's complaint - was a breach of its right of ATI of public interest[976].The Court characterized the applicant as a "watch dog" which status warrants Convention protection.[977]

In its judgment of the case Youth Initiative For Human Rights v Serbia[978], the ECtHR recognised more explicitly than ever before the ATD right held by public authorities, based on Article 10 of the Convention (right to freedom of expression and information). The applicant was a Serbian NGO - Youth Initiative for Human Rights - and the judgment recognised the importance of NGOs acting in the public interest[979]. The Court engaged in an interpretative exercise of the ATI right, and argued that "the notion of 'freedom to receive information' embraces a right of access to information."[980]

In the case of *OVESSG*[981] the ECtHR further clarified and expanded the scope of application of Article 10 of the Convention with regard to the right of ATD. The decision is especially supportive for requests by journalists and NGOs to have ATD/[982] The ECtHR, recognized that the function of creating forums for public debate is not limited to the press. That function may

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[975] *Társaság a Szabadságjogokért v Hungary*, [2009] ECHR 618, 37374/05, (2011) 53 EHRR [Társaság].
[976] Ibid, at para 3.
[977] Ibid, at para 27.
[978] Youth Initiative for Human Rights v. Serbia, No. 48135/06, 25 June 2013 [Youth Initiative].
[979] Dirk Voorhoof, "Article 10 of the Convention includes the right of access to data held by an intelligence agency", Strasbourg Observers, July 8, 2013, online: <http://strasbourgobservers.com/2013/07/08/article-10-of-the-convention-includes-the-right-of-access-to-data-held-by-intelligence-agency/>.
[980] Youth Initiative, supra note 978 at para 20.
[981] Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, No. 39534/07, 28 November 2013 [OVESSG].
[982] Dirk Voorhoof & Rónán Ó Fathaigh, "The press and NGOs' right of access to official documents under strict scrutiny of the European Court of Human Rights", Strasbourg Observers. December 3, 2013, online: <http://strasbourgobservers.com/2013/12/03/the-press-and-ngos-right-of-access-to-official-documents-under-strict-scrutiny-of-the-european-court-of-human-rights-2/>.

also be exercised by NGOs whose activities are an essential element of an informed public debate. The Court has therefore accepted that NGOs, like the press, may be characterised as social "watchdogs."[983] NGOs are characterized with such an important status, since they are involved in the legitimate gathering of information of public interest[984] and therefore, their activities warrant similar Convention protection to that afforded to the press.[985]

The CJEU has been another venue followed by the NGOs to defend the public's right to information. In the landmark case - Council v Access Info (280/11)[986]- AIE submitted a request to the Council for a copy of the report which contained information on the Member States' reactions to the Commission's proposal for the reform of Regulation 1049. With this appeal AIE moved the CJEU to clarify the obligation for transparency on the EU isntitutions in the course of a legislative procedure. The case demonstrates the power of using ATI in holding institutions accountable even in ongoing conversations during the course of a legislative procedure. The case will certainly affect issues of accountability and democratic nature of the EU representatives.[987]

In another CJEU case - IFAW Internationaler Tierschutz-Fonds GmbH – a German animal rights NGO asked the Commission for access to certain documents which the Commission had received from Germany. The Court decided that the Member States do not have a right of absolute veto, but had to give reasons for refusal.[988] This case epitomises "new grounds for the relations between Member States rules and the EU rules of access to documents."[989]

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[983] OVESSG, supra note 981 at para 34.
[984] Ibid, at para 36.
[985] Ibid, at para 34.
[986] Note that there are two cases here- case T-233/09 was before the General Court and then it was appealed to the Court of Justice. The appealed case is C-280/11 P, Council of the European Union v Access Info Europe. The case is not published yet in the European Court Reports. For reference see <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11> [Access Info Europe].
[987] Irma Spahiu, "Courts: An effective venue to Promote Government Transparency? The case of the European Union" (2015) 31(80) Utrecht Journal of International and European Law, 5-24, at 10 [Spahiu, "Courts"].
[988] In Case C-64/05 P (n 59) para 4(15) says: "Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions."
[989] Spahiu, "Courts", supra note 987 at 12.

The Albanian NGOs have also engaged in litigation, although in a limited number because of the limited resources and the high political pressure. The number is growing together with public awareness and citizen consciousness. "Res Publica" and the QZHDI are two centres that have been involved in many court cases. In 2013, "Res Publica" was very active in litigation engaging Ministries. "Res Publica" filed two requests at the Ministry of the Environment, one about the advertisements paid by this Ministry in 2009-2013, and the other about the pollution levels in Albania. Both requests were refused by the Ministry. Both cases ended up in court, which ruled in favor of the Centre and requested the release of the information by the Ministry, as part of its legal obligations.[990] In addition, "Res Publica" requested from the Ministry of Economy information regarding the file of the privatization of "Albpetrol", the biggest public oil company in the country. The request was ignored for months and ended up in court. The Court decided in July 2013 that the Ministry should provide the centre with the information.[991] In 2014, a famous case against the Council of Ministers, originated from an ATI request filed by "Res Publica" about the files on the hiring process of the members of the Commission of Public Procurement. The Council of the Ministers, the body that appointed the members, turned down the request. The case was sent to the Administrative Court which decided in October 2014 that the Council of Ministers should release the requested information.[992]

QZHDI has also been involved in ATI litigation since the adoption of the ATI law. QZHDI started a judicial review against the decision of the Ministry of Education that denied information to an NGO regarding the criteria needed to start a day-care centre. The Court of Tirana ordered the Ministry to provide the information requested. This was the first time that a court in Albania decided on an ATI case. In October-November 2003 QZHDI led a group of five NGOs at the Constitutional Court of Albania against an order of the then Prime Minister Fatos Nano, who ordered all institutions to withhold information from the media. Only four days before the appearance at the Court, the Prime Minister Nano changed his order and abandoned the case.

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[990] Res Publica, "E drejta e informimit – Dy vendime te tjera, kesaj rradhe kunder Ministrise se Mjedisit", 8.10.2014, online: <http://www.respublica.org.al/e-drejta-e-informimit-dy-vendime-te-tjera-kesaj-rradhe-kunder-ministrise-se-mjedisit/>.

[991] Res Publica, "Detyrim për dhënie informacioni: Res Publica Vs Ministria e Ekonomisë, Tregtisë dhe Energjitikës", 18.7.2013, online: <http://www.respublica.org.al/detyrim-per-dhenie-informacioni-res-publica-vs-ministria-e-ekonomise-tregtise-dhe-energjitikes/>.

[992] Res Publica, "E drejta e informimit – Res Publica fiton gjyqin kunder Keshillit te Ministrave", 6.10.2014, online: <http://www.respublica.org.al/e-drejta-e-informimit-res-publica-fiton-gjyqin-kunder-keshillit-te-ministrave/>.

This case demonstrated how easily and openly the government dismissed the ATI law without fear of legal consequences. In another case, QZHDI got involved in a project for which information requests were sent to the administration and the court. The centre got refusals from both branches and some cases went to court. According to Aliaj, a lawyer at the centre, it was ironic that the courts refused to release information, even after they ruled in their judgements in favor of the release.[993] The QZHDI is actually leading a court case against the Ministry of Economy for a refusal to provide information regarding the privatization of AlbTelecom, the sole public company of telecommunication in Albania. The Ministry refused to release the acquisition contract to the QZHDI and the case is still ongoing.[994]

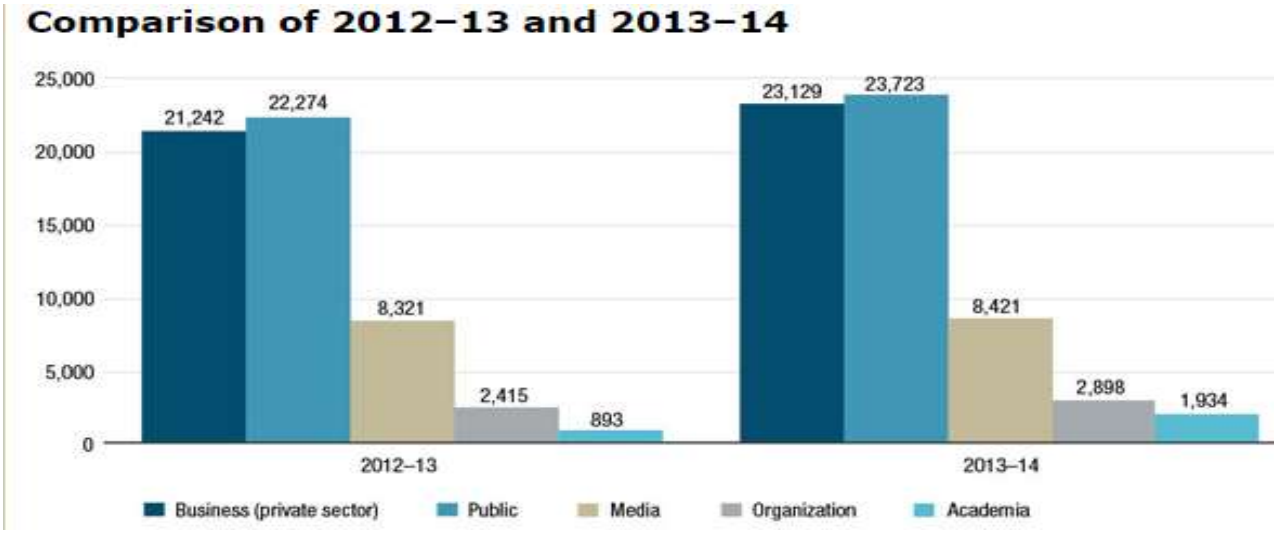
8.4 Data for access to information requests made by the NGOs and media

The following data informs about the amount of ATI requests filed by the NGOs at the main government institutions in Canada and the EU. At the federal level, the Canadian government has received a considerably small amount of ATI requests compared to the other categories (business or public). Table 28 below compares data from 2012 and 2013. The number of requests reflects data form all the Departments and Agencies at the federal level (approximately 256).

Table 29 has all the data collected from the Canadian federal departments and agencies from 2004 to 2014. The table includes information about organizations and the media, but many media are organized in associations which pursue interests that are similar to those of the NGOs (as argued in Chapter 3), which makes this division not clear cut. As one can notice, while the number of ATI requests for media has significantly increased (from 2680 to 8421), the percentage to the total requests has not followed the same pattern (only increased 3.4%). For organizations, the numbers have remained more or less steady (from 2107 to 2898), but the percentage to total requests has declined significantly (from 8.4% to 4.8%).

[993] Note that all this information about QZHDI cases were reported in the Interview with Viola Aliaj, QZHDI, May 8, 2015. I could not find further information elsewhere.
[994] Ceshtje gjyqesore (case law), online: <http://qzhdi-alb.org/ceshtje-gjyqesore>.

Table 28: Source of Access to Information requests received



Source: Government of Canada, Info Source Bulletin Number 37B – Statistical Reporting. Online: <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37b02-eng.asp#ai>.

Table 29: Requests for ATI to the federal government of Canada 2004-2014

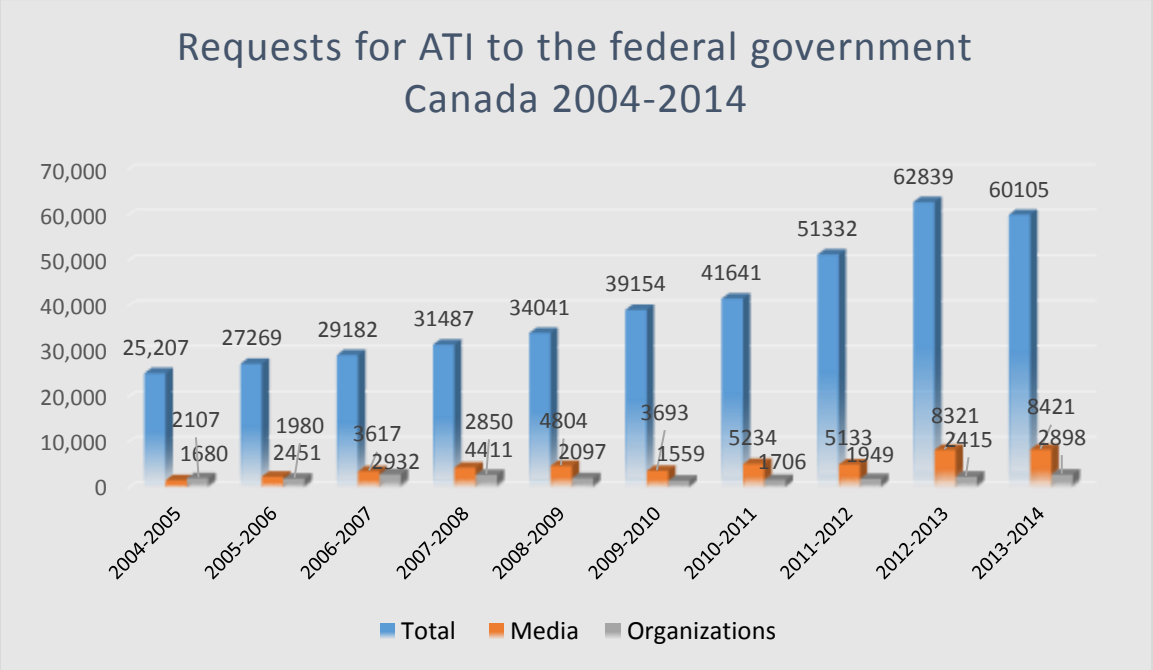
Years	**2013-2014**	**2012-2013**	**2011-2012**	**2010-2011**	**2009-2010**	**2008-2009**	**2007-2008**	**2006-2007**	**2005-2006**	**2004-2005**
Total req.	60, 105	62,839	51, 332	41, 641	39, 154	34, 041	31, 487	29, 182	27,269	25,207
media	8,421 (14%)	8, 321 (13%)	5,133 (9%)	5, 234 (12.6%)	3, 693 (10.5%)	4,804 (14.1%)	4,411 (14%)	3,617 (12.4%)	2,451 (9%)	2,680 (10.6%)
Orgz.	2,898 (4.8%)	2, 415 (3.8%)	1, 946 (3.7%)	1, 706 (4.1%)	1, 559 (4.4%)	2,097 (6.2%)	2, 850 (9.1%)	2,932 (10%)	1,980 (7.3%)	2,107 (8.4%)

Source: Table drawn by author using data of the Government of Canada at InfoSource. Online: <http://www.infosource.gc.ca/index-eng.asp>.

This trend is interesting and reveals a lot about the constraints of pursuing ATI requests. The process is lengthy and costly, and only powerful media can afford. Some of the media interviewees have emphasized the lack of resources which works as an impediment to engage with ATI – the system is difficult to navigate for someone unexperienced, and needs money and time, which most of the NGOs and small media do not have. This was confirmed in the

interviews that I had with Hinds (Newspaper Canada), Henheffer (CJFE), Karanicolas (CLD), and CCLA. The number of requests from the NGOs show a concerning trend – the percentage has dropped by more than half. While this has happened for different reasons (mainly lack of resources), it constitutes a retreat of the NGOs from the ATI system. Many authors have argued about the important role of the NGOs for establishing spaces for public deliberation of values and policies, and courts have attributed them the status of a "watchdog". Therefore, an NGO withdrawal from the ATI space means missing opportunities for discussions of values and extraction of knowledge. This may have major repercussions in the ATI regime in Canada.

Table 30: Requests for ATI at the federal level



The data in Tables 28, 29 and 30 show another interesting pattern which answers my third concern I laid out at the very beginning of this chapter – whether media occupies most of the space in ATI requests. Data reveals that journalists are not at the ones who make the most of requests for ATI. Yes, the numbers are rising, but very slowly (only 3.4%). In 2014, the requests from journalist constituted 14% of the total number of requests, which is not a big number considering that most media engage in investigative journalism to get their stories. Therefore, the

claims from the government that journalist exhaust the ATI system, with the purpose to reveal stories that embarrass governments, are not based in facts and numbers. Table 30 shows the same data in graph form.

Table 31 below shows ATD requests made to the European Commission from 2004 to 2013. The categorization of groups here is slightly different from the Canadian one. Instead of the term "organization", the term "civil society" is used. This is an umbrella term that does not specifically indicate what groups could be included in the categorization and what is the percentage of the NGOs. As a result the numbers could be a bit misleading. However, for the purpose of this research, civil society can be accepted as an umbrella term that can be identified with NGOs. This is part of the problem of the definitional certainty, as I explained in Chapter 3.

Table 31: ATD requests to the European Commission

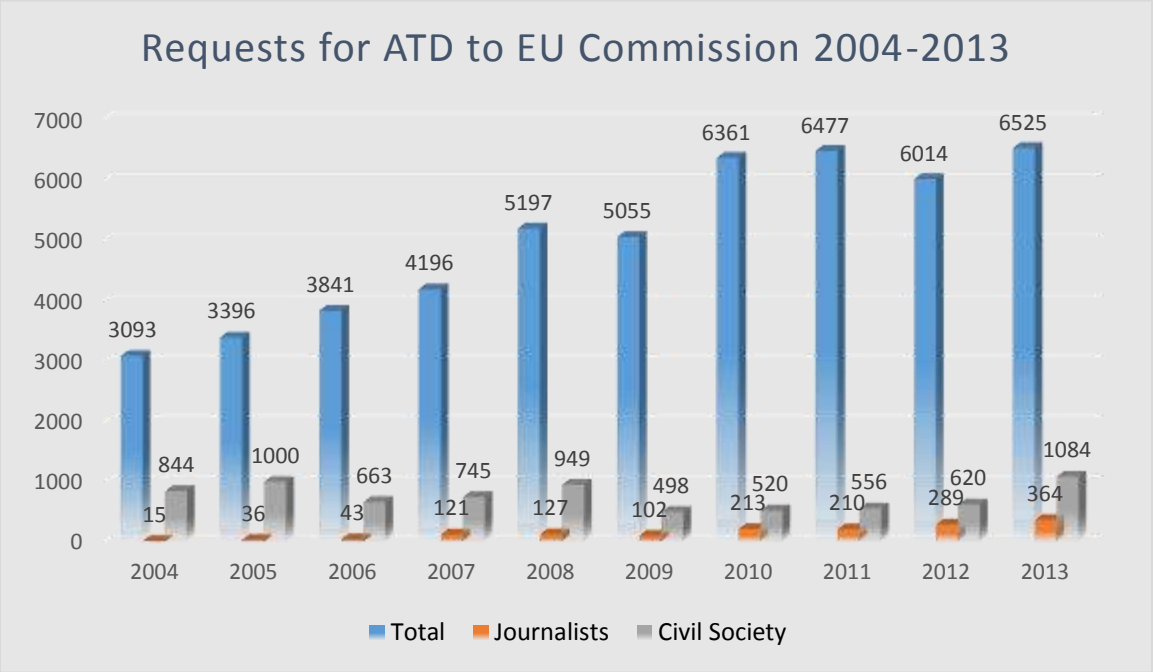
Years	**2013**	**2012**	**2011**	**2010**	**2009**	**2008**	**2007**	**2006**	**2005**	**2004**
Total	6,525	6,014	6,477	6,361	5,055	5,197	4,196	3,841	3,396	3,093
Journal.	364-5.58%	289-4.81%	210-3.25%	213-3.35%	102-2.02%	127-2.46%	121-2.9%	43-1.14%	36-1.07%	15-0.5%
Civil Society [995]	1084-16.62%	620-10.32%	556-8.59%	520-8.18%	498-9.85%	949-18.26%	745-17.77%	663-17.27%	1000-29.44%	844-27.31%

Source: Chart drawn by the author using data from the European Commission, Access to Documents. Online: <http://ec.europa.eu/transparency/access_documents/reports_en.htm>.

Table 32 below reflects the same data in graph form.

[995] Civil Society here includes: Interest groups, industry, NGOs, etc. See, <http://ec.europa.eu/transparency/access_documents/docs/rapport_2013/com-2014-619_en.pdf>.

Table 32: Requests for ATD to the Commission



A similar pattern of decline (as the Canadian one) is noticed at the European Commission. The number of requests made by journalists has increased almost 25 times, while its percentage has only increased about 10 times. The number of requests of civil society has an irregular pattern, declining from 2009-2012, but increasing in 2013. However, it is still lower than it was in 2004-2005, when it was almost ¾ higher. This significant drop can be explained by many things. It is worth mentioning that in 2008 the Commission submitted its proposal for the recast of Regulation 1049, which received a huge backlash from civil society organizations. The fact that the numbers are still low may be attributed to the fact that the position of the Commission has not changed much on the Regulation, and the negotiations between the EU institutions on the matter are still frozen.

Tables 33 and 34 below shows ATD requests made to the Council of the European Union from 2004 to 2013. Here the numbers show a different picture from the tables above.

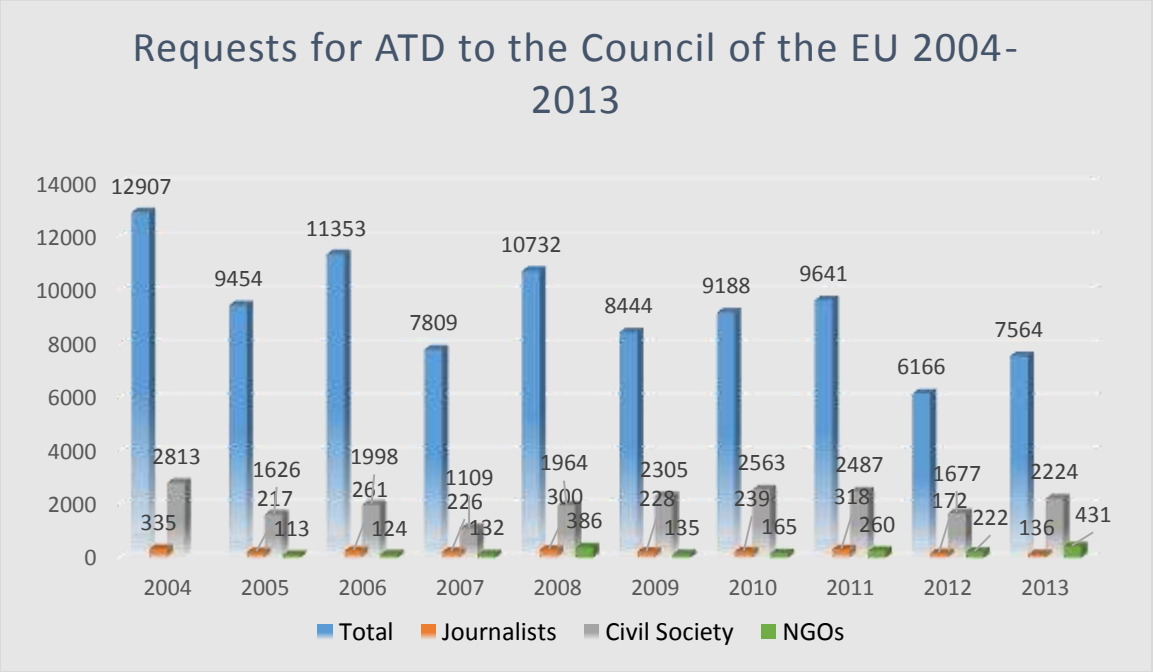
Table 33: Requests of ATD made to the Council of the European Union

Years	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004
Total	7,564	6,166	9,641	9,188	8,444	10,732	7,809	11,353	9,454	12,907
Journal.	136-1.8%	172-2.8%	318-3.3%	239-2.6%	228-2.7%	300-2.8%	226-2.9%	261-2.3%	217-2.3%	335-2.6%
Civil Society [996]/NGOs	2224-29.4%/431-5.7%	1677-27.2%/222-3.6%	2487-25.8%/260-2.7%	2563-27.9%/165-1.8%	2305-27.3%/135-1.6%	1964-18.3%/386-3.6%	1109-14.2%/132-1.7%	1998-17.6%/124-1.1%	1626-17.2%/113-1.2%	2813-21.8%

Source: Table drawn by author using data from the Council of European Union, Access to Documents Annual Reports. Online: <http://www.consilium.europa.eu/en/search/?q=access+to+documents+annual+reports>.

Table 34 reflects the same numbers in graph form.

Table 34: Requests for ATD to the Council



[996] Civil Society here includes: Consultants, Environmental Lobbies, Other groups of interests, Industrial/Commercial Sector and NGOs. Online: <http://www.consilium.europa.eu/en/documents-publications/publications/2014/council-annual-report-access-to-documents-2013/>.

In tables 33 and 34 the number of the requests and the percentage for journalists has steadily declined. The same trend is noticed for the total number of requests. But, the numbers are different for civil society and especially for NGOs (which are shown separately from the civil society numbers for the Council). These numbers have increased despite of the big decline in the total number. What is noticeable here is the hike in numbers of requests of the NGOs (from 1.2% to 5.7%). The Council is perceived to be the most secretive body in the EU, and which does not offer much cooperation with civil society. That might have drawn the attention of the NGOs.

Tables 35 and 36 shows the number of requests for ATD made to the EP. The number of total requests has decreased significantly, almost two times lower than ten years ago. The requests made by the journalists show a very irregular trend, going up and down, with 2008 being the lowest point in terms of numbers of requests and percentage (1 and 0.11% respectively). However, they follow the same trend with the total requests. The requests from civil society have also dropped from 2004 in both numbers and percentage. The small numbers of requests is noticeable for this table. The data might be explained with the fact that the EP is considered to be an advocate of ATD in the EU, and has fought in many political battles to improve transparency and ATD in the EU. This makes it not a very important target for filing ATD requests.

Table 35: Requests for ATD to the European Parliament 2004-2013

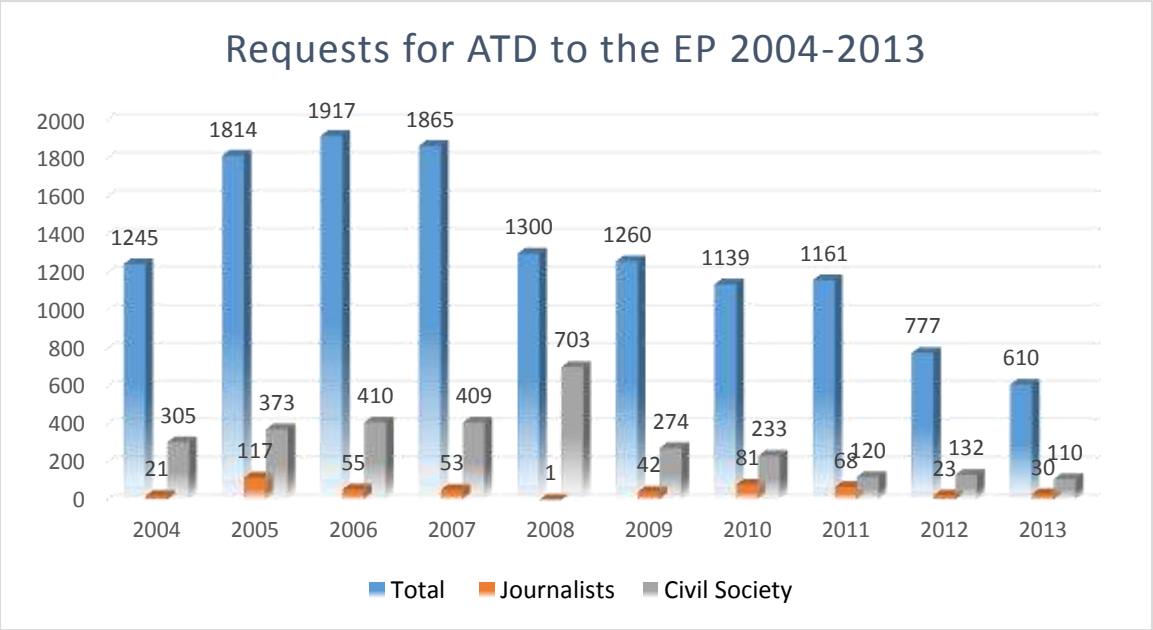
Years	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004
Total	610	777	1,161	1,139	1,260	1,300	1,865	1,917	1,814	1,245
Journal.	30-5%	23-3%	68-5.84%	81-7.12%	42-3.35%	1-0.11%	53-2.86%	55-2.88%	117-6.47%	21-1.71%
Civil Society [997]	110-18%	132-16.95%	120-10.36%	233-20.47%	274-21.75%	703-54.06%	409-21.95%	410-21.39%	373-20.59%	305-24.57%

Source: Table Drawn by the author using data from European Parliament, Register of Documents: Annual Report. Online: <http://www.europarl.europa.eu/RegistreWeb/information/report.htm>.

[997] Civil Society here includes: Interests Groups, Industry, NGOs, etc. online: <http://www.europarl.europa.eu/register/pdf/rapport_annuel_2013_EN.pdf>.

Table 36 below shows the same figures in graph form.

Table 36: Requests for ATD to the European Parliament



The data above is somehow mixed, but is an indicator about the amount of work being done by NGOs in both Canada and the EU. In Canada, although the total number of requests have risen significantly, requests made by the NGOs have dropped. As some of the interviews have revealed, the falling numbers are attributed to the broken ATI regime. Long delays and high fees coupled with the attitudes of the government officials mean that the information takes longer and more expensive to get, resources that most of the NGOs don't have. This situation makes NGOs less attracted and active in their ATI activity.

In the EU, the numbers are diverse. On the one hand, for the European Commission the requests from civil society seem to have steadily grown, following the same curb as the total number, while for the Council the numbers have grown even faster. On the other hand, for the EP numbers have dropped, but following the same trend as the total number. It seems that the Council is the EU institution that has attracted the most attention of the civil society and the NGOs in particular. This could be explained in part with what is happening at the EU regarding the changes of Regulation 1049. Another reason might be the extensive lobbying mechanism that

exists in the EU, where "an estimated 3000 lobbying entities have an office in Brussels and target European institutions to influence legislation."[998] One of the benefits that the lobbying offers is access to the decision-making process of the institutions.[999] As such, organizations and media already have another venue to access documents of the EU institutions. This was confirmed in the interview with Darbishire which admitted that access in the EU institutions is also realized through other forms, such as participation in not only formal mechanisms, but also engagement via public debate and via lobbying.[1000] The Commission and the EP, are more committed to transparency, and have a joint Transparency Register[1001] for lobbying, launched in 2011[1002]. This may explain the declining numbers of request to the EP and the Commission. The numbers for the EP are lower due to the fact that the EP has been a long-standing advocate for transparency in the EU.

8.5 Comparisons and conclusions

As argued above, the promotion and development of transparency and ATI right in Canada and the EU owes a special recognition to the media and NGOs. The dynamics of ATI regime in both jurisdictions cannot be understood without the role of these "social watchdogs" because as they push for publicity, right to free press, and obtain information in the public interest. Stories of these ATI users show another face of the ATI regime, one that is somehow different from that depicted by public officials. These stories tell that there are problems with the ATI regimes in both jurisdictions. In Canada, all persons I interviewed agreed that the *ATIA* law is in desperate need for change, and that getting information through ATI requests has become more difficult. In the EU, the recast of Regulation 1049 is still pending. But, as Darbishire explained, "it may not be the best time for law reform" considering the economic crisis, the Greek crisis, the refugee crisis, and lately the security threats in the EU. Otherwise, Darbishire contemplated that the EU

[998] Transparency International, "EU lobbying", online: <http://www.transparencyinternational.eu/focus_areas/lobbying-the-eu/>.
[999] See European Parliament, "Library Briefing: Lobbying the EU institutions", 18.06.2013, online: <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130558/LDM_BRI(2013)130558_REV1_EN.pdf>.
[1000] Interview with Helen Darbishire, Executive Director of Access Info Europe, August 10, 2015.
[1001] See Transparency Register, online: <http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>.
[1002] European Commission, Press Release, 23 June 2011, online: <http://europa.eu/rapid/press-release_IP-11-773_en.htm?locale=en>.

is "doing quite well in defending and even advancing transparency. Of course, Regulation 1049/2001 could be better, but …the key is the implementation, for which we fight by making a noise about specific cases."[1003]

As this chapter examined, NGOs and media have worked in many fronts to accomplish their role of social watchdogs. It is fascinating to know that some of the biggest scandals in the Canadian history, related to misuse of huge amounts of public funds, have been illuminated by journalists using ATI requests. It is in this cases, that one understands the great value of ATI rights, as ones that tear up the veil of secrecy, keep our government accountable and make for active citizens. These cases open up spaces to think, get knowledge, shape ideas, break monopolies of knowledge, control information and control through information. Habermas contends that "civil society, through resonant and autonomous public spheres, develops impulses with enough vitality to bring conflicts from the periphery into the center of the political system."[1004] Through ATI, NGOs and media have drawn public's attention to issues that really matter for public life and created opportunities for developing ideas, debating and participating. The mention in section 2(b) of the Charter of the "freedom of opinion" has led one Canadian writer to suggest that the role of the press in opinion formation requires compulsory access to government information,[1005]

It is interesting how the Canadian and European NGOs have come together in creating the Global RTI Rating which is then adopted in Canada to create its Canadian version. In the EU some of the work was focused on using ATI as a tool to assess other human rights. This strategy was absent in Canada. Data gathered from institutions demonstrate some interesting trends. In Canada, the numbers of requests from NGOs are falling and this is explained with the feeling of "fatigue" due to the long delays and expensive process that most NGOs cannot afford. In the EU, these numbers are increasing, but mostly those of requests submitted to the EU Council. This can be due to the recasting process of Regulation 1049 which started in 2008 and has been in deadlock from 2011.

[1003] Interview with Helen Darbishire, August 10, 2015.
[1004] Habermas, *Between Facts and Norms,* supra note 128 at 330.
[1005] M. Manning, "Rights, Freedoms and the Courts: A practical analysis of the Constitution Act", 1982, at 210 [Manning].

The EU is a step ahead of Canada when it comes to the status of the right of ATI. Canada needs first a push for an upgrade the ATI law and then recognize ATI as a fundamental human right. Almost all the NGOs working on ATI in Canada have recognized that "the foundational attitude towards access to information as a human right ….is signally absent in Canada."[1006] The CLD acknowledges that "It is time for Canadians and their government to recognise that the right to access information held by public bodies is a human right. This now needs to be matched by action, initially in terms of amending the ATIA."[1007] This is the reason why NGOs and media in Canada were engaged in Law reform and litigation, to push for changes in ATI regime. However, the commitment on this front has not generated any substantial results in Canada. The way the federal system works in Canada gives too much power to the government. As a result, even attempts to engage the Court system have not done much since they lack the legal framework necessary to expand the meaning of access rights. CLD argued in this regard:

> Unfortunately, neither global recognition of the fundamental importance of RTI as a human right nor the Supreme Court's ruling have had an impact on attitudes towards RTI in Canada, where access systems remain stuck in the same rut they have occupied for decades. To break out of this rut, Canada needs one jurisdiction that is prepared to think outside of the (Canadian) box and be prepared to take bold steps to put in place a truly effective RTI regime. There is enormous resistance to this, based largely on accumulated attitudes and biases.[1008]

However, using the Courts' system, the NGOs have succeeded a partial achievement of the ATI recognition as a human right - the interpretation of the Supreme Court that recognizes ATI under freedom of expression – making ATI a Charter right[1009], subject to some limitation. Of course, this is an initial step towards the full recognition of ATI as a constitutional human right.

The EU NGOs have been more successful in their attempts to affect legislative or policy changes. They have been active in pressuring government in important milestones of the rights to

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[1006]Centre for Law and Democracy, "Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada", January 2013, at 4-5, online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.RTI_.Jan13.pdf>.
[1007] Ibid, at 16-17.
[1008] Centre for Law and Democracy, "Submission to the Independent Review of the Newfoundland and Labrador Access to Information and Protection of Privacy Act", July 2014 at 4, online: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada.Nfld_.RTI_.Jul14.pdf>.
[1009] See Criminal Lawyers' Association, supra note 970.

ATD such as the Treaty protection of these rights, the introduction Charter rights, or the recasting process of Regulation 1049. This is in part due to the division of political power in the EU, where the co-decision procedure has enabled the EU Parliament to block initiatives that would endanger the future of the ATD in the EU. One could say that the NGOs in the EU have been supported by the EU Parliament and the courts' system. Courts have more leeway to favour rights if they are also protected by legislation – and the European courts have certainly expanded the meaning of ATD provisions with the intervention of some of the NGOs.

CHAPTER 9: THE ROLE OF THE OVERSIGHT INSTITUTIONS: LOOKING AT ACCESS TO INFORMATION FROM AN ARBITER'S PERSPECTIVE

Information Commissioners and Ombudsmen are institutions that oversee the application of the ATI laws in practice and offer valuable perspectives on upholding the public values of these laws according to guiding democratic principles. There exist two models of ATI oversight, an Information Commissioner model, and an Ombudsman model. Canada and the EU represent each of them respectively. Within the first model, there are two variations, related to their powers and scope. I use the case study of Ontario and Albania as an example of these variations.

Oversight institutions serve as arbiters between the government and the public. The purpose of this chapter is to understand their rationale in conciliating the public interest in ATI with the interest of institutions. I explore their work, their relationship with government and other actors, and their influence in the development of an ATI rights regime in both jurisdictions. In doing so, I identify the strengths and weaknesses of their control/overview system. Data, such as statistics, annual reports, recommendations, legislative proposals, etc, will be visited to comprehend how ATI is valued from their perspective. I analyze these data trying to make sense of the tensions around cases of complaints, and the battles being fought every day to hold in place a dynamic ATI system.

9.1 The role of the Information Commissioner of Canada as a watchdog on access to information

A fundamental principle of the *ATIA* is that decisions on disclosure should be reviewed independently of government. In the case of an access refusal, the Act sets out two levels of independent review. The first review is carried out by the Information Commissioner of Canada (ICC) and the second by the courts. The ICC was introduced with the *ATIA* in 1982 and the Office was established in 1983. It assists individuals and organizations who believe that federal institutions have not respected their rights under the *ATIA*. The Chief Justice McLachlin has referred to the Commissioners as the "watchdogs of the fundamental rights" protected by

the *ATIA*.[1010] The Commissioner has established herself clearly as a guardian of ATI rights, and has emphasized the importance of information in society. Legault, one the most influential ICCs has stated that "information is the new source of wealth, power and influence. Those who have it want to protect it. Those who don't, want access to it. Never before has information - especially government information - been so high on the public's radar."[1011] This statement reveals a clear dichotomy embedded in every ATI regime, the governments's need for protecting information and the public's right to access it. This dichotomy informs a great deal about the importance of information for controlling through power and influence, and goes to the core of my main concern in this research - breaking up the information monopoly.

The ICC investigates complaints about how federal institutions handle ATI requests. The Commissioner is appointed directly by the Parliament and reports to it by way of annual reports, special reports and parliamentary appearances. Being an agent of the legislature allows the Commissioner to be removed from the government of the day, and scrutinize the activities of government. Commissioners have developed on the Ombudsman model - they have strong investigative powers to assist them in mediating between dissatisfied information applicants and government institutions. They may not order a complaint to be resolved in a particular way, but can only recommend to government to act upon ATI requests. Thus, it is upon the institutions to follow the ICC's recommendations or not. When the Commissioner concludes that a complaint is well founded and the institution does not act upon her formal recommendation to disclose records, she may, with the complainant's consent, seek judicial review by the Federal Court. A complainant may also seek judicial review after receiving the results of the Commissioner's investigation. The ICC closely monitors all cases with potential ramifications on the right of ATI and may seek leave to participate in proceedings with potential impact on the right.

The ICC uses a combination of individual investigations, systemic investigations and report cards for the oversight on the state of compliance of the federal government with the *ATIA*. The goal of these investigations is to maximize compliance with the Act while fostering disclosure of

[1010] McLachlin, "ATI", supra note 228 at 6.
[1011] Office of the Information Commissioner of Canada, Speaking Notes of Suzanne Legault Information Commissioner of Canada to the Canadian Legal Information Institute (CanLII) Conference, Ottawa, September 13, 2013, online <http://www.oic-ci.gc.ca/eng/media-room-salle-media_speeches-discours_2013_5.aspx>.

public sector information. The ICC uses a full range of tools, activities and powers at her disposal, from mediation to persuasion and litigation, as required. The working of the ICC Office is supported by three branches. First, the Complaints Resolution and Compliance Branch carries out investigations and dispute resolution efforts to resolve complaints. It also conducts systemic investigations[1012]. Second, the Legal Services Branch provides legal advice on investigations, as well as on legislative and administrative matters. It also represents the Commissioner in court cases. Third, the Corporate Services mainly delivers administrative and management support.

In addition to the investigation of complaints received externally, the Commissioner has the authority to initiate the investigation of complaints on her own motion when she is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under the Act. Another type of a self-initiated investigation is a systemic investigation which the ICC undertakes when there are complaints of ongoing concern regarding certain issues such as chronically late responses, misuse of time extensions, lack of resources, etc.[1013]

Furthermore, the ICC uses another tool to evaluate the institutional compliance under the ATIA – the Report cards. They are a type of proactive commissioner-initiated assessment that looks into assessing systemic issues such as chronically late responses, misuse of time extensions, lack of resources, etc. As the name indicates, at the end of its investigation, the ICC issues report evaluations with letter grades for each institution. Report cards allow for a measurement in ATI compliance and a comparison between institutions' performance.

The ICC has continuously been concerned with the level protection of ATI rights in Canada. It has been engaged in many debates on the need to reform the ATI regime, and has been a key opposition in many government initiatives affecting ATI. For instance, the ICC's response to the open government initiative was that although proactive disclosure is a good thing, it isn't

[1012] Note: these investigations are initiated by the ICC on issues of ongoing concern.
[1013] Josée Villeneuve, "Assessment of public institutions' performance in access to information: The Canadian experience", Paper prepared for the first Global Conference on Transparency Research, Newark, USA, 2011, at 7, online: <https://spaa.newark.rutgers.edu/sites/default/files/files/Transparency_Research_Conference/Papers/Villeneuve_Josee.pdf> [Villeneuve].

enough. The ICC argued "In order to promote trust in public institutions, there is not only a need to increase the availability and the quality of information, but also to ensure access to that information. Citizens want to be able to validate the information that is provided to them, or to obtain more details about an issue of interest or simply know that the right is there for them to exercise when needed."[1014]

The ICC values the importance of ATI for two reasons. First, at the individual level ATI affects the rights of all Canadians. The ICC Legault once said: "I am often asked to explain why access to information is important to Canadians. In response, I point out that federal policies, programs and laws touch so many aspects of everyday life—the regulation of health products, international travel, mail delivery, transportation and food safety, to name just a few."[1015] This statement shows the extent of which the use of ATI affects many human rights. Second, at a more general level, ATI influences the way of governing, and makes it more inclusive and participatory. ICC recognizes that ATI "is fundamental to Canada's system of government, a key tool that facilitates citizen engagement with the public policy process. When the access system falters, not only is Canadians' participation in government thwarted but ultimately, the health of Canadian democracy is at stake."[1016] Because of the importance of ATI in the functioning of a democratic system, the ICC has transformed itself in a resilient advocate for such a right.

As I have explained in previous chapters, the number of ATI requests has increased progressively. This number has been reflected in a growing number of the complaints at the ICC. As the table below shows, complaints about refusals of requests have increased significantly from 2009, and that has had a significant effect on the total number. The numbers of the other two categories, have slightly fluctuated over the years, but have stayed more or less at the same level.

[1014] Information Commissioner Suzanne Legault before the House of Commons Standing Committee on Procedure and House Affairs, November 2013.
[1015] Office of the Information Commissioner, Message from the Commissioner, Annual Report 2013-2014, online: <http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_1.aspx>.
[1016] Office of the Information Commissioner, Annual Report 2012-2013: Message from the Commissioner, online: <http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_1.aspx>.

Table 37: Number of the complaints at the ICC 2009-2015

Complaints	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Refusal[1017]	864	996	1036	1040	1219	1102
Administrative[1018]	792	810	391	519	801	604
Cabinet confidence	33	22	38	37	61	43
Total	1689	1828	1465	1596	2081	1749

Source: Table drawn by the author with data from the Office of the Information Commissioner, Annual Reports. Online: <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx>.

Despite of the growing number of complaints, the ICC has been suffering from budget constraints for a while. The Office has explained that significant and successive budget cuts have placed the OIC at the limit of its financial and organizational flexibility. These combined factors have a direct impact on the OIC's ability to safeguard information rights under the *ATIA.*[1019] Between 2011-12 and 2012-2013, overall complaints increased by 9 percent. Over that period, missing record complaints increased by 51 percent. According to the annual report 2013-14, the complaints have increased 30 percent, but the budget cuts were reduced by roughly 11 percent since 2009.[1020] Gogolek, the Executive Director of the BC FIPA analyzed the repercussions of the ICC budget cuts. He explained that the cuts meant two things. First, without resources, there will delays in the Commissioner's office, meaning that information requesters will have to wait even longer to get their documents. Second, because of the two step complaint procedure, "if the government digs in its heels, requesters can't even get their day in Federal Court until the Commissioner's office finishes its review of the file."[1021] Budget constraints place a real burden in the work of the ICC and weakens its position vis á vis to the government for the protection of the ATI rights.

[1017] about the application of exemptions, no record or excluded information.
[1018] about delays, time extensions and fees
[1019] Office of the Information Commissioner, Quarterly Financial Report 2014-2015, online: <http://www.oic-ci.gc.ca/eng/rapport-financier-trimestriel-quarterly-financial-report-2014-2015-q1.aspx>.
[1020] Office of the Information Commissioner, Canadian Access and Privacy Association Conference 2014: Speaking notes for Emily McCarthy, Assistant Commissioner, December 8, 2014, online: <http://www.oic-ci.gc.ca/eng/media-room-salle-media_speeches-discours_2014_6.aspx>.
[1021] Vincent Gogolek, "Don't Tackle Increasing Access to Information Complaints by Silencing the Watchdog", Huffington Post: The Blog. 12.10.2014, online: <http://www.huffingtonpost.ca/vincent-gogolek/access-to-information-_b_6298050.html>.

9.1.1 Powers of the Information Commissioner of Canada

One of the most controversial issues in relation to the reform of Canada's ATI legislation is whether or not to grant order-making power to the ICC. Canada's jurisdictions have adopted different approaches on this issue. Oversight bodies in Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and Quebec have the power to issue legally binding orders, while oversight bodies in the other provinces and territories can only make recommendations. Rankin argued that requesters and government officials in these six provinces consider the order-making model to be very successful, due to a very robust mediation role played by Commissioners.[1022] In addition, Flaherty emphasized that Information and Privacy Commissioners in Ontario, B.C., and Alberta are as successful as they are "because they are true regulators, even though they rarely exercise actual order-making power on the privacy side of their mandate. It is the prospect of their doing so that makes all parts of government pay attention to them."[1023]

There are opposing perspectives on the issue of the order-making power. On the one hand, it has been argued that order-making power serves to enhance the efficacy of the informal dispute resolution process, as well as overall compliance. According to David Loukidelis, British Columbia's Information and Privacy Commissioner, speaking about his office said: "over the 16 years of our office's experience, …order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office."[1024]

On the other hand, the opposing argument is that making the ICC's orders legally binding will turn the administrative appeal into a more cumbersome, procedurally rigorous and time consuming process. Increasing the pressure on the administrative process by establishing an administrative review procedure such as the one offered by the ICC is supposed to produce quick and simple results. In this procedure, the involvement of review officers who become experts in

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[1022] Rankin, "FOI in Canada", supra note 243 at 24.
[1023] Flaherty, supra note 861 at 26.
[1024] Report of the Standing Committee on Access to Information, Privacy and Ethics, The Access to Information Act: First Steps Towards Renewal (June 2009), at 6, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E>.

dealing with ATI appeals, has been considered an advantage. These officers gain expertise in determining whether or not information is being legitimately withheld. The ICC's Overview of the *ATIA* Investigative Procedure[1025] makes it clear that the process is almost judicial in its procedural rigour. For example, it includes opportunities for representation by the complainant, the public authority's access and privacy office, and other authority officials. Making the ICC orders legally binding is feared that will make the complaint process more complex.

Departing from these two contrasting positions, the House of Commons Standing Committee on Access to Information, Privacy and Ethics, in 2009, recommended that the ICC be granted order-making power over procedural matters (such as timelines and fees), but not over substantive refusals (such as the application of exceptions). In 2002, the Review Task Force supported the order-making model concluding that a quasi-judicial body with order-making powers combined with a strong mediation function, would be the model most conducive to achieving consistent compliance and a robust culture of access.[1026]

Many ATI proponents, especially the media, have long advocated for a change in the ICC's powers. For instance, the CNA has emphasized that the powers of the Commissioner need to be strengthened.[1027] The CJEF has boldly stated that the powers of the ICC should be transformed from those of an ombudsman to those of an order-making tribunal.[1028] Roberts has criticized the current model by arguing that "the ombudsman model appears to have produced exactly the sort of vices that it was intended to avoid: adversarialism, legalism and formality."[1029] He has suggested that an effective ATI reform can be achieved by bolstering the authority of the ICC by

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[1025] See online: <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx>.
[1026] Government of Canada, Access to Information: Making it Work for Canadians. Report of the Access to Information Review Task Force (June 2002), online: <http://publications.gc.ca/collections/Collection/BT22-83-2002E.pdf>,
[1027] Canadian Newspaper Association, Public Affairs, "In Pursuit of Meaningful Access to Information Reform Proposals to Strengthen Canadian Democracy", February, 2005, at 3, online: <http://www.newspaperscanada.ca/sites/default/files/CNA%20POLICY%20-%20In%20Pursuit%20of%20Meaningful%20Access%20to%20Information%20Reform.pdf>.
[1028] Canadian Journalists for Free Expression, "A hollow right: Access to information in crisis", A submission by Canadian Journalists for Free Expression to the Office of the Information Commissioner concerning reform Of Canada's Access to Information Act, January 2013, at 11.
[1029] Alasdair Roberts, "New Strategies for Enforcement of the Access to Information Act" (2002) 27 Queen's L.J. at 665 [Roberts, "New Strategies"].

giving him the power to order the disclosure of information, just as some provincial Commissioners do.[1030]

Even the government has acknowledged the success of an order-making Information Commissioner. In 2002, a report of the Treasury Board and the Department of Justice on *ATIA* Reform stated that "in Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful."[1031] The Conservative Party promised in the 2006 election campaign to give the ICC the power to order the release of information[1032], a promise not kept.

However, nothing has changed in this regard. Canada's problems with institutional compliance and bureaucratic resistance to transparency are persistent and demonstrate that, as Flaherty argued, the Commissioner over time "has become something of a toothless watchdog."[1033] The same position was upheld in Heinz, a 2006 Supreme Court case on privacy and ATI, which ruled that "the Privacy Commissioner and the Information Commissioner are of little help because, with no power to make binding orders, they have no teeth."[1034] Although there is no data to show how often, or in what circumstances, requesters choose not to complain about access refusals, in a survey undertaken by the Public Policy Forum in 2001, many requesters reported that they regarded the complaint process as "useless" and consequently did not report problems of noncompliance.[1035] This view reinforces the idea that an empowered oversight body is essential to an effective ATI regime. As such, the order-making power has the potential to enhance the status of the ICC and the compliance of public authorities with her decisions, which could, in turn, enable her to put in place a much more rapid complaints processing system.

[1030] Alasdair Roberts, "Monitoring Performance by Federal Agencies: A Tool for Enforcement of the Access to Information Act", March 1999, Working Paper, School of Policy Studies, Queen's University, at 6 [Roberts, "Monitoring Performance"].
[1031] ATI, "Making it Work", supra note 290 at 112-113.
[1032] Stand Up for Canada, The 2006 Conservative Party federal election platform, online: <http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf>.
[1033] Flaherty, supra note 861 at 26.
[1034] H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 SCR 441, 2006 SCC 13 [Heinz].
[1035] D. Zussman, N. Averill & G. Lépine, Report on Consultations to Review the Access to Information Act and its Implementation (Ottawa: Public Policy Forum, 20 August 2001), online: Public Policy Forum <http://www.ppforum.com/english/ati/atifinale.pdf>.

The ICC Office has held two different positions regarding the order-making power. Initially, the ICC has been hesitant to accept that having binding power, its orders would be taken more seriously by the government. Instead, the ICC resisted proposals by parliamentarians and non-governmental organizations that he be given an "order power" comparable to that exercised by provincial commissioners. Former ICC John Grace observed in 1994: "The virtue of the ombudsman's approach is… that it allows for a less adversarial, less legalistic, more informal style. The test of a constructive relationship with government institutions is whether it results in the release of more information than under a regime with the power to enforce orders."[1036] The next Commissioner held the same position. In 1998, Commissioner Grace criticized the proposals for order power, observing that it might lead "more to conflict and excessively legalistic approaches than to more openness."[1037] Later, Commissioner Reid restated this position, arguing that his office enjoys a remarkable success rate notwithstanding its lack of order powers.[1038]

However, more recently, the Commissioner seems to have changed its position towards the order-making power. Especially Commissioner Legault has been bold in her proposals to change the *ATIA* including a change in the model of the ICC. She has continuously emphasized the urgent need to modernize the ATI regime from a legislative perspective and to align it with more progressive regimes both nationally and internationally.[1039] This change in position was probably caused by a deteriorating situation within the ATI regime in Canada and the increased non-compliance rates. The authority of the ICC has been corroding over the years, and her position taken less seriously by the government. Against this trend, the ICC seems to be fighting a lonely battle because of the lack of strong allies. The Office has openly acknowledged that there is no

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[1036] Office of the Information Commissioner of Canada, *The Access to Information Act: Ten Years On* (Ottawa: Minister of Public Works and Government Services Canada, 1994) at 9.
[1037] Office of the Information Commissioner of Canada, *Annual Report 1997-1998* (Ottawa: Minister of Public Works and Government Services Canada, 1998) at 10.
[1038] J.M. Reid, "Remarks to the Ottawa Chapter of the Institute of Internal Auditors" (17 October 2000), online: Office of the Information Commissioner of Canada, online: <http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=11>.
[1039] Suzzane Legault, "Strengthening the Access to Information Act To Meet Today's Imperatives", Presentation to The Standing Committee on Access to Information, Privacy and Ethics, Office of the Information Commissioner of Canada, 2009.

well-established advocacy group that specializes in ATI issues[1040], leaving her without partners in the battle for an ATI modernization.

The powers of the ICC, have also been subject of many court decisions which have usually been favourable to the ICC. The Federal Court in Canada (Attorney General) v Canada (Information Commissioner), paragraph 177 outlined the powers of the ICC. These powers, it is argued, make the ICC much more flexible in dealing with ATI cases which sometimes require a variety of legal rules of evidence and inquiry.

A. The Merger Project

As mentioned before, the only jurisdiction in Canada where the Information and the Privacy Commissioners hold distinct offices is the federal level. This difference between the federal and provincial models has enticed the interest of law practitioners and academics in Canada. There has been ongoing debates on merging the two offices at the federal level and providing them with order-making powers. Rankin argued that since the early 1990s, when the Mulroney government announced its intention to merge the offices of the ICC and PCC under a single commissioner, the pros and cons of such an initiative have been debated.[1041] According to Banisar, a primary government concern of having two bodies is that there could be conflict between the two—and that could become messy, expensive, and embarrassing. There was also concern that public bodies and the public will receive conflicting advice from the two commissioners when they disagree.[1042] As noted by the Canadian Access to Information Review Task Force in 2002:

> A situation can arise where the Information Commissioner advises the institution to disclose personal information in the public interest, but the Privacy Commissioner advises the institution to protect the information on the grounds that the public interest in the case does not clearly outweigh the invasion of privacy that could result from disclosure. This puts the institution in the difficult position of having conflicting recommendations from the two Commissioners.[1043]

[1040] Roberts, "New Strategies", supra note 1033
[1041] Rankin, "FOI in Canada", supra note 243 at 20.
[1042] Banisar, "RTI", supra note 590 at 24.
[1043] ATI, "Making it Work", supra note 290 at 59.

Banisar commented that the most significant benefit of having a single body is the shared expertise and reduction of conflict. He explained that there is a strong interrelation between ATI and privacy rights. Although they have some areas of conflict, there also are strong areas of commonality. Having a single body can reduce the possibility of institutional conflict. For Banisar, in practice, many requests for information under ATI legislation will relate to personal information, and having this dual expertise will allow for better balancing.[1044] In addition, Banisar warns about an imbalance that could be especially problematic because one law has a greater constitutional protection[1045], referring to the Privacy Act. However, the Privacy Commissioners have the opposite opinion on this view. According to them, the strongest drawback to adopting a single-commission model is the danger that one interest may be stronger or perceived as more powerful and that the bodies do not equally protect or balance both interests. They worried that it would "diminish" or "dilute" the profile of privacy at a time when there were profound privacy challenges.[1046]

To end the debate, and evaluate these pros and cons of the merger, in 2005, the government appointed the Supreme Court Justice, the Honourable Gérard La Forest, to study the feasibility of merging the two offices or of cross-appointing one single commissioner to both. The Canadian Privacy Act allows for the appointment of the Information Commissioner as Privacy Commissioner, but as Justice La Forest would comment after the review that this "option has never been exercised, although the possibility of combining the two offices has received active consideration."[1047] Justice La Forest conducted his review between July 22, 2005 (the date of his appointment) and November 15, 2005 (the date of his report to the Minister of Justice).[1048] His report recommended against a full merger on the basis that it would be likely to have a detrimental impact on the policy aims of the legislation.[1049] La Forest suggested that having a

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[1044] Banisar, "RTI", supra note 590 at 25.
[1045] Ibid, at 26.
[1046] Remarks of the Information Commissioner of Canada to the Canadian Access and Privacy Association, October 28, 2003.
[1047] Gérard La Forest, The Offices of the Information and Privacy Commissioners: The Merger And Related Issues, Report of the Special Advisor to the Canadian Minister of Justice (2005), at 19. See also page 20-23 for a useful summary of the combined models that operate at the provincial level. Online: <http://www.justice.gc.ca/eng/ip/rep-rap.pdf>.
[1048] Information Commissioner of Canada, Recurring Themes: Merger of the Offices of the Information and Privacy Commissioners, Annual Report 2005-2006, online: <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2005-2006_6.aspx>.
[1049] La Forest, supra note 1052 at 55.

single federal commissioner represent both ATI and privacy concerns would reduce the amount of attention brought to either one of these areas. He further argued that a single Information and Privacy Commissioner may be overburdened and unable to meet their obligations as well as they currently do, due to the challenges that arise in both access and privacy regimes. La Forest was of the opinion that potential gains, in terms of government transparency, from having only one commissioner, would not be significant enough to go through with the merger.[1050] In addition, he concluded that the order-making model is not inconsistent with a very robust mediation role played by these Commissioners.[1051] Justice la Forest recommended, among other things, that there should not be a full merger of the offices for policy reasons related to the *ATIA*, the *Privacy Act*, and *PIPEDA*; the *ATIA* and the *Privacy Act* should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction, and to recognize the role of the commissioners in educating the public and conducting research relevant to their mandates.[1052]

The ICC John Reid, at first supported the idea of having a federal Commission based on the provincial model, but after Justice La Forest's report he no longer advocated the single-commissioner model. Regarding the merger proposal, Reid expressed his opposition explaining that "In the single-commissioner model, it is certainly possible that one value – openness or privacy – would get preferential treatment."[1053] Considering the recommendations of the La Forest Report and the other opposition faced by the Commissioners and other ATI advocates, the government put the merger project on hold. After 10 years, it seems that this project is abandoned since there have been no more discussions around the possibility of a merger.

9.1.2 Administration of complaints

The Office of the ICC investigates complaints about federal institutions' handling of access requests. The ICC has strong investigative powers to assist her in mediating between dissatisfied

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[1050] Ibid, at 43.
[1051] Rankin, "FOI in Canada", supra note 243 at 24.
[1052] Office of the Information Commissioner, "Strengthening the Access to Information Act To Meet Today's Imperatives", online: <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
[1053] John Reid, Information Commissioner of Canada, "A Commissioner's Perspective: Then and Now", October 6, 2005, online: <http://www.oic-ci.gc.ca/eng/media_room-speeches-2005-october_6.aspx>.

information applicants and government institutions. As an ombudsperson, the Commissioner may not order a complaint to be resolved in a particular way, though she may refer a case to the Federal Court for resolution. Whenever possible, the Commissioner relies on persuasion to solve disputes, asking for a Federal Court review only if an individual has been improperly denied access and a negotiated solution has proved impossible.

The Commissioner has no discretion to refuse to investigate a complaint. Complaints may allege improper refusal to disclose requested records, undue delay in providing records, inadequate searches for requested records, excessive fees, unreasonable time extensions, refusal to translate requested records, or any other matter relating to requesting or obtaining access to records under the Act[1054]. In addition to the investigation of complaints received externally, the Commissioner can initiate the investigation of complaints on her own motion when she is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under the Act.

When the Office receives a complaint, it confidentially investigates the facts, allowing both the complainant and the federal organization to present their cases. Jacobs argued that the ICC "has understood its role as an ombudsman to mean that it should keep everything, including the very fact of most cases occurring as confidential."[1055] This effort may require Office staff to critically analyze and review policies, procedures, legislation and case law, as well as examine government records. The Office obtains the information needed to examine the complaint through meetings or correspondence with officials and the complainant. The law requires the Commissioner to carry out "impartial, independent and non-partisan investigations."[1056] In accordance with the information gathered through the investigation, the Commissioner makes a finding which cannot be of civil or criminal liability. When the Commissioner finds that an exception to the right of access has not been properly applied, she informs the head of the institution that the complaint is well founded and formally recommends that the withheld information be disclosed. On occasions, when the head of an institution does not agree to follow this recommendation, the Commissioner may, with the consent of the complainant, ask the

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[1054] Section 30 of the *ATIA*.
[1055] Laverne Astrid Jacobs, "Fashioning Administrative Independence at the "Tribunal" Level: An Ethnographic Study of Access to Information and Privacy Commission in Canada", Dissertation, Graduate Program in Law, York University, Toronto, July 2009, at 297.
[1056] Heinz, supra note 1034 at para 33.

Federal Court, under section 42 of the Act, to review the institution's refusal to release the information. In addition, a complainant is entitled to ask the Federal Court, under section 41 of the Act, to review an institution's refusal to disclose information. The referral to the federal court concludes the formal investigation by the ICC.

In many cases complaints are resolved by mediation. In fact, experience suggests that institutions may find the prospect of a formal investigation sufficiently distasteful that they would prefer to cooperate informally with the OIC in developing and implementing compliance plans[1057]. The ICC encourages federal institutions to disclose information as a matter of course and to respect Canadians' rights to request and receive information in the name of transparency and accountability. However, the ICC advised that in the 30-plus year history, the Office has "documented multiple challenges and deficiencies with the Act. The Act is applied to encourage a culture of delay. The Act is applied to deny disclosure. It acts as a shield against transparency. The interests of the government trump the interests of the public."[1058] This situation can be explained with the commissioner's approach of naming and shaming which may only have limited effectiveness. The repetition of ATI shameful stories has normalized them and dulled the shameful character of these stories. In response to this culture, the ICC has continuously pushed the government to change its approach to ATI rights, modernize the legislation, and reflect a culture change in its practices. The latest ICC proposal for a comprehensive modernization of the *ATIA* was made in 2015 and included 85 recommendations. So far, no government action has taken place in response to those recommendations.

A. Examples of types of requests

The ICC receives lots of complaints, but the number does not reflect all the dissatisfied applicants, many of which decide not to bring their case to the ICC. This represents a major difficulty in assessing the traditional approach to enforcement of the federal ATI law – it does not operate unless complaints are made. As a result, there may be only a weak correlation

[1057] The Information Commissioner indicated in April 1998 that the OIC's work "had a sobering and motivating effect" within these institutions, and that the actions which they had been prompted to take were likely to improve compliance. See: 1997-98 Annual Report, at 13-17, and 1996-97 Annual Report, at 77-79.
[1058] Office of the Information Commissioner, "Striking the Right Balance for Transparency–Recommendations to modernize the *Access to Information Act"*, March 2015, at 5. [pdf] online: <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx>.

between complaint statistics and actual non-compliance. However, the numbers that are brought to the ICC demonstrate to a certain extent the dynamics of the ATI regime in Canada.

The complaints to the ICC are diverse in nature, but many of them are on matters of national security, international affairs and defence. Commissioner Legault launched a pilot project in 2011 to target files pertaining to these issues, which are often complex and time-consuming to investigate. The files contained a variety of request. For example, an historian complained about the heavily redacted records the Department of Justice Canada released relating to a law Canada had passed in the late 1930s preventing Canadians from fighting in foreign wars.[1059] Another complaint was about the refusal by Library and Archives Canada (LAC) to release records related to security at the 1976 Montréal and 1988 Calgary Olympics. Other complaints pertained to important historical events such as the archival records about the demise of the constitutional amendment proposed in the Meech Lake Accord in 1990.[1060]

Section 19 is the most often cited exemption in the Commissioner's complaints. The OIC office cannot access information subject of s.69 of the *ATIA*, but may ask the Privy Council Office (PCO) to certify documents as Cabinet confidences. In 2013–2014, 45 percent of the new complaints at the Commissioner involved issues relating to section 19.[1061] While the ICC has not been very successful in limiting the application of this section, in some cases it may convince the institution to consider whether any of the conditions that would permit disclosure of personal information apply. This may include determining whether the information is publicly available, whether the person to whom the information relates might consent to the information's release or whether the information warrants being disclosed in the public interest.[1062]

Many complaints to the ICC are about missing records in the government agencies, which according to the Office have increased substantially. For this reason, in 2012-2013 the ICC conducted a systemic investigation into the use of text-based messaging in federal institutions.

[1059] Office of the Information Commissioner, Annual Report 2013-2014, Investigations, online: <http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_4.aspx>.
[1060] Ibid.
[1061] Ibid.
[1062] Office of the Information Commissioner, Annual Report 2012-2013: Ensuring compliance with the Act, online: <http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_1.aspx>.

Eleven were selected for review. The Commissioner found that the use of instant messaging on government-issued wireless devices to conduct government business is putting the right of ATI at an unacceptable risk. In addition, she found that access to instant messages sent and received by ministers' office staff is at particular risk.[1063]

On September 11, 2015, the ICC filed a notice of application against the Prime Minister pursuant to section 42 of the *ATIA.*[1064] This case is in relation to an ATI request for any records created between March 26, 2013 to August 22, 2013 related to Senators Mike Duffy, Mac Harb, Patrick Brazeau and Pamela Wallin.[1065] The case was commenced following an investigation by the ICC's office concerning PCO's refusal to disclose records responsive to an ATI request. As a result of this investigation, the Commissioner concluded that PCO was not justified when refusing ATI, and recommended that the Prime Minister disclose a significant amount of additional information. The PCO, on behalf of the Prime Minister, declined to implement the recommendation. The court case challenged the Prime Minister's decision, as head of PCO, to refuse records responsive to the ATI request based on claimed exemptions for "personal information" (s.19(1)), "advice and recommendations" (s.21(1)(a)) and "solicitor-client privilege" (s.23). In the proceeding, the ICC maintained that the Prime Minister erred in relying on these exemptions when refusing access to the requested information. The ICC also maintained that where there was discretion to either disclose or withhold information, the Prime Minister failed to demonstrate that this discretion was exercised in a reasonable manner bearing in mind all relevant factors including the public interest in the information's disclosure.[1066]

The above cases reflect some of the tensions that exist in the ATI regime in Canada, the nature of the ATI requests, and their significance on Canadian constitutionalism, accountability and governance. They also demonstrate a powerless but devoted advocate of ATI, who is fighting back against the culture of secrecy in Canadian institutions.

[1063] Office of the Information Commissioner, "Instant Messaging putting Access to Information at risk", April 2014, online: <http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx>.
[1064] Information Commissioner of Canada v. The Prime Minister of Canada**,** T-1535-15.
[1065] Office of the Information Commissioner, "Information Commissioner files a notice of application against the Prime Minister of Canada", September 11, 2015 online: <http://www.oic-ci.gc.ca/eng/les-grands-titres_top-stories_20.aspx?>.
[1066] Ibid.

9.1.3 The interaction with other institutions

The ICC has continuously advocated for ATI rights by criticizing the effectiveness of the ATI regime and engaging in many law reform initiatives. For decades Canadian Commissioners have warned that the ATI system is in crisis and in need for repair. To address this crisis, the ICC Office has worked in several fronts to fulfill its watchdog duties in keeping in place an effective ATI regime in Canada. It has used several instruments to achieve this goal and engaged with many institutions, such as the Parliament, the government and the courts. Since the Commissioner is an independent agent of Parliament, she uses two principal reporting instruments to inform Parliament on its activities, an annual report and special reports. The annual reports provide an overview of the activities of the ICC for an entire fiscal year, while the special reports are used to bring to the attention of Parliament any issues of urgency or importance. For instance, a Special Report in 2008 identified several interconnected issues in the ATI system: information management, time extensions, consultations, human resources and training, and leadership. In 2009, another systemic issue affecting timely responses to access requests revealed that it was to the delegation of authorities.[1067]

The ICC has been invited many times by the government to give recommendations on how to improve the ATI system in Canada. For instance, in 2006, when the Prime Minister Harper came to power with big promises on improving the ATI system, Commissioner Reid issued a set of recommendations which aimed to address the weaknesses and enhance ATI rights. However, instead of considering Reid's recommendations, the government discharged him from the office. Reid's successor, Marleau sounded the same dire alarm, calling the state of the ATI system "grim", and issued a widely praised report with a dozen specific recommendations to rescue the access system. The Conservative government followed the same approach with the Marleau's report – it ignored it until the Marleau quit in apparent frustration, as Weston argued.[1068] The next and current commissioner, Legault, continued the work of her predecessors in fighting a battle to uphold ATI rights in Canada. This battle became tougher in the years of Legault's term,

[1067] Villeneuve, supra note 1013 at 19.
[1068] Greg Weston, "Senate expense scandal left no paper trail, really?", CBC News, September 2, 2013, online: <http://www.cbc.ca/news/politics/senate-expense-scandal-left-no-paper-trail-really-1.1344795>.

to the point that she has continuously been warning that the public's ATI right is at risk of being totally obliterated.

Another significant engagement of the ICC with the government, was during 2007, when she was consulted about the future of the CAIRS as part of the TBS's policy renewal initiative pertaining to ATI. In October 2007, the ICC recommended to TBS that CAIRS be maintained until an alternative could be found. However, in April 2008, TBS announced that that it was discontinuing the requirement to update CAIRS. After this decision, the ICC received two complaints and initiated an investigation. The Office consulted with a number of stakeholders and obtained representations from them. The representations indicated that the information in CAIRS provided real value to access requesters and the public in general. The lack of a centralized source of information made the search process more time consuming, inefficient and costly. As a result, the Office recommended that any alternate system should allow for quick, inexpensive and easy searches of current and previous requests. TBS representations highlighted various factors that were considered prior to the decision, such as the fact that the system was of limited value to federal institutions and that the information was still available directly from these institutions. The ICC argued that although CAIRS was not originally designed for public use, the information contained in the database generated substantial and continued public interest.[1069] In addition, the ICC explained that abolishing the requirement to update the information contained in CAIRS effectively eliminated a centralized source of information on access requests received by federal institutions. However, since the information was still available from institutions, the Office was unable to conclude that the policy change represented a denial of access under the Act.[1070]

A. Problems with ATI administration

The everyday work of the ICC with the ATI complaints has revealed that there are significant problems with the administration of ATIA in Canada.

[1069] Office of the Information Commissioner, "The Coordination of Access to Information Requests System (CAIRS)", 2009-2010, online: <http://www.oic-ci.gc.ca/eng/syst-inv_inv-syst_2009-2010_1.aspx>.
[1070] Ibid.

- **Frequent political interference**

ICC John Reid often called for action because government continued to distrust and resist the *ATIA* and the oversight of the ICC. He argued:

> Governments claim to embrace openness but they act to exert political control over what is disclosed and the timing of disclosure. If the right of access is to be meaningful, the legal incentives for compliance must be strengthened, there must be a well-resourced and fiercely independent watchdog and all members of Parliament must become engaged in monitoring the manner in which Ministers and public servants discharge their obligations to be transparent.[1071]

In an investigation the ICC found a pattern of improper involvement by a small group of ministerial staff members at Public Works and Government Services Canada (PWGSC) in responding to requests under the *ATIA.* She noticed that "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"[1072]. The ICC investigation revealed that ministerial staff were involved in processing ATI requests; officials delayed responding in order to obtain the approval of ministerial staff members who did not have any delegated authority under the Act; ministerial staff exerted pressure over employees in the ATIP Directorate where employees were instructed to preserve good relations with the Minister's Office at the expense of these employees' responsibilities under the Act.[1073] At the conclusion of the investigation, the ICC made a number of recommendations to PWGSC to prevent political interference from recurring. The Minister accepted all but one recommendation and a number of measures were implemented by March 31, 2014.[1074]

One recent example of political interference in the administration of ATI relates to the long-gun registry. All started when the ICC received an information request for Firearms Registry database. The request was made on March 27, 2012, before the coming into force of the *Ending the Long-gun Registry Act (ELRA).* On April 13, 2012, the ICC wrote to the then Minister of Public Safety and Emergency Preparedness, the Honourable Vic Toews, to inform him that any

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[1071] John Reid, Information Commissioner of Canada, "A Commissioner's Perspective: Then and Now", October 6, 2005, online: <http://www.oic-ci.gc.ca/eng/media_room-speeches-2005-october_6.aspx?>.
[1072] Interference with Access to Information: Part 2 - Special report to Parliament by Suzanne Legault Information Commissioner of Canada, April 2014, at 3, online: <http://www.oic-ci.gc.ca/eng/ingerence-dans-acces-a-l'information-partie-2-interference-with-access-to-information-part-2.aspx>
[1073] Ibid, at 8-9.
[1074] Ibid, at 3.

records for which a request had been received under the Act were subject to the right of access and could not be destroyed until a response had been provided. What happened was that between October 25 and October 29, 2012, the RCMP destroyed all electronic records of non-restricted firearms. Beeby explained that long-gun registry records were largely destroyed by Oct. 31, 2012.[1075] After a long investigation, the ICC concluded that the RCMP illegally destroyed records related to long-gun registry, while they were still under investigation, and thus there was an obligation to preserve the records.

On May 7, 2015, the government introduced Bill C-59 in Parliament, entitled the *Economic Action Plan 2015 Act, No. 1.* Two sections of the Bill C-59 amended the ELRA, sections 230 and 231. Section 230 of Bill C-59 amended section 29 of the ELRA to exclude the operation of the *ATIA* retroactive to October 25, 2011, the date on which the ELRA was introduced in Parliament. It ousted the application of the *ATIA*, in particular the provisions guaranteeing the right of access (s.4), and complaint (s.30), and the Commissioner's powers to investigative (s.36), make recommendations (s.37), and seek judicial review (ss. 41, 42 and 46). It also retroactively ousted the offence of obstructing the Commissioner in the performance of her duties and functions (s.67) and the offence of obstructing the right of access, including by destroying records (s.67.1). Section 230 also provided that the ELRA retroactively superseded any other Act of Parliament in the event of any inconsistency, and that the destruction of the records shall take place despite any requirements to retain the records or copies contained in any other Act.

Section 231 of the Bill C-59 provided that no administrative, civil or criminal proceedings lie against the Crown for the destruction of the records related to the Long-gun Registry from the date the ELRA came into force, April 5, 2012. This section also provided that no administrative, civil or criminal proceedings lie against the Crown for any act or omission done in purported compliance with the Act between October 25, 2011 and the coming into force of section 231.

[1075] Dean Beeby, "Gun registry access law change could set precedent, watchdog warns MPs", CBC News, May 14, 2015, online: <http://www.cbc.ca/news/politics/gun-registry-access-law-change-could-set-precedent-watchdog-warns-mps-1.3074304>.

Bill C-59 spurred the reaction of many ATI advocates and faced the strong opposition of the ICC, whose role it ignored and dismissed. In a letter to the Senate, Commissioner Legault depicted Bill C-59 as "a perilous precedent against Canadians' quasi-constitutional right to know."[1076] She openly expressed her opposition to the media that she had never seen anything like this[1077] and that she took the government to the Federal Court on May 14, 2015.[1078] As a response, the media supported this decision and accused the Harper government to retroactively rewrite Canada's ATI law in order to prevent possible criminal charges against the RCMP.[1079] Vallance-Jones described the Bill C-59 as "almost Orwellian. It seeks to rewrite history, to say that lawful access to records that existed before didn't actually exist after all."[1080] What was more striking in this story was the reaction of the government which considered the Legault's investigation as merely finding a "loophole" in the law, one that the government would close soon."[1081] A spokesman for Public Safety Minister, Steven Blaney would only say the retroactive law would fix a "bureaucratic loophole" that allowed citizens to request heavily redacted copies of the gun registry data while the legislation to destroy the data was before Parliament.[1082]

This story demonstrates how creative the government can become on finding ways to cover cases of abuse in the ATI regime, while exercising a strong political interference in ATI's administration. What is more salient in this case is the normalization of the government's disruptive behavior in managing ATI rights and the ease with which it tries to circumvent legal obligations and responsibilities. Giving a retroactive effect to a legal act to cover the destruction of registers, is indeed a dangerous precedent that ignores institutional accountability under ATI, and dismisses an important right of Canadians, that of exercising control over their government.

[1076] Office of the Information Commissioner, "Letter to the Speaker of the Senate", May 2015, online: <http://www.oic-ci.gc.ca/eng/registre-armes-depaules_long-gun-registry_1.aspx>.
[1077] CBC News, "Information Commissioner warns of dangerous precedent in RCMP long-gun registry case", May 16, 2015, online: <http://www.cbc.ca/radio/thehouse/how-will-canada-meet-its-new-emissions-reduction-target-1.3074096/information-commissioner-warns-of-dangerous-precedent-in-rcmp-long-gun-registry-case-1.3074098>.
[1078] CBC News, "Info commissioner taking government to court", May 14, 2015, online: <http://www.cbc.ca/news/info-commissioner-taking-government-to-court-1.3075113>.
[1079] Bruce Cheadle, "Budget bill C-59 rewrites access law to protect RCMP on gun registry: CP", CBC News, May 13, 2015, online: <http://www.cbc.ca/news/politics/budget-bill-c-59-rewrites-access-law-to-protect-rcmp-on-gun-registry-cp-1.3072548> [Cheadle].
[1080] Ibid.
[1081] Dean Beeby, "Gun registry access law change could set precedent, watchdog warns MPs", CBC News, May 14, 2015, online: <http://www.cbc.ca/news/politics/gun-registry-access-law-change-could-set-precedent-watchdog-warns-mps-1.3074304>
[1082] Cheadle, supra note 1079.

The political interference in the administration of the *ATIA* has surfaced as an ongoing problem during many of the ICC's investigations. It had interfered continuously with the work of the people who deal everyday with ATI requests, namely the ATIP coordinators, a problem that I have already mentioned in Chapter seven. During his mandate Commissioner Reid, expressed that he was "frankly troubled by the profound pressures placed on coordinators by their superiors to administer the access law as part of the departmental communications function and to avoid, at all costs, embarrassing the minister. [and he was]…troubled by the absence of a comprehensive, mandatory training strategy for ATIP offices, senior officials and exempt staff."[1083]

- **Avoidance of record keeping**

Various federal Information Commissioners have noted that ATI has no meaning when government officials do not create records. Commissioner John Grace has noted:

> The whole scheme of the *Access to Information Act* depends on records being created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost. If records about particular subjects are not created, or if they cannot be readily located and produced, the right of access is meaningless.[1084]

Grace's successor, Commissioner John Reid picked up the theme, and recommended the establishment of a legal framework for information management which would, as a primary feature, require federal departments, agencies and institutions to create and appropriately maintain records that adequately document their organization, functions, policies, decisions, procedures, and essential transactions. He also suggested that ATI legislation include provisions requiring the creation of records and a related offence for failure to do so with the intent to deny a right of access.[1085]

[1083] Information Commissioner of Canada, "Recurring Themes: Merger of the Offices of the Information and Privacy Commissioners", Annual Report 2005-2006, online: <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2005-2006_6.aspx>.

[1084] Office of the Information Commissioner, John Grace, Annual Report 1999-2000.

[1085] Response to the Report of the Access to Information Review Task Force*; Draft Bill, Open Government Act;* Response to the Government's Action Plan for Reform of the *Access to Information Act* (and Bill C-2)*;* and evidence given before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, March 9, 2009.

The Commissioner Legault has called for the *ATIA* to include a comprehensive legal duty to document decision making, with appropriate sanctions for non-compliance. For example, in a September 2013 speech, she included the duty to document among the amendments required to modernize the Act, noting that this is particularly necessary in light of new technological developments. She advised that "Unless a government official makes a conscious effort to record that information elsewhere, it is lost to the public. This duty to record is one of the casualties of the instant messaging environment."[1086]

- **Time extensions and fees.**

This has been an ongoing problem for some time, and has put a lot of frustration on the applicants. Dragging responses for unlimited time, and high applicable fees have served as a deterrent, and caused many requesters to abandon the requests. Time and money to track down information requests are scarce resources and many people do not have. In addition, in many cases information is time sensitive, and once is delayed it may become useless. Furthermore, as mentioned above, a "toothless" watchdog like the ICC cannot not offer much to remedy the costs of chasing information. All these things together have caused a decrease on the number of complaints at the ICC.

Some of the investigation at the ICC have revealed extended delays in responses varying from days to months, and even years. For instance, in the investigation of a complaint about Transport Canada, the ICC discovered a 540-day time extension to respond to a request for records related to the development of a joint Canada–U.S. declaration on security and competitiveness. The investigation determined that Transport Canada's extension was invalid.[1087] In another case, National Defence took a 1,100-day extension to respond to a request for information about the sale of surplus military assets to Uruguay. At slightly more than three years, this extension was one of the longest the ICC Office had seen in recent memory, [1088] although, there have been

[1086] Remarks to the Canadian Legal Information Institute Conference, Ottawa, September 2013. See also the Commissioner's 2010-2011 Annual Report.
[1087] Office of the Information Commissioner, "Annual Report 2012-2013: Ensuring compliance with the Act", online: <http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_1.aspx>.
[1088] Ibid.

cases when the extension was even longer. One institution took an extension of more than three years for responding to an access request.[1089]

In regards to the application fees, there have been instances when the fees have been so high that they became unaffordable for the average person. Access fees are set out in the ATI Regulations[1090], but fee estimation is a complex process. Determining fee amounts and processing fee payments adds more complexity to the administration of the ATI system and results in delays for requesters. Fees are also inconsistently applied across institutions. In 2013–2014, the ICC investigated a complaint against the Privy Council Office (PCO) about a $4,250 fee estimate. She learned that this estimate was not based in the Regulations, and the PCO was advised to provide a new, reasonable fee estimate. As a result, the PCO decided to decrease the fee to $119.80 to the requester.[1091]

Time extensions and fees are an inherited problem in the *ATIA* since there is no provision that limits the time extensions and no provision on fees. Commissioner Marleau has argued that "extensions have become the norm rather than the exception,"[1092] contrary to the intention of the Act. Since it is left to an institution to decide on how much time they need to answer to an information request, any time can be legal. In addition, fees, especially related to search times, depend on the quality and implementation of information management practices. This is considered to be a loophole in the law that can only be fixed by legislative changes.

The ICC has tried in many ways to address the problems with the ATI administration. One the tools she has used in this regard has been issuing reports cards with the aim that institutions will self-reflect on the results, and change their behaviour towards ATI. The ICC first introduced the report cards process in 1998 in order to determine what percentage of requests went beyond the

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[1089] Ibid.
[1090] Access to Information Regulations, SOR 83-507, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-83-507/page-1.html#h-6>.
[1091] Office of the Information Commissioner, "Striking the right balance for transparency: Recommendations to modernize the Access to Information Act", Chapter 2: The right of access, online: <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_4.aspx>.
[1092] Office of the Information Commissioner, "Report Cards: Systemic Issues Affecting Access to Information in Canada, 2007-2008" – A Special Report to Parliament by Robert Marleau, February 2009, at 4.

statutory timelines, a measure known as the deemed refusal rate.[1093] In 1999, the OIC issued report cards that provided statistical analyses of performance in a small number of departments, and assigned letter grades to each of those departments. The effectiveness of report cards declined over time primarily because of the methodology used to assess performance, not the real state of compliance within the institution which was dependent on many complex factors.[1094] In 2007-2008 the ICC changed the report card system, by providing a broader picture of institutional performance including a description of contextual factors. Institutions received a score – ranging from one to five stars, instead of grade letters – according to their overall performance.[1095]

B. Law reform

Considering the state of the *ATIA* many Information Commissioners have called for legislative action to update and strengthen the law. These efforts have begun early in the life of the ICC and have intensified through years, even though unsuccessfully. Commissioners Grace, Reid, Marleau and Legault have all pushed for changes in the *ATIA* and came forward with concrete recommendations for such change. In his tenth-year anniversary report, ICC John Grace presented his case for reform. He recognized that "while the Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information – an approach which is too slow and cumbersome for an information society."[1096] He issued forty-three recommendations for the renewal of the *ATIA*.

Grace's successor, Commissioner Reid continuously criticized the effectiveness of the ATI system and called for reforms. He has been one of the most active ICC. When the *ATIA* was amended by the Terrorism Act in November 2001[1097], the amendments allowed the Attorney General to issue a certificate to bar an investigation by the ICC regarding information obtained in

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[1093] Villeneuve, supra note 1013 at 13. The deemed refusal rate is obtained by dividing the number of requests that went beyond their statutory timelines by the total number of requests, over a specified period of time
[1094] Ibid, at 14.
[1095] Office of the Information Commissioner, "Report Cards: Systemic Issues Affecting Access to Information in Canada, 2007-2008" – A Special Report to Parliament by Robert Marleau, February 2009, at 7.
[1096] Office of the Information Commissioner, "Strengthening the Access to Information Act to Meet Today's Imperatives", March 2009, online: <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
[1097] Bill C-36, the Anti-Terrorism Act, online: <http://canada.justice.gc.ca/en/terrorism/>.

confidence from a "foreign entity" or for protection of national security if the Commissioner has ordered the release of information. Rankin argued that these changes "led to additional secrecy at the federal level."[1098] The ICC described the review as "so limited as to be fruitless for any objector and demeaning to the reviewing judge."[1099]

Commissioner Reid followed closely the work of the Access to Information Review Task Force created by the government in 2000 to inquire about options for access reform.[1100] The Task made 139 recommendations for legislative, administrative and cultural reform. In response to this report ICC Reid tabled a special report in Parliament in October 2002.[1101] However, nothing came of this report. In the wake of the Sponsorship scandal, Reid introduced a report in Parliament entitled "Blueprint for reform". Some of the recommendations included that all exemptions in the *ATIA* should contain an injury test and be discretionary; all exemptions should be subject to a public interest override; a mandatory requirement for public officials to document their actions and decisions; cabinet confidences to be brought within the coverage of the law and the review jurisdiction of the ICC; the Act to be a complete code setting out the openness/secrecy balance and section 24 of the *ATIA*, which sets out this open-ended, mandatory, class exemption, to be abolished. Reid asked Justice Gomery, who was assigned to conduct the inquiry on the Sponsorship Scandal, to look carefully at his blueprint and urged him to support his calls for reform of the *ATIA*.[1102]

In response to the Gomery report and recommendations the Liberal Government released a framework for revisions of the *ATIA* in 2005 and ICC released a draft bill.[1103] The Bill, entitled the *Open Government Act*, was tabled before the Standing Committee on Access to Information, Privacy and Ethics at the request of this Committee. It proposed substantial changes to the access law. A primary objective was to address concerns about a "culture of secrecy" within political

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[1098] Rankin, "FOI in Canada", supra note 243 at 5.
[1099] Remarks to Special Committee on Bill C-36, 6 December 2001.
[1100] Department of Justice, "A Comprehensive Framework for Access to Information Reform: A discussion Paper", April 2005, at 3-4, online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/ati-aai/ati-aai.pdf>.
[1101] Douglas et al, supra note 291 at 5.
[1102] John Reid, Information Commissioner of Canada, "A Commissioner's Perspective: Then and Now October 6, 2005", online: <http://www.oic-ci.gc.ca/eng/media_room-speeches-2005-october_6.aspx>.
[1103] See Information Commissioner of Canada, "Access to Information Act – Proposed Changes and Notes", online: <http://www.infocom.gc.ca/specialreports/2005reform-e.asp>.

and bureaucratic environments. The proposed Act was endorsed by Commissioner Gomery in his Phase 2 report, *Restoring Accountability*.[1104] Soon after, just before elections, in November 2005, the Conservative Party pledged to pass some of the Reid's proposals if elected, but that promise was broken when they came to power.

Reid's successor, Commissioner Marleau, did not give up on the hope for a law reform on ATI. In February 2009, ICC Marleau released 12 recommendations for strengthening the *ATIA* and its enforcement system. The House of Commons Standing Committee on Access, Privacy and Ethics Committee endorsed some of these recommendations, in a report issued in June 2009. However, the Conservative government rejected all of them in December 2009. At the same year, Commissioner Legault took over the Office and made 12 recommendations to the Standing Committee on Access to Information, Privacy and Ethics. She called for the Parliament to review the *ATIA* every five years; the right of ATI to be extended to all persons; the ICC to be provided with order-making power for administrative matters; the *ATIA* to provide the ICC with discretion on whether to investigate complaints; the ICC to have a public education and research mandate and an advisory mandate on proposed legislative initiatives; the *ATIA* to be extended to records of the general administration of Parliament, the courts, and Cabinet confidences; a mandatory approval by the ICC for all extensions beyond sixty days; to allow requesters the option of direct recourse to the Federal Court for access refusals.[1105] Many of these recommendations were part of law reform introduced by other ICCs in the past, but that were disregarded by the government.

In November 2013, Legault appeared before the House of Commons Standing Committee on Procedure and House Affairs as part of its review of the Board of Internal Economy, the governing body of the House of Commons. In her remarks, the Commissioner again spoke in favour of extending the coverage of the *ATIA* to the administration of Parliament. The committee declined this request in its report in December 2013. Instead, the committee noted that the "level of proactive disclosure already available is sufficient for the transparency and accountability of

[1104] Suzanne Legault, Information Commissioner of Canada, "Strengthening the Access to Information Act To Meet Today's Imperatives", Mach 2009, online: <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
[1105] Ibid.

the House and its Members."[1106] This reaction was another one on the line of rejections the ICC had previously faced, but coming from Parliament it demonstrated that all other institutions, not just government, try to avoid having ATI apply into own home.

Despite this rejection, the ICC persistently continued to push for change in the ATI regime. Only recently, in 2015, Commissioner Legault, issued 85 recommendations[1107] for law reform in her report to Parliament. Most of them were introduced before, such as extending the *ATIA* coverage; establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance; extending the right of access to all persons; eliminating all access fees; adopting an order-making model for the ICC; introducing offences sanctioned by fines varying from $5000-$25000[1108], among many other recommendations. They had the same fate as other proposals – went unrecognized.

Another indirect strategy followed by the ICC to open up opportunities for modernizing the ATI legal framework and strengthening government transparency were the calls for the government to join the Open Government Partnership (OGP) as a global initiative to enhance the way of governing. In September 2010, the federal and provincial Commissioners across Canada issued a call for open government.[1109] They also took advantage of this initiative to push for legislative changes when the government was developing an Action Plan for the OGP initiative. The Commissioners suggested that the Action Plan on OGP represented a missed opportunity for comprehensive reform of the *ATIA.* In a January 2012 letter to Minister Clement on behalf of Canada's information and privacy commissioners, ICC Legault, offered to assist the government in developing the Action Plan. The letter suggested the government recognize and support the relationship between open government and a modernized *ATIA.*[1110] However, this letter achieved

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[1106] Office of the Information Commissioner. "Annual Report 2013-2014, Part 4: Promoting Access - Appearances before parliamentary committees", online: <http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_6.aspx>

[1107] Office of the Information Commissioner, "Striking the right balance for transparency", March 2015, online: <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_9.aspx#4_2>.

[1108] Ibid, Chapter 7.

[1109] Call for open government from ATIA and Privacy Commissioners, online: <http://www.oic-ci.gc.ca/eng/med-roo-sal-med_nr-cp_2010_8.aspx>.

[1110] Information Commissioner of Canada, "Letter on open government for the President of the Treasury Board," 20 January 2012, online: <http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx>.

no recognition by the government and no action for ATI reform was reflected in the OGP Action Plan.

As mentioned above, all the Commissioners have tried more than once while they were in office to push for change in the ATI legal framework. However, all of their attempts to influence an ATI law reform seem to have failed to overcome institutional barriers, which are raised and maintained to preserve the legal status quo in Canada. Cavoukian called these attempts "Mayday" calls and cries that have gone unheeded.[1111] This inability to make for a strong opposition against the government regarding ATI demonstrates the nature of the ICC as a "toothless watchdog", as many scholars have described it. Several failed attempts for a law reform has caused a lot of frustration on the ICC as an oversight institution and has left it powerless in face of strong government opposition.

9.1.4 The case of Ontario

As explained above, the IPCO is different from the ICC in two ways, it has an order-making power and the two commissioners are merged into one. The IPCO is argued to be one of the most active commissioners in Canada which has left its footprint in ATI's framework. In 2010, Commissioner Ann Cavoukian "unveiled the concept Access by Design consisting of 7 Fundamental Principles that encourage public institutions to take a proactive approach to releasing government records, making the disclosure of government-held information an automatic process whenever possible."[1112] "Access by design" is a revolutionary idea that has the potential to change the legal landscape and practice of ATI in Canada.

The appeal process at the IPCO goes through three stages: Intake, Mediation and Adjudication. In the intake stage requests are screened and appeals may be dismissed, settled, or go to mediation. In mediation the IPCO helps parties to either reach a full settlement or simplify

[1111] Information and Privacy Commissioner Ontario, "Submission to the Access to Information Review Task Force: Access to Information Act", May 2001 at 17, online: <https://www.ipc.on.ca/images/Resources/up-1info0501.pdf>.
[1112] Ann Cavoukian, Information and Privacy Commissioner, "2013 Access and Privacy: Freedom and Liberty", Office of the Information and Privacy Commissioner Ontario, at 3, online: <http://www.ipc.on.ca/images/Resources/ar-2013-e.pdf>.

the appeal[1113]. Mediation can succeed in settling some or all of the issues, reducing the number of records in dispute, clarifying the issues and helping the parties to better understand the legislation in place. The role of the mediator is to facilitate discussion and negotiation, and in the majority of cases, mediation is successful. In situations where mediation is not completely successful, the mediator prepares a report, which summarizes the case and identifies the issues left unresolved. Then, the file is forwarded to the third stage, adjudication. In the adjudication, a written inquiry is conducted and parties are notified about the issues that need to be addressed. Parties are given an opportunity to submit written representations[1114] emphasizing their position on the issues, and they are generally shared between parties in the appeal, unless there are confidentiality concerns. Once the adjudicator has considered all representations and reviewed the records, a decision is made, and a written order is issued.

IPCP has been active beyond Ontario, and in the federal level. In her submission to the Task Force in 2001, Cavoukian drew attention to the crisis in the federal level related to government compliance with the legislation. She explained that "the failure of government institutions to comply with …provisions can undermine legislation more than any other factor."[1115] Cavoukian urged the Task Force to make improvements to the federal access scheme, including changes for strengthening the ICC, such as giving it order-making powers, undertaking mediation and conducting research, and public education.[1116]

Because the IPCO deals with both privacy and ATI issues, she has often urged to stop using privacy as a shield against transparency, in cases when ATI refusals are justified with privacy concerns. She criticized this practice by saying that "the reasoning behind this excuse is an effort to play it safe, instead of gaining a proper understanding of what the options are for disclosure, or in the worst cases, using it as a convenient diversion for inaction."[1117] The IPCO has

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[1113] Ontario's Information and Privacy Commissioner, "The Appeal Process", August 2014, at 5, online: <https://www.ipc.on.ca/images/Resources/appeal_process-e.pdf>.
[1114] Ibid, at 6.
[1115] Information and Privacy Commissioner Ontario, "Submission to the Access to Information Review Task Force: Access to Information Act", May 2001, at 15, online: <https://www.ipc.on.ca/images/Resources/up-1info0501.pdf>.
[1116] Ibid, at 17.
[1117] Ann Cavoukian, Information and Privacy Commissioner, "2013 Access and Privacy: Freedom and Liberty", Office of the Information and Privacy Commissioner Ontario, at 39, online: <http://www.ipc.on.ca/images/Resources/ar-2013-e.pdf>.

advocated for a strong access system that strikes a careful balance between access and privacy and advised governments to ensure the continued relevance of ATI, while still vigilantly protecting the personal information of Canadians. In October 2014, the IPCO joined other commissioners in urging governments to review and modernize information management practices drawing in advancements in information technology. In a joint resolution[1118], the commissioners said the digital era has brought tremendous opportunities and new challenges for access and privacy rights.

9.2 The role of the EU Ombudsman as a watchdog on access to documents

First established in Sweden, the ombudsman is traditionally a neutral decision-maker who investigates allegations of maladministration in the executive branch of government and judiciary.[1119] In the EU, the creation of the European Ombudsman (EO) originates at the Treaty of Maastricht in 1992,[1120] so it was prior than the introduction of the ATI legislation in the EU. The role of the EO is to safeguard the fundamental rights of citizens living in Europe by ensuring open and accountable administrations within the EU. In this capacity he has been a strong voice for the protection of the right to ATD and is considered a prominent advocate of openness within the EU architecture.

9.2.1 Powers of the EU Ombudsman

The EO deals with complaints regarding maladministration by the EU institutions and bodies when they fail to act in accordance with the law. It means that the EO's scope is much broader than investigating complaints on refusals of ATD, as is it the case with the ICC. As Harden puts it, "The essence of Ombudsman is not to check the lawfulness of administrative behavior, which is the task and prerogative of the ECJ, but to control administrative behavior for compliance with

[1118] Protect and Promote Canadians' Access and Privacy Rights in the Era of Digital Government Resolution of the Federal, Provincial and Territorial Privacy and Information Ombudspersons and Commissioners Ottawa, October 28-29, 2014, online: <https://www.priv.gc.ca/media/nr-c/2014/res_141029_e.asp>.
[1119] See generally, Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Boston: Martinus Nijhoff Publishers, 2004) at 1 [Reif, *The Ombudsman*]; See also Donald C. Rowat, ed., *The Ombudsman: Citizen's Defender* (Toronto: University of Toronto Press, 1966) [Rowat, *The Ombudsman*]; Linda C. Reif, ed., *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Boston: Kluwer Law, 1999) [Reif, "*The International*"]; Stephen Owen, "The Ombudsman: Essential Elements & Common Challenges" in Linda C. Reif, Mary A. Amrshall & Charles Ferris , eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1993), at 1 [Owen, "The Ombudsman"].
[1120] Article 195 (ex 138e) TEC.

administrative ethics."[1121] Even though the role of the EO is much broader than fostering transparency in the EU, the protection of a right to ATD has been at the centre of his work. The position is distinctive within the EU because it is filled entirely at the discretion of the EP.[1122] Magnette argued that "the European Ombudsman is a new kind of 'agent', whose status and role remain unclear. On the one hand, it is formally a parliamentary body, designed to strengthen the control of EU institutions and administrations by MEPs; on the other hand, the profile and role of this organ is close to that of a court."[1123] However, just like the Commissioner in Canada, the EO does not have order-making power. Only the Courts have power to give legally binding judgments and to provide authoritative interpretations of the law. The EO can make proposals and recommendations and, as a last resort, draw political attention to a case by making a special report to the EP. The effectiveness of the EO thus depends on moral authority.

The ombudsman role is a Nordic innovation. Its first incumbent, Jacob Söderman, had previously served as Finland's ombudsman, and he was elected as an EO on 12 July 1995 and took office on 27 September 1995.[1124] According to Birkinshaw, Söderman "attacked secrecy in the EU with missionary zeal"[1125] soon after coming to office. Harden emphasized the importance of the EO by saying that "The European Ombudsman has been central to the development of openness and transparency as broader principles of law."[1126] During the time as the EO Söderman has been very active in promoting transparency and ATI as important values in the EU. In fact, in 1996, the Ombudsman undertook an inquiry on its own initiative into the provision of public ATD by all European institutions and bodies and dedicated his first ever special report to the EP on precisely this topic in 1997. The inquiry involved fifteen Community institutions other than the Council and Commission.[1127] The reason for the inquiry was that the

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[1121] Harden, "Revision of 1049", supra note 389 at 256.
[1122] Corbett, Jacobs, et al, supra note 440 at 240.
[1123] Paul Magnette "Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union", (2003) 10:5 Journal of European Public Policy, 677-694 at 677 [Magnette].
[1124] Craig, supra note 386 at 742.
[1125] Patrick Birkinshaw, *Freedom of information: the law, the practice and the ideal* (London: Butterworths, 2001). at 369 [Birkinshaw, *FOI*].
[1126] I Harden, "The European Ombudsman's Efforts to Increase Openness in the Union", in V Deckmyn, ed, *Increasing Transparency in the European Union* (European Institute of Public Administration, 2002) at 123 [Harden, "The EO"].
[1127] European Ombudsman, "The role of the European Ombudsman", Israel, September 1997, online: <http://www.ombudsman.europa.eu/speeches/pdfen/jerus_en.pdf>.

Ombudsman's office had received a number of complaints which seemed to suggest that the staff of Community institutions and bodies were not always adequately instructed on how to deal with requests for documents. Because an important part of the Ombudsman's mission is to enhance relations between Community institutions and bodies and European citizens, a more transparent European administration is quite clearly a condition for achievements in this field. After an exchange of views with the institutions and bodies in question, during which they all showed a positive attitude to the initiative, the Ombudsman formally recommended to fourteen institutions in December 1996 that they should come up with a common transparency regime, and adopt rules on public access to documents.[1128] The Treaty of Amsterdam was still under proposal at that time, and it later included a right to ATD. Regulation 1049 was adopted five years later.

The EO seems to be a powerful institution in the EU. Magnette argued that "The powers of the Ombudsman, limited as they are, give him the opportunity to combine the instruments of parliamentary scrutiny and judicial control in an original way."[1129] The Annual Reports show that the level of compliance from the institutions is high, about eighty per cent each year[1130]. Given that there is no order-making powers assigned to the EO, the high compliance demonstrate that EO has established a moral authority in the EU.

9.2.2 Administration of complaints

According to the Statute of the Ombudsman,[1131] when the EO receives a complaint, he starts an investigation. There are three steps that he may take in any case of complaint. First, he looks for an amicable solution between the institution concerned and the complainant to remove the maladministration and satisfy the complainant. Second, if no friendly solution can be reached, the EO informs the institution concerned and, when appropriate, makes draft recommendations. The institution must reply within three months. If the recommendations are not accepted and no

[1128] Ibid.
[1129] Magnette, supra note 1123 at 678.
[1130] European Ombudsman, Annual Report, 2014, at 25, online: <http://www.ombudsman.europa.eu/activities/annualreport.faces/en/59959/html.bookmark#hl3> [EO, "Annual Report 2014"].
[1131] Statute: Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, Adopted by Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25), online: <http://www.ombudsman.europa.eu/en/resources/statute.faces>.

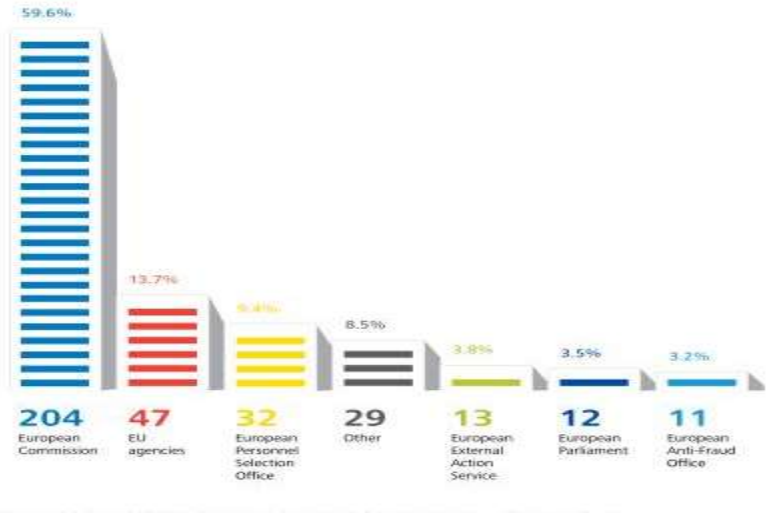
other solution to eliminate the maladministration can be found, the EO sends a special report with possible recommendations to the EP and to the institution concerned. This stage gives the Parliament a possibility to look for a way to solve the matter. The EO has the obligation to inform the appropriate national police if his inquiries reveal criminal activity, or to inform the institution or body concerned about the need to initiate a disciplinary process. The Ombudsman's office may launch investigations even with its own initiative, and follows the same procedure.

The involvement of Parliament in the investigation process is an interesting step which provides the EO with a strong support and explains (although in part) why its recommendations are followed. As such, the EP has become a strong ally of the EO.

As stated above, most of the complaints to the EO deal with cases of maladministration. However, requests for ATD constitute a high volume of the general requests. According to the EO, "for several years now, 20% to 30% of the complaints that the Ombudsman's office investigates have concerned transparency. The most common transparency issues raised are the institutions' refusal to grant access to documents and/or information."[1132] These numbers demonstrate that EU citizens make substantive amounts of requests for ATD. Most of the requests are made to the key institutions of the EU. Table 38 below shows that the European Commission in 2014 has received almost 60 per cent of the total requests, with a huge difference with other EU institutions and bodies. The Commission usually gets more than 50 per cent of the total complaints. This is not surprising considering that the Commission has a crucial role in the EU decision-making as the executive body of the EU, equivalent to the national government. Most of the legislation in the EU originates in the Commission, so most of its activities draw the attention of European public.

[1132] EO, "Annual Report 2014", supra note 1130 at 7.

Table 38: Inquiries conducted by the EO in 2014 according to institutions



Source: EU ombudsman, Annual Report 2014, online: <http://www.ombudsman.europa.eu/activities/annualreport.faces/en/59959/html.bookmark#hl3>.

The EO receives all sorts of complaints concerning different issues and institutions in the EU. I am mentioning below a couple of very recent and important investigations she has been engaged into. One of them relates to the Transatlantic Trade and Investment Partnership (TTIP), which has lately drawn a lot of public and media attention. The TTIP, an EU-US trade agreement, will create the largest free trade area in history with the aim of reducing the regulatory barriers to trade. According to the EO "TTIP will shape future rules and standards in areas such as food safety, cars, chemicals, pharmaceuticals, energy, the environment, and the workplace."[1133]The European Commission was negotiating the agreement on behalf of the EU, on a mandate granted by the Council of the EU.[1134] During the negotiations on the TTIP there were major concerns about the closed process of these negotiations. For instance, Independent argued that "the process has been secretive and undemocratic. This secrecy is on-going, with nearly all information on negotiations coming from leaked documents and Freedom of Information requests."[1135] To address these concerns the EO opened three strategic

[1133] EO, "Annual Report 2014", supra note 1130.
[1134] European Commission, "What is TTIP about", online: <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/>.
[1135] Lee Williams, "What is TTIP? And six reasons why the answer should scare you", The Independent, 6 October 2015, online: <http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>.

investigations, two of which on her own initiative in connection with the ongoing negotiations on the TTIP.

The first complaint about TTIP started on 17 February 2014, when a group of European NGOs[1136] made a request to the Commission, under Regulation 1049 for access to documents related to the agreement. After the Commission's negative reply in the confirmatory application, the complainants turned to the EO, who decided on November 4, 2015 that the Commission had failed to grant the documents conforming to Regulation 1049.[1137]

In addition to this complaint, the Ombudsman O'Reilly started two other investigations related to TTIP on her own initiative. In July 2014, the EO began investigating the refusal by the Council of the EU to release the directives that the EU was using to negotiate the TTIP. She also started inquiring into the steps that the Commission was taking to ensure transparent and public participation in TTIP negotiations.[1138] Earlier, the Ombudsman had put forward, to the European Commission, measures it could take to enable timely public access to TTIP documents, and details of meetings with stakeholders. There were concerns over refusal to disclose documents, unauthorized disclosure of documents, delays, and certain stakeholders apparently receiving privileged access to TTIP documents.[1139] Following the EO's investigations, in October, the Council published the directives in question. Shortly after, the Commission announced its plans to increase transparency in lobbying, promising to grant broader access to other TTIP documents.[1140] In February 2015, the Commission published the texts of the agreements in its webpage, including the text of the EU-Canada Free Trade Agreement (CETA).[1141]

Another important inquiry Ombudsman O'Reilly that started in 2014 was on trilogues, which are informal meetings between the Parliament, Commission and the Council of the EU. They are

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[1136] The group consisted of five NGOs: ClientEarth, the European Environmental Bureau, Friends of the Earth Europe, Corporate Europe Observatory and the European Federation of Journalists.
[1137] European Ombudsman, Refusal to grant access to documents relating to the TTIP negotiations, Case: 119/2015/PHP, online: <http://www.ombudsman.europa.eu/cases/caseopened.faces/en/59021/html.bookmark>.
[1138] EO, "Annual Report 2014", supra note 1130 at 8-9.
[1139] Note that these concerns were not only related to the first requests by NGOs. Investigations were broader.
[1140] Ibid, at 9.
[1141] See European Commission, "EU negotiating texts in TTIP", 10 February 2015, online: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>.

an important part of the EU legislative process, and have been a major concern for taking place in secrecy. This inquiry was "as an effort to facilitate a discussion about how trilogues can be made more transparent but also about where non-disclosure of documents needs to be maintained."[1142] With this inquiry the EO was trying to address two main concerns: if increased transparency concerning trilogues could actually prove harmful to the trilogue process, and if there was a risk that greater transparency, at the wrong time, would provide greater lobbying opportunities for well-resourced private interests to the detriment of the average citizen. In July 2016, the EO concluded the inquiry and proposed that the three institutions (the EP, Commission and Council) make some information and documentation publicly available, such as: trilogue dates**,** initial positions of the three institutions, general trilogue agendas, etc.[1143]

These examples demonstrate that the EO had developed a relatively good relationship with the EU institutions. Especially as it regards the ATD requests, the EO's practice shows that the level of compliance is satisfactory even through there is no order-making power in place to facilitate this compliance. This means that the EO has established its authority and credibility in the EU as an institution that deserves attention and is taken seriously.

9.2.3 The interaction with other institutions

The EO is an impartial body, it takes no orders from any government or organization. However, it maintains good relationships with other institutions in the EU. For instance, it has a close relationship with the EP for which it produces two types of reports, annual and special reports. The annual report summarizes the yearly activity of the EO while special reports are submitted in cases when recommendations in an investigation are not accepted by institutions. They require the EP to take appropriate action. The European Ombudsman places a great deal of importance on relations with the EP. During 2014, the Ombudsman met with over 50 MEPs across all main groups on a one-to-one basis on various issues of mutual concern.[1144]

[1142] European Ombudsman, Trilogues and transparent law-making - European Ombudsman - Opening Address, A speech on the International Right to Know Day, 28 September, 2015, online: <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/60991/html.bookmark>.

[1143] Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, 12 July 2016, online: <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/69213/html.bookmark>.

[1144] EO, "Annual Report 2014", supra note 1130 at 26.

In addition, the EO appreciates its relationship with the Commission, given its size in the EU administration and that it is the subject of the greatest number of complaints at the EO. The two institutions maintain monthly meetings at the director level regularly. In 2014, O'Reilly praised the new Commission for its efforts to improve the transparency of its work, especially in the context of lobbying transparency. Relationship building is now one of the Ombudsman's priorities at all levels of the Commission. During 2014, the Ombudsman met with several relevant Directors and Heads of Unit of the Commission.[1145]

Maintaining a good relationship with the main bodies in the EU, is one of the EO's strategies to influence a culture of good administration. This strategy includes upholding the values of transparency and ATD as critical for a healthy democracy in the EU. In this context, the EO has engaged in lobbying and law reform. The EO office lobbied for the inclusion of a commitment to transparency in the Charter of fundamental rights adopted in 2000.[1146] It is now a fact that the Charter guarantees a fundamental principal of openness and a public right of ATD. Moreover, the EO has provided leadership on ATD via the Code of Good Administrative Behaviour[1147] which is endorsed by the Parliament and supervised by the EO. The Code not only offers a guide to the EU institutions, but has also become a vital tool for citizens wishing to inform themselves of their rights[1148], including the right of ATD. Magnette argued that:

> In 2000, he pleaded his case in front of the members of the Convention in charge of drafting the Charter of Fundamental Rights… the code was incorporated in the Charter adopted at the Nice Summit in December 2000. In less than five years, the Ombudsman managed to codify the doctrine of good administrative behaviour and have it incorporated in a Charter which is the expression of the Union's fundamental values.[1149]

When the Commission announced the review of Regulation 1049, and proposed a draft for this purpose, the EO got involved. On 2 June 2008, the EO, Diamandouros, criticised the draft law and called upon the EP to defend the EU's commitment to transparency and the citizens' right of

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[1145] Ibid, at 27.
[1146] Harden, "Statement", supra note 441
[1147] The European Code of Good Administrative Behaviour (2001), online: <http://www.ombudsman.europa.eu/en/resources/code.faces>.
[1148] Ibid, at 2.
[1149] Magnette, supra note 1123 at 685.

ATD in the EU. He asserted that the overall effect of the proposed revisions would be that the Commission could share documents informally with a limited number of favoured external recipients of its choice, without having to give public access to them.[1150]

As this involvement shows, the EO, even though not an institution specifically designed to promote ATD and transparency, has influenced important developments of this right and principle in the EU. It has acted as an ATI advocate from its inception and continually supported its expansion through law and practice.

9.2.4 The case of Albania

The Commissioner of the Right to Information and Protection of Personal Data (CRIPPD) in Albania is a relatively young institution. Until the end of 2014 its role was occupied by the People's Advocate, which is the equivalent of the Ombudsman in the EU. When the new law on ATI[1151] came into force in October 2014, it gave the powers of the Information Commissioner to the Privacy Commissioner that already existed, merging the two bodies together. CRIPPD is similar in nature and scope with the IPCO – it handles both privacy and ATI and its decisions are binding. Both these powers were only introduced by the new law to strengthen its authority. In the past, the People's Advocate was a weak institution because of the limited legal remedies and the inherited culture of non-compliance of the Albanian institutions.[1152]

Although the time is short to evaluate the work of the CRIPPD, it seems that it is establishing a stronger position compared to the People's Advocate. In just two months, from November to December 2014 there have been 26 complaints to the CRIPPD. From those, only five have led to investigations, and only two have led to decisions where the authorities were required to provide the information requested.[1153] The other ones were solved amicably with the mediation of the CRIPPD. In 2015, there are 50 decisions published in the Commissioner's website pertaining to

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[1150] European Ombudsman, "Ombudsman warns that Citizens' Right of Access to Documents is at risk", European Ombudsman Press Release No.7 (2008), online: <http://ombudsman.europa.eu/release/en/2008-06-02.htm>.
[1151] Law No. 119/2014, On the right to Information.
[1152] Spahiu, "Government", supra note 230 at 125.
[1153] Komisionerit për të Drejtën e Informimit dhe Mbrojtjen e të Dhënave Personale, Raporti vjetor (The CRIPPD, Annual Report) 2014, at 6, online: <http://idp.al/images/autoriteti/Raporte_Vjetore/RAPORTI_VJETOR_2014.pdf> [CRIPPD, Annual Report].

complaints made by individuals and organizations. The decisions are scanned and posted on the website, with names erased to maintain confidentiality.[1154] These investigations have revealed that the ATI law in Albania is mostly disregarded by the public administration which avoids to fulfill the obligation under the law by dismissing requests for ATI by citizens.[1155] This situation has been the norm rather than the exception in Albania and it is inherited from the old law which provided no safeguards for the protection of the right of ATI in cases when information was denied.

The new law provides the CRIPPD with new powers which enhance its capacities to supervise the activities of the institutions in compliance with the ATI legislation. For instance, the law requires from the public authorities to implement institutional transparency programs, to determine the information categories to be made public without request, and the disclosure method of this information.[1156] CRIPPD approves and distributes the model transparency programs[1157] and supervises their implementation. In addition, public authorities are required to maintain public registers to document all ATI requests and their responses. The CRIPPD sets the standards on the format and the content of the register.[1158] Furthermore, the CRIPPD examines periodically, in collaboration with the Ministry of Finance, public fees/charges for ATI requests and, where appropriate, orders their amendment.[1159]

These powers make the CRIPPD an institution that has the potential to change the culture of non-compliance in the Albanian public administration. They give teeth to this oversight body, so it can be taken seriously by the public officials. However, the CRIPPD's success will depend heavily on the will of the political leadership in Albania. As I argued in Chapter seven, the implementation of the law, including the success of the oversight mechanisms depend on the will of the government. In the Albanian case this is even more problematic since the government controls all other institutions, including the courts.

[1154] Regjistri I kerkesave dhe pergjigjeve (the Register of requests and responses), online: <http://idp.al/index.php/sq/programi-i-transparences/regjistri-i-kerkesave>
[1155] CRIPPD, Annual Report, supra note 1153 at 6.
[1156] Law No. 119/2014, On the right to Information, Article 4.
[1157] Ibid, Article 6.
[1158] Ibid, Article 8.
[1159] Ibid, Article 13.

Comparing the oversight models in the EU and Canada with the CRIPPD, one can notice a big difference in terms of mandate and power. Not only the CRIPPD has order-making power, but its oversight extends to many activities of the institutions such as transparency programs, public registers and fees. The EO and the ICC do not possess such powers, and their success depends on the moral authority they succeed to establish their alliances with other institutions and the support from the public.

9.3 Comparisons and Conclusions

Both Canada and the EU have an independent oversight and enforcement bodies to ensure that public authorities comply with their duties in relation to transparency and ATI. Both of them are creatures of Parliament, and both have limited powers of recommendation, investigation and advice. While the ICC was created by the *ATIA* in 1982, in the EU, the creation of the EO originates at the Treaty of Maastricht in 1992, so it was prior than the introduction of the ATD legislation in the EU. The comparison between Canada and the EU shows that these institutions are very similar to each other. Although with limited powers they have engaged in many initiatives for ATI reforms. However, is seems like the EU Ombudsman has gained more moral grounds as an enforcement body.

The existence of an oversight body is important because it provides a channel for the citizens to understand the actions of government through investigations and inquiries. This process encourages the administration to explain to the citizens why it acts as it does and recognizing a possible right of appeal. In this context, the existence of an ombudsman also improves the general quality of government service by making officials prudent and avoid engaging in careless procedures. However, the four models examined above have achieved different levels of success in affecting government behaviour. The IPCO and the EO have been more successful, than the ICC and the CRIPPD.

In addition, oversight bodies intervene more frequently in transparency issues, acting as a "filter" to prevent the courts' overload, but also reducing the time for the citizens to process a request. Their mission is very different from a judicial one, they have extended powers of investigation and can conduct inquiries but cannot impose any legal obligation, unless they have

order-making power as it is the case in Ontario and Albania. The ICC and EO can only submit draft recommendations, sometimes accompanied with "remarks" or "reform proposals", to the institutions suspected of maladministration but is not empowered to impose sanctions. Notwithstanding, through their investigations they have produced general principles and precedents that could be employed by government and the courts. In the case of the EO, Magnette argued that through his "decisions", the EO has gradually established a "jurisprudence" based on a teleological philosophy of "good administrative practices" and even "good governance". Magnette explained that lack of power to make binding decisions may be a weakness, but may also be a source of diffuse power.[1160] Oversight bodies have the ultimate privilege of being able to conduct inquiries on their own initiative, contrary to the judges. Whereas Courts depend on cases brought to them to develop jurisprudence, oversight bodies are free to determine their own priorities.

Furthermore, oversight bodies help improve legislation. Through the careful selection of cases which they see as symbolically important, they establish themselves as a power of initiative and pressure in the continuous reform of the Canadian and the EU governance. In the name of transparency, which they are the guardian of, the oversight bodies empower themselves with the right to suggest procedural reforms which aim to increase citizens' participation in administrative procedures. The EO has been more successful in this regard since it has had the support of the EP. The involvement of Parliament in the investigation process is an interesting step which is not present in Canada, and provides the EO with much more potential that its voice will be heard. As such, the EP has become a strong ally of the EO. According to Magnette, the EO, "acting as a parliamentary organ, and with the strong support of the EP, …used his powers of inquiry and proposition to suggest wide-ranging reforms of European governance."[1161] This kind of support is not provided to the ICC, and it seems that it is fighting a lonely battle because of the lack of strong allies.

Table 39 below represents the models of the fours oversight bodies that I studied in this chapter.

[1160] Magnette, supra note 1123 at 682.
[1161] Ibid, at 690.

Table 39: Comparison of Oversight Models

	Canada	Ontario	EU	Albania
Model	Information Commissioner	Information and Privacy Commissioner	Ombudsman	Commissioner of the right to information and protection of personal data (CRIPPD)
mandate	-review complaints -investigate	-Review decisions -conduct research -advice on proposed legislation -public education	-uncover cases of maladministration -review complaints -conduct inquiries	-investigate complaints -review transparency programs -conduct inquires -public education
powers	recommendations	Order-making	recommendations	Order-making
Application fee	5$	10$ personal 25$ other info	Free	Free
Time of complaint	Within 60 days	within 30 days	3 calendar months	Within 30 business days
Complaints steps	To ICC first, than the Federal Court	To the IPCO first, than the Court	To EO or court after making a confirmatory application[1162]	To CRIPPD first, than the Court

[1162] It means that the persons to whom the request is denied, should apply to the institution asking for a review of the decision and reasons of rejection, before going to the EO.

CHAPTER 10: TRANSPARENCY AND ACCESS TO INFORMATION JURISPRUDENCE

Court's interpretation is critical in understanding how ATI laws are perceived, shaped and implemented, and how they are balanced against other rights and interests. The jurisprudence of the Supreme Court of Canada (SCC) and the Court of Justice of the EU (CJEU) will be explored to extrapolate on the nature and the value that the justice system assigns to the access laws. Some decisions from the Federal Court of Canada (FCC) and the European Court of Human Rights (ECtHR) will also be explored. These Courts' decisions complement the legal framework on ATI, they offer guidance to practitioners, and expand the legal understanding of the status of access rights.

The purpose of this Chapter is to shed light in the legal discourse and jurisprudence. Court interpretation is critical in understanding the design, the purpose and the objectives of ATI laws and how they come into play in practice. A case law analysis of ATI rights provides a better understanding of their status, and how a legislative scheme helps to define, frame, and value access rights. The case law of the two highest courts offers a fruitful insight into the legal and social debates around transparency and ATI.

The role of the courts in promoting human rights has always been very important. In the EU, courts have shown to be essential in transforming ATI into a fundamental human right. In Canada, access rights do not hold such status, and although the courts have not been very influential in changing that status, they have certainly enhanced it with an expansive interpretation of the rights.

10.1 Perspectives from the Canadian courts system

The tensions in the *ATIA* have been for several years facilitated by judicial interpretations. McCamus argued about the importance of judicial interpretation saying that "judicial review is the most attractive of the alternatives."[1163] Indeed, the case law is significant because it facilitates the work of practitioners and public officials by providing guidance on how to decide on

[1163] McCamus, at 55.

conflicting cases. As Kazmierski points out "ensuring that government officials properly exercise their discretion pursuant to access legislation also depends on the role of the judiciary."[1164] ATI has drawn a considerable amount of attention from both activists and citizens in Canada. Many cases have ended up in courts establishing an important body of jurisprudence that guides institutions in the application of the ATI legislation in everyday practice. In these cases access rights have been interpreted creatively and new dimensions have been explored. However, the courts have not been able to escape the legal restrictions that of the *ATIA.*

Although ATI is not a constitutional right in Canada, the SCC has recognized it as having a quasi-constitutional status. As Dickson C.J. noted in *Canada National Railway*, writing in the context of human rights legislation, a court's goal in interpreting quasi-constitutional statutes should be to preserve the impact of the right. The Court recognized that "in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact."[1165]

10.1.1 Access to information as a constitutional right

The quasi-constitutional status of access rights was upgraded in 2010 by *Criminal Lawyers' Association*[1166],a landmark case of the SCC in which the Court recognized a limited right to ATI held by public authorities as part of the freedom of expression of the Charter.[1167] The case was brought by the Criminal Lawyers' Liberties Association under Ontario's FIPA[1168] for documents held by the Ontario Provincial Police which were denied. The case was put forward as a constitutional claim and in turn, the Court recognized, for the first time that the right of ATI was a "derivative right" of the freedom of expression. This case has a meaningful significance since it provides a constitutional framework for access rights.

[1164] Kazmierski, supra note 655 at 51.
[1165] *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, at 1134 (emphasis added).
[1166] *Criminal Lawyers' Association*, supra note 970.
[1167] Section 2(b)
[1168] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

The question before the Court was whether the Constitution recognized an ATI right. The Court found that section 2(b) of the Charter protects a derivate right to ATI in certain circumstances. According to Kazmierski, this case rightly garnered much attention because it was the first decision in which a majority of the Court recognized that there was constitutional protection for the right to ATI.[1169] However, this protection did not apply in this case. The reason for this partial recognition was that s. 2(*b*) does not guarantee access to all documents in government hands. Instead, it guarantees freedom of expression. According to the Court "Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."[1170] The Court questioned the application of s. 2(b) in this case, and built on the methodology developed in previous cases. It used the framework set in *Irwin*[1171] which involved three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2 (*b*)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? Irwin established that to demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant could show this, there is a prima facie case for the production of the documents in question.

Considering the three level methodology in Irwin, the Supreme Court concluded that the requirements for considering ATI as part of the s. 2(b) were not satisfied. The main question was whether s. 2(*b*) was engaged at all. The court concluded that the scope of the s. 2(*b*) protection included a right to ATI only in limited cases "where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints."[1172] The derivative right of access ties directly to core democratic values. As the Supreme Court noted "access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society."[1173] The unanimous Court also stated there to be:

[1169] Kazmierski, supra note 655 at 54.
[1170] *Criminal Lawyers' Association*, supra note 970 at para 29.
[1171] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 967-68.
[1172] *Criminal Lawyers' Association*, supra note 970 at para 31.
[1173] Ibid, at para 1.

> A prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.… Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.[1174]

This position indicates that the Court values ATI as a right that contributes to the public debates on issues of governance. In addition, there is a link established between open government and public discussions on matters of public interest. ATI is part of this link and serves as a catalyst that facilitates the relationship transparency-public debate. While the access request in the case was not characterized as necessary to allow for meaningful discussion on a matter of public interest, it is significant because it recognized that an underlying derivative right potentially exists. Moreover, the Canadian Lawyers' Association disputed the Respondent Minister's contention that the requester's purpose in making a request is a relevant consideration in the exercise of his discretion to disclose records. Generally, requesters need not even explain why they are requesting the information to which they seek access. To the extent that the purpose is known, it should only be considered where it would be a factor in favour of disclosure. Such an approach is appropriate in light of the constitutional status of the right to ATI.

Although the *Canadian Lawyers' Association* case does not have a general application, it is still important because it is a reminder about the significance of an explicit public interest test that should be employed in any ATI case. The Court's ruling effectively required the public interest to be taken into account whenever public authorities are evaluating the applicability of discretionary exceptions.[1175] The only explicit public interest test included in the *ATIA* applies to the section 20, exception for third-party trade secrets. The scope of the public interest test was effectively extended by this case, which held that the public interest must be taken into account when deciding whether or not to apply discretionary exceptions[1176]. As a result, every discretionary exception within the *ATIA* is now deemed to contain at least some form of public

[1174] Ibid at para 36.
[1175] Ibid at para. 48.
[1176] Ibid.

interest test, albeit a weak one. However, the *ATIA* contains many exceptions which are not mandatory, and which therefore lack any form of public interest test.

10.1.2 Important cases from jurisprudence

A. Access to Information as important for democratic principles

In many cases the Supreme Court has described ATI as a pillar of our democracy, and as such very important for the principles of accountability and participation. In 1997, in *Dagg* Justice La Forest recognized that "The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry."[1177] In addition, Justice La Forest looked at ATI as a right of the citizens given by statute to exercise their responsibilities of citizenship more effectively. He stated: "Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view."[1178] This position demonstrates that the Court acknowledges a direct connection between ATI, knowledge, and participation. In this context, the access rights act as a premise for knowledge gain, and that in turn may contribute to using that expertise to participate in the decision-making process of public institutions.

More recently, in *Merck*[1179] the Supreme Court stated that ATI is important for accountability. It stated that "Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. 'Sunlight', as Louis Brandeis put it so well, 'is said to be the best of disinfectants'…"[1180] In addition, the Court emphasized it is important that "Citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public…. to facilitate one of the foundations of our society,

[1177] Dagg, supra note 630 at 432-433.
[1178] Ibid.
[1179] *Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 [Merck].
[1180] Ibid, at para 1

democracy."[1181] In *Merck* the Court engaged in a broader interpretation of the *ATIA* and advised that "legislation must be given a broad and purposive interpretation" by the courts.[1182]

In addition, as the Supreme Court noted in *Minister of National Defence*, when tasked with interpreting words not defined in ATI legislation, that courts must give such words a broad and liberal interpretation "in order to create a meaningful right of access to government information."[1183] This approach is in line with the guidance for interpretation of quasi-constitutional legislation put forward by this Court.

B. Exemptions and exceptions under the Access to Information Act

As explained in the previous chapters, there is a lot of debate regarding the coverage of the *ATIA,* which leaves out of its reach important public institutions, such as ministers' offices, Cabinet confidences, agents of Parliament, etc. Such issue is inherent in the Act, and many proposals are made to change its coverage, however without success. The collective decision-making process has traditionally been protected by the rule of confidentiality, which upholds the principle of collective responsibility and enables ministers to engage in full and free discussions necessary for the effective functioning of a Cabinet system. In 2011, in *Minister of National Defence*[1184] the Supreme Court determined that the offices of the Prime Minister, Ministers of the Crown, the RCMP and PCO are not institutions covered by the *ATIA.* A two-part test was devised by the Supreme Court to determine whether records are "under the control" of an institution and therefore accessible. The case arose out of complaints made to the Information Commissioner about refusals to provide information in response to a number of requests. The records requested were primarily agendas, notes and emails relating to these offices. The main focus was on the daily agendas of the Prime Minister Chretien. The Court held that the agenda of the former Prime Minister Jean Chrétien in the possession of the RCMP and the PCO were under the control of a "government institution". However, they were not subject to disclosure because section 19(1) of the *ATIA* prohibits the head of a government institution from releasing

[1181] Ibid, at para. 22.
[1182] Ibid, at para. 22.
[1183] *Minister of National Defence*, supra note 966 at para. 48.
[1184] Ibid.

any record that contains personal information as defined in s. 3 of the *Privacy Act.* Section 3(j) of the *Privacy Act* creates an exception by allowing for the disclosure of personal information where such information pertains to an individual who is or was an officer or employee of a government institution and where the information relates to the position or function of the individual. Nevertheless, the court found that this exception did not apply as the Prime Minister could not be viewed as an officer of a government institution.

The Canadian Civil Liberties Association intervened in these cases to argue for a large and liberal interpretation of the *ATIA,* emphasizing the quasi-constitutional nature the Act[1185] and asking the Court to recognize this status. The Supreme Court found that the meaning of "government institution" under the *ATIA* did not include ministerial offices and to expand the scope of the Act in this way was an issue for Parliament and not the courts.[1186] Indeed, the way the Act is designed leaves little room to the courts to interpret the access right beyond the exceptions threshold. The reasoning in this decision confirmed that the Courts can only go that far in the interpretation of the access laws in Canada. Justice Kelen, J. argued that: "The question for the Court is not whether the documents should be accessible to the public under Canada's 'freedom to information' law, but whether the documents are currently accessible to the public under Canada's existing law. The Court does not legislate or change the law; it interprets the existing law."[1187]

This ruling was preceded by ten years of legal battle going through five levels of courts, and every ruling was supported by each of the Prime Ministers of the day. The government and its ministries enjoy a special protection in terms of information they produce and how it becomes public. Other court cases in the past have supported this "special status" as something embedded in the law and political tradition in Canada. For instance, in the case *Canada (Attorney General) v. Canada (Information Commissioner)*, one of the 25 institutions in the case stated "Canada's form of democracy is responsible parliamentary government [and] public servants are not accountable to the public; public servants are accountable to their ministers and ministers are

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[1185] See Factum of the CCLA to the SCC in Canada (Information Commissioner) *v*. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306, 2010 at 3, online: <http://ccla.org/wordpress/wp-content/uploads/2010/09/2011-04-04-Factum-for-Web-Posting.pdf>.

[1186] *Minister of National Defence*, supra note 966 at para 13.

[1187] Ibid, at para 12.

accountable in the House."[1188] This position is a strong demonstration of the fact that the Canadian tradition requires government to conceal the discussions in its workings. This status gives the government the legal right under the *ATIA* to be excluded from its application. In this context, Rankin argued that "it is unlikely that case law will generate any judicial standards or guidelines for the application of these exemptions. The Court cannot simply substitute its view for that of the Minister as to whether the document is entitled to be released."[1189]

Cabinet confidentiality also enjoys special treatment in the *ATIA*, which has often become subject of judicial interpretation. The Supreme Court has sided with this special treatment in many cases. A leading case in this regard is *Babcock*[1190] where the Supreme Court recognized that Cabinet confidentiality is essential to good government because "The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly."[1191] The court explained that the British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The idea is to provide some space for government to thinks and discuss matters without public scrutiny, and that they express their ideas freely without swaying to their genuine positions. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. According to the Court, the process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition, to ensuring candour in Cabinet discussions, the Supreme Court recognized another important reason for protecting Cabinet documents, namely to avoid creating or fanning ill-informed or captious public or political criticism. Ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet

[1188] Canada (Attorney General) v. Canada (Information Commissioner), 2004-03-25, 2004 FC 431, at para 200.
[1189] Rankin, "The new ATIPA", supra note 278 at 32.
[1190] Babcock, supra note 496.
[1191] Ibid, at para 18.

deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.[1192]

To preserve the rule of confidentiality, section 69(1) of the *ATIA* provides that the Act does not apply to confidences of the Queen's Privy Council for Canada. This institution is responsible for issuing certificates that validate information as confidential. In *Babcock*, the Supreme Court noted that the Clerk of the Privy Council should determine two things for a certification: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality.[1193] The Court explained that sec. 39 of the *ATIA* permits the Clerk to certify information as confidential, so it does not restrain voluntary disclosure of confidential information if the Clerk decides to. The Court in *Babcock* also recognized that cabinet confidences must be subject to consideration of the public interest, and noted that "At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield."[1194] In cases when the public interest is not taken into account, under ss. 37 and 38, a judge balances the competing public interests in protection and disclosure of information, while under s. 39, by contrast, the Clerk or minister balances the competing interests. If the Clerk or minister validly certifies information as confidential, a judge or tribunal must refuse any application for disclosure, without examining the information.[1195]

Although the Supreme Court has recognized a public interest balancing test in cases of Cabinet confidences, it has also agreed that this common law balancing can be vitiated by clear legislative language.[1196] Nonetheless, the erosion of an absolute common law protection for Cabinet confidences demonstrates the importance of limiting the protection offered in other

[1192] Ibid, at para 18.
[1193] Ibid, at para 28.
[1194] Ibid, at para19.
[1195] Ibid, at para 17.
[1196] See *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at para 50.

contexts as well.[1197] This limitation offers a venue of access in cases where public interest is predominant. As such, it serves as an important tool in keeping the government accountable.

The ATIA also excludes draft legislation[1198] from the application of the Act. This provision relates to any drafts of legislation proposed by the Government. It is not relevant whether the legislation was ever introduced into the House of Commons or the Senate, it still remains a Cabinet confidence. Draft legislation remains a confidence even after the final version is introduced in the House of Commons or the Senate. In *Quinn*[1199], the Federal Court concluded that draft regulations examined by the Clerk of the Privy Council Office are excluded from the Act as such an examination is part of the regulatory process.

In a recent case, *John Doe*[1200] the Supreme Court interpreted and decided on an exception to Ontario's provincial access regime for "advice or recommendations" of a public servant. The Canadian Civil Liberties Association intervened in the case to argue that the "advice or recommendations" exception should be interpreted narrowly and records should not be shielded from disclosure. Shielding a broader range of records from disclosure hinders the rights of Canadians to have informed public debate and discussion about government policy choices. The Association also argued that the interpretation of the legislation should respect the values enshrined in the *Charter* and the global trend towards greater transparency in government. These arguments before the court opened up discussions about the amount of government information that are labelled as "policy option" and therefore inaccessible by the public. The negative decision of the Court demonstrates the justice's system inability to circumvent legislative provisions, and confirms advocates' concerns about a broken system that needs to be changed.

C. Solicitor-client privilege

Another exemption that may apply to the ATIA gives the head of a government institution who receives an access request the discretion to invoke the solicitor-client privilege.[1201] There

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[1197] "Bringing Canada's lagging information rights into the 21st century", Comments of the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic, January 31, 2013, at 10.
[1198] ATIA, section 69 (1)(f).
[1199] *Quinn v. Canada (Prime Minister)*, 2011 FC 379.
[1200] *John Doe*, supra note 965.
[1201] *ATIA*, supra note 587 s. 23.

are two types of decisions to be made in relation to s. 23, (1) a factual decision: Is the requested information subject to solicitor-client privilege?, (2) a discretionary decision: Should the information nevertheless be disclosed? This requires a balancing of the reasons for non-release of privileged information against reasonable factors in favour of release, followed by an exercise of discretion. For s. 23 to apply, the heads of institutions do not have to demonstrate prejudice, nor give reasons for the refusal to disclose. In *Blank*[1202], the Federal Court of Appeal indicated that the permissive nature of s. 23 reflects the fact that the solicitor-client privilege may be waived by or on behalf of the client. It can be assumed that, by asserting the solicitor-client privilege, the client or a party acting on the client's behalf has decided that waiver would not be in the public interest. There is no legal duty on the minister to expressly explain why the privilege is not being waived. However, the Court found that partial disclosure of information is allowed and "the disclosure of portions of the solicitors' accounts does not constitute waiver of solicitor-client privilege."[1203] In addition, the Court ruled that "Documents released to the applicant under the prosecution's disclosure obligations in the criminal proceedings do not lose their privileged character by that reason alone. Partial disclosure of a record does not render the entire record accessible."[1204] The reasoning is based on the severity principle in the ATIA which allows for partial disclosure of information. This principle becomes significant especially in circumstances when a piece of accessible information is to be found in a documents which is exempted from the application of the Act.

D. Time limits

As argued in the previous chapters, one of the major problems in the implementation of the Access to Information Act is the unlimited time extensions. The Act sets a limit of 30 days to respond to access requests, but also allows for an unlimited extension of that limit. This weakness in the Act has been used extensively by the federal institutions causing elongated delays. However, in *National Defence*, a fairly recent case of Federal Court of Appeal,[1205] dealt with the time limits set out in the Act. The case relates to a request that was made to National Defence on February 3, 2011 for records relating to the sale of certain military assets. National

[1202] *Canada (Justice) v. Blank*, 2007 FCA 87.
[1203] *Blank v. Canada (Minister of Justice)*, 2005 FC 1551, at para 38.
[1204] Ibid, at para 49.
[1205] See *Canada (Office of the Information Commissioner) v Canada (National Defence)*, 2015 FCA 56.

Defence advised the requester that it would extend the time limit by 1,110 days. With the requester's consent, the Commissioner applied for a declaration from the Federal Court that the Minister of National Defence had failed to give access to the records requested under the Act within the time limits set out in the Act and was, therefore, deemed to have refused to give access to the requested information. About one month before the hearing of the application, National Defence gave the requester access to the requested records. The Federal Court agreed to hear the matter even though the dispute had become moot. The Federal Court of Appeal held that the correct interpretation for time extensions was the construction offered by the Information Commissioner.[1206] A government institution may avail itself of the power to extend the time to respond to an access request, as provided by section 9 of the Act, but only when the required conditions are met. The Court added: "One such condition is that the period taken be reasonable when regard is had to the circumstances set out in paragraph 9(1)(a) and/or 9(1)(b). If this condition is not satisfied, the time is not validly extended with the result that the 30-day time limit imposed by operation of section 7 remains the applicable limit."[1207] The Court concluded that "a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken."[1208] The decision sets standards to institutions in terms of how they must justify the use and length of extensions. The case is expected to have a positive impact on timeliness and access rights.

E. Personal information: individuals vs corporations

Chapter six has made a detailed analysis of the relationship between privacy and ATI, emphasizing that privacy is one of common reasons used by the government for denying information, as a mandatory exception under the *ATIA*. Courts have interpreted access and privacy provisions to improve the institutions' ability to deal with various cases. Considering the nature of the cases that have made their way up to the justice system, Onyshko argues "The court's interpretation of the definition (of personal privacy) has been the deciding factor in most personal information cases. In general, the cases consider two separate but related issues: whether information falls within the definition and whether personal information falls within one

[1206] Ibid, at para 71.
[1207] Ibid, at para 72.
[1208] Ibid, at para 73.

of the definition's exclusions."[1209] Indeed, most of the time cases before courts deal with uncertainty of whether information is private or public and whether it is exempted or not.

Section 19 of the *ATIA* provides that information about an "identifiable individual" constitutes personal information as regards to an individual human being, not a corporate entity. A corporation would therefore not qualify as an identifiable individual, and s. 19 could not be applied to exempt information about a corporation. However, in *Janssen-Ortho Inc*[1210] the Federal Court of Appeal ruled that the names of employees of a corporation (who are identifiable individuals) qualified as personal information. The exemption applied because none of the employees consented to the release of their names or to the disclosure that they were employed by the corporation. Similar decision was made in *SNC Lavalin*[1211] where the Federal Court of Appeal ruled that the views or opinions of employees while acting as representatives of a corporation also qualify as personal information.

In another case, *Minister of Citizenship and Immigration*[1212] the Federal Court of Appeal ruled that the same information can be "personal" to more than one individual. In this case, employees had made statements about their manager during interviews in the context of a workplace assessment. The Court said that the names of persons interviewed were the personal information of both the interviewees and the manager. After balancing the private interests of the interviewees, the private interests of the manager and the public interest in disclosure and non-disclosure, the Court determined that the manager's interest in the information should prevail - the manager had a right to know under the *ATIA* both what was said about him and who said it.

In *Heinz*[1213], the Supreme Court decided to grant the personal privacy exemptions to third parties (Heinz) by engaging in a broader interpretation of "personal information", as an

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[1209] Onyshko, "The FC & ATIA", supra note 244 at107.
[1210] *Canada (Health) v. Janssen-Ortho Inc*., 2007 FCA 252 [Jansen-Ortho].
[1211] *SNC Lavalin Inc. v. Canada (Canadian International Development Agency),* 2007 FCA 397 [SNC Lavalin].
[1212] *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration),* 2002 FCA 270.
[1213] *Heinz*, supra note 1034. In Heinz, a request for information was made to the CFIA[1213]. CFIA advised the third party, Heinz, of its intention to disclose information requested pursuant to section 27[1213] of the *ATIA*, and after receiving representations from Heinz, informed Heinz of its intention to disclose requested records, subject to certain redactions. Heinz applied for judicial review of this decision pursuant to section 44[1213] of the *ATIA*. The issue here is whether a third party, may raise an exemption within the context of section 44. The court determined that a third party may raise the "personal information" exemption in the context of a proceeding commenced under section

exemption found in s.19 of the *ATIA.* The Court decided that this information included businesses information as well. The Court reestablished that where there is a conflict between the right to privacy (of Heinz) and the right of access (of the requester), it is the right to privacy which takes precedence over access. In its analysis, the Court emphasized several times that "the protection of the privacy of individuals is paramount over the right of access."[1214] The Court's reasoning of the case is based on a careful analysis of balancing the two rights while taking a modern approach: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[1215]

The Supreme Court has left an important trail of judicial decisions regarding personal information of individual persons. In two landmark decisions, *Dagg*[1216] and the *RCMP*[1217], the Court extensively engaged in an analysis of what constitutes "personal information". In both cases, the Court first examined whether the information requested was personal, and second, whether it fell under the exemptions of s. 3 of the *Privacy Act*. In Dagg, Michael Dagg[1218], the appellant[1219], filed a request with the Department of Finance for copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. The issue here was whether the information in the logs constituted "personal information" within the meaning of s. 3 of the *Privacy Act,* and whether the Minister failed to exercise his discretion properly in refusing to disclose the requested information pursuant to section 19(2)(*c*) of the *ATIA* and s. 8(2)(*m*)(i) of the *Privacy Act*. The appeal was allowed, but with a narrow split, five to four. Justice Cory J. argued that the requested information was related to the "responsibilities of the position held by the individual" and fell under the specific exception set out at s. 3(*j*)(iii) of the *Privacy Act*. In this case, since the information was related to the position, not to the individual, the majority of the Court decided that it is not personal

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44 of the *ATIA*. As a result the appeal brought by the Attorney General for disclosure of the information was dismissed.

[1214] *Heinz*, supra note 1034 at para 2. The same emphasis on privacy is noticed in paras 26, 29 and 31.

[1215] Ibid at para 21.

[1216] *Dagg*, supra note 630.

[1217] *RCMP*, supra note 656.

[1218] Note that Michael Dagg is a professional ATI consultant.

[1219] The appellant intended to present this information to the union for the collective bargaining process purposes. The Minister of Finance, the respondent, disclosed the relevant logs but deleted all the other information requested on the ground that it constituted personal information.

information and should be released. For the determination of what constitutes "personal information" the court engaged in a process of balancing the competing values of access and privacy going through several steps.

First, it analyzed the meaning of "personal information". Justice La Forest accepted that "Privacy is a broad and somewhat evanescent concept."[1220] For this reason he looked at the "reasonable expectation of privacy"[1221] and concluded that the expectation applied in this case. Second, the Court recognized the value of access stating that "The overarching purpose of access to information legislation …is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."[1222] Third, the court emphasized that privacy is paramount over access, encompassed by the definition of "personal information" in s.3 of the *Privacy Act*. La Forest mentioned that when the Bill (C-43) was introduced for third reading in 1982, the Minister of Communications made the following comments: "the principle that the right to privacy takes precedence over the general right of access has been clearly recognized."[1223] and thus "Parliament did not intend access to be given preeminence over privacy."[1224]

The analysis made in *Dagg* demonstrated that deciding on cases where access and privacy rights come into conflict is a very complex and challenging process. The case reveals that concerns of conceptualization of privacy have played a significant role in the aggravation of this complexity. Justice La Forest admitted that one of the main challenges for the Court was the broad definition of privacy.[1225] The fact that the split of Justices in *Dagg* was very narrow exhibits uncertainty on the issues. This is observed by Onyshko who argued that "a basic problem in the access jurisprudence is that judges adopt conflicting positions without

[1220] *Dagg*, supra note 630 at para 67.
[1221] Ibid, at paras 71-72.
[1222] Ibid at para 61.
[1223] Ibid at para 50.
[1224] Ibid at para 51.
[1225] Ibid at para 67.

distinguishing relevant case law."[1226] Indeed, the Justices in *Dagg* take different approaches even when they use the same legal sources.

Similarly, in *RCMP*[1227], the Court examined whether the information requested constituted "personal information" as defined in s. 3 of the *Privacy Act*, and whether the information fell within the exception set out in section 3(*j*) of the *Privacy Act*.[1228] The Court agreed that the information requested fell within the definition of "personal information". The next step was whether it was also encompassed by one of the specific, non-exhaustive examples set out in paragraphs (*a*) to (*i*) of s. 3 of the Act. The Court agreed that, although this was indeed personal information, it was associated with the general characteristics of a federal employee position, and it was, in effect, information about the position, not about the person. The Court was able to draw a line between government employee information which may be accessed by the public on the one side (which relates to the general characteristics associated with the position or function), and employee information which should be withheld in the interests of privacy on the other side (which relates to the competence or characteristics of an individual employee.[1229]) The analysis in the *RCMP* validates that distinguishing when information is public or private is not a matter of choosing between black and white, but instead, choosing between different tones of grey. It involves an extensive analysis, which in my view, only a court is capable of conducting. Because the information of the four RCMP officers in this case is considered both private (it belongs to the officers) and public (has a public interest as officers are public employees), concealing or disclosing that information had to go through a careful, detailed examination.

Some of the cases in the Canadian jurisprudence reveal that the legislative weaknesses of a system cannot be addressed through judicial battles. However, they also demonstrate the

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[1226] Onyshko, "The FC & ATIA", supra note 244 at 142.

[1227] The case involves an individual who requested certain information from the RCMP pertaining to four of its officers. The RCMP refused to disclose the information on the grounds that the records contained "personal information", as defined by section 3 of the *Privacy Act*. The case went to the ICC, Federal Court and the Court of Appeal, all of which held that the request is not "personal information" and must be released. The appeal in the Supreme Court was also allowed.

[1228] *RCMP*, supra note 656 at para 12.

[1229] Ibid at para 39. The list of the RCMP members' historical postings, their status and date; (2) the list of ranks, and the dates they achieved those ranks; (3) their years of service; and (4) their anniversary dates of service, are all elements that relate to the general characteristics associated with the position or functions of an RCMP member.

potential of the courts to protect and enhance ATI rights in cases of accountability, conformity with democratic principles, exemptions and exceptions, privacy, confidentiality and time limits.

10.2 Perspectives from the European Union courts

10.2.1 The Court of Justice of the European Union (CJEU)

The CJEU is the court of the EU and interprets the EU legislation. The Court has established numerous principles of European administrative law that have significantly transformed operational concepts and methods in European public administration. The Court has played an important role as a force for openness. The Court's judgments have helped to entrench the right access to documents (ATD) in popular consciousness. It has consistently applied a presumption of openness in disputes about the interpretation of EU policies on ATD.[1230] Curtin has called the process of acknowledging the right of ATD as a basic democratic right as a "creeping constitutionalization"[1231] of this right.

Three years before the adoption of the Amsterdam Treaty, Advocate-General Giuseppe Tesauro argued that the Court should acknowledge that the right to information was implied in the terms of the Treaty on European Union.[1232] The opinion of Advocate-General Phillipe Leger also pushed for a stronger protection for the right to ATD.[1233] The decisions of the Court served as precursors to the Regulation 1049. For instance, in *Huatala*[1234], the Court found that the Council had erred on not conferring the information to the Member of Parliament Huatala. However, the case recognized only a limited right to ATD as the Court avoided ruling on a "breach of the fundamental principle" of Community law that citizens of the EU must be given the widest and fullest possible ATD of the Community institutions.[1235] After the entering into force of Regulation 1049, its broad definitions and provisions required the engagement of the CJEU to clarify many legal ambiguities in the general phrasing of Regulation, which according

[1230] Roberts, "Multilateral Institutions, supra note 365 at 273.
[1231] Deirdre Curtin, "Transparency and political participation in EU governance", (1999) 3 Cultural values, 445-72 [Curtin, "Transparency"].
[1232] Case C-58/94, Netherlands v Council [1995] ECR-I-2169, Opinion of Advocate-General Tesauro, at para 19.
[1233] Case C-353/99 P, Hautala v Council, unreported, 6 December 2001, Opinion of Advocate-General Leger.
[1234] Case C-353/99 P, Council of the European Union v. Heidi Hautala, Judgment of the European Court of Justice of 6 December 2001 (dismissing an appeal where the Council wrongly refused to consider partial ATD) [Hautala].
[1235] *Ibid.*

to Curtin "heralded a period of relatively intensive litigation, enhancing in this area the phenomenon of 'judge-made law'."[1236] It is important to note that the Court practice to date demonstrates that it interprets the right of access very broadly, with very few exceptions.

There are a number of cases from the CJEU jurisprudence that have made history for transforming ATD in meaningful ways. Some cases stand out in this regards.

A. Accountability of Institutions

In the landmark case *Access Info*[1237], Acces Info Europe submitted a request to the Council for a copy of the report which contained information on the Member States' reactions to the Commission's proposal for the reform of Regulation 1049. The Council only granted Access Info partial ATD by providing the content of discussions, but erasing the names of the states making proposals. Access Info appealed the case to the CJEU to clarify the obligation for transparency on the EU isntitutions in the course of a legislative procedure.

The CJEU emphasized that Regulation 1049 echoed the intention of Article 1(2) TEU for creating an ever closer union in which decisions were taken as openly as possible and as closely as possible to the citizen. Hence, the Court held that the right of ATD was related to the democratic nature of the European institutions. Although the Court recognized that this right is subject to certain limitations (such as information in the course of a legislative procedure), these limitations should be interpreted and applied strictly. The Court found that if the Council decided to refuse the request of Access Info, it should have satisfied two conditions. First, explain how disclosure could undermine the interest protected by the exception upon which it was relying (in this case Article 4(3) of the Regulation). Second, the risk of the interest being undermined should have been reasonably foreseeable and not purely hypothetical. The Court carefully balanced the

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[1236] Deindre Curtin, "The Role of Judge-made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence', in E. Spaventa et al. eds, Empowerment and Disempowerment of the EU Citizen (Hart Publishing, 2012), at 101 [Curtin, "Judge-made Law]; D. Adamski, "How Wide Is "the Widest Possible"? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited", (2009) 46 Common Market Law Review 521 [Adamski, "How Wide"].

[1237] Note that there are two cases here- case T-233/09 was before the General Court and then it was appealed to the CJEU. The appealed case is C-280/11 P, Council of the European Union v Access Info Europe. The case is not published yet in the European Court Reports. For reference see: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11> [Access Info Europe].

principle of transparency with the preservation of the effectiveness of the Council's decision-making process. It reiterated that the protection of effectiveness of the Council was not enough to justify refusing ATD. Instead, the Council should have explained how ATD requested by Access Info undermined its decision-making. The Council was not entitled to automatically refuse access by relying on a presumption based on the considerations concerning the need to protect the delegation's room for manœuvre during preliminary discussions of the Commission's legislative proposal.

Access Info Europe is a landmark case that puts ongoing legislative proposals under public scrutiny. The case becomes even more significant considering that the documents requested aimed to disclose information regarding important changes of the EU Regulation on ATD. These changes had the potential to affect the citizens' rights of access and weaken the accountability of EU institutions. Hence, the case sets an important precedent because it demonstrates the power of using the right of ATD in holding European institutions accountable even in ongoing conversations during the course of a legislative procedure, which falls under the exemptions of the Regulation 1049. The case will certainly affect issues of accountability and democratic nature of the EU representatives.[1238]

B. Member states right of veto

The CJEU has offered excellent guidance to the institutions by deciding on cases that deal with information that comes from the Member States, but are on the possession of the Union institutions and are requested on the basis of Regulation 1049. One of such cases is *Kingdom of Sweden,*[1239] a leading case, because it sets new rules for the Member States regarding their ATD regime. The case establishes that Member States do not have a right of veto over their documents. It is up to the institution to have the final say on whether or not the document will be released as they are the ones that are legally liable for that decision before the Court. The Member State must explain how and why that document is covered by one of the exceptions found in Regulation 1049 and they cannot simply refer to their national law on ATI. The Court

[1238] Spahiu, "Courts", supra note 987 at 10.
[1239] Case C-64/05 P Kingdom of Sweden v Commission of the European Communities and Others [2007] ECR I – 11389 [Kingdom of Sweden].

acknowledged that Member States do not have "an unconditional right of veto", but they can object to the disclosure of documents, only if it gives proper reasons grounded on the exceptions set out in the Regulation.

This case sets new grounds for the relations between Member States rules and the EU rules of ATD. Concerning Member State documents in the possession of the EU institutions, the CJEU has restricted the Member State's discretion in rejecting their disclosure. The Member State is mandated to give reasons for its refusal, and, more essentially, these reasons should be able to fall under the exceptions outlined in Article 4(1)-(3) of the Regulation 1049 or relate to the specific protection accorded to sensitive documents.[1240]

In another case before the European Court, IFAW Internationaler Tierschutz-Fonds GmbH, a German animal rights' NGO asked the Commission for access to certain documents which the Commission had received from Germany. The request asked for documents regarding a procedure in which the Commission gave an opinion favorable to the carrying out of an industrial project. The Commission refused its request and the case went to the Court of First Instance which ruled[1241] that the Commission had acted properly since the German authorities were opposed to the disclosure of those documents under Article 4(5) of Regulation 1049. The case then went to the CJEU (appealed by Sweden[1242]) which decided that the Court of First Instance has erred at looking at s. 4(5) of Regulation 1049 as conferring on Member States a right of absolute veto, without the need to state any reasons, on the disclosure of documents originating from it.[1243] This case epitomises "new grounds for the relations between Member States rules and the EU rules of access to documents."[1244]

[1240] Art 9, Reg 1049, supra note 64.
[1241] Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission of the European Communities* [2004], ECR II-04135 [IFAW].
[1242] Kingdom of Sweden, supra note 1239.
[1243] Ibid, at para 4(15). It says: "Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions."'
[1244] Spahiu, "Courts", supra note 990 at 12.

C. International Relations

In In 't Veld[1245], the CJEU instructed the European Commission to be more transparent about negotiations of the TTIP (Transatlantic Trade and Investment Partnership[1246]). The case engaged a Member of the European Parliament, Sophie in't Veld who asked from the Commission ATD regarding the TTIP. The Commission rejected the access reasoning that it will affect ongoing trade negotiations and hence international relations.

In this case, the Court indicated that ATD related to international agreements should be ensured, unless it would undermine the conduct of negotiations. Although the Court did not impose disclosure as the rule, it set out a certain number of conditions which must be met for the documents to remain undisclosed. First, the risk for negotiations should be specific and foreseeable. Hypothetical concerns about the possible impact of transparency on the negotiating power of the EU will not suffice to refuse ATD. The EU institutions will now have to provide clear reasons and explain to the general public why denial of access to negotiating documents will harm the position of the EU. The CJEU recognized that invoking the mere existence of a threat to the EU's interests in the field of international relations does not in itself satisfy the requirement. Second, the European Commission will need to make an assessment between the public interest in ATD and the need to protect the international relations of the EU. In making this assessment, the Commission will also have to consider the advantages of increased openness, including the possibility for EU citizens to participate more closely in the decision-making process and to guarantee that the administration enjoys greater legitimacy. Third, any exception to the general principle of ATD must be interpreted and applied strictly. Regulation 1049 requires a right to ATD as wide as possible, hence any restriction must be exceptional and duly justified.

Although the CJEU has played a significant role in the interpretation of the right of ATD in the EU, another court has also made a meaningful contribution to the concepts of access and transparency as principles guiding the European Human Rights legislation. This is the European

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[1245] Council of the European Union v Sophie in 't Veld, C-350/12P, 3 July 2014 (case not published yet), online: <http://www.alde.eu/uploads/media/judgment_03072014.pdf>.

[1246] European Commission, Transatlantic Trade and Investment Partnership, online: <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

Court of Human Rights (ECtHR) which, although it is not a EU Court, it is important to ensure respect for the rights and freedoms guaranteed in the European Charter of Rights and Freedoms.

10.2.2 The contribution of the European Court of Human Rights

This Court has gradually developed an expansive reading of the Article 10 of the Convention of Human Rights. According to McDonagh, the path to recognition by the ECtHR of a right to information as part of the right to freedom of expression has been long and tortuous.[1247] Initially, it held that the freedom to receive information as guaranteed by Article 10 could not be construed as imposing on a state positive obligation to disseminate information or to disclose information to the public. Article 10(1) of the European Convention on Human Rights provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The conventional view was that the right to receive information under Article 10 did not entail a corresponding right of access to official information. This was the case for instance in *Leander*[1248] where the applicant sought confidential government information so he could bring a claim arising out of an unsuccessful job application. This case was unsuccessful.

However, in subsequent decisions, the ECtHR recognized that there can be a right to ATI. Initially, this was done by reference to Article 8 of the Convention through means of personal information as in *Gaskin*[1249] or *McGinley and Egan*[1250]. Most recently, in *Haralambie*[1251] the Court reiterated the vital interest for individuals who were the subject of personal files held by the public authorities to be able to have access to them. The Court emphasized that the authorities had a duty to provide an effective procedure for obtaining access to such information and that their failure to provide for an effective and accessible procedure to enable the applicant

[1247] Maeve McDonagh, "The Right to Information in International Human Rights Law", (2013) 13:1 Human Rights Law Review at 34 [McDonagh].
[1248] *Leander v Sweden,* Merits, App no 9248/81, A/116, (1987) 9 EHRR 433, IHRL 69 (ECHR 1987) [Leander].
[1249] *Gaskin v United Kingdom*, Merits and Just Satisfaction, App No 10454/83, Case No 2/1988/146/200, A/160, [1989] ECHR 13 [Gaskin].
[1250] *McGinley and Egan v United Kingdom,* [1998] ECHR 51, 23414/94, 21825/93 [McGinley and Egan].
[1251] *Haralambie v Romania,* App no 21737/03, ECHR 21 January 2010 [Haralambie].

to obtain access to his personal security files within a reasonable time constituted a violation of Article 8 of the Convention.

In the recent case law, however, a different approach has emerged. The Court began to accept that the refusal to give access to administrative documents is to be considered as interference in the applicant's right to receive information. Therefore, Article 10 of the Convention may imply a right of ATD held by public bodies. This right was confirmed in *Társaság*[1252] where the Court recognized for the first time that it had "recently advanced towards a broader interpretation of the notion of 'freedom to receive information' …and thereby towards the recognition of a right of access to information."[1253] In addition, the Court acknowledged that ATD is essential for civil society to play its "social watchdog" role and that states have an obligation to eliminate barriers to access information where "such barriers exist solely because of an information monopoly held by the authorities."[1254]Article 10 was central to the Court's reasoning in this case where the Court found a violation of this Article when the Hungarian domestic courts had refused access to a complaint which sought constitutional scrutiny of certain amendments to the Hungarian Criminal Code. The decision of the Hungarian courts denying access to the details of a parliamentarian's complaint pending before the Constitutional Court had amounted to a breach of the right to have ATI of public interest[1255]. The Court characterized the applicant, a Hungarian NGO, as a "watch dog" which status warrants Convention protection[1256]. It concluded that obstacles created in order to hinder ATI of public interest might discourage the media and other public interest organizations from pursuing their vital role as "public watchdogs".

In later cases, the ECtHR established that Article 10 of the Convention includes a right of ATD as part of the freedom of expression. For instance, in its judgment in *Youth Initiative for Human Rights*[1257], the Court recognised more explicitly than ever before the right of ATD held by public authorities, based on Article 10 of the Convention. The judgment emphasized the role of NGOs protecting the public interest. The Court reiterated in robust terms that "when a non-

[1252] *Társaság*, supra note 975.
[1253] Ibid, at para 35.
[1254] Darbishire 2010, at 12.
[1255] *Társaság*, supra note 975 *a*t para 3.
[1256] Ibid, at para 27.
[1257] *Youth Initiative*, supra note 978.

governmental organisation is involved in matters of public interest…., it is exercising a role as a public watchdog of similar importance to that of the press."[1258] The applicant, a Serbian NGO, requested the Serbian Intelligence Agency to provide some factual information concerning the use of electronic surveillance measures by that agency in 2005. The agency first refused the request, relying thereby on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue be nevertheless disclosed under the Serbian Freedom of Information Act 2004[1259], the Intelligence Agency notified the applicant that it did not hold that information. Youth Initiative for Human Rights complained to the Court, under Articles 6 and 10 of the Convention, about the refusal of access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour. The ECtHR engaged in an interpretative exercise of the right of ATD, and argued that "the notion of 'freedom to receive information' embraces a right of access to information."[1260] The decision urged the Serbian Surveillance Agency to release the information requested.

In OVESSG, the Court was especially supportive for requests by journalists and NGOs to have ATD.[1261] The judgment recognized the role of information and the NGOs in society and echoed previous decisions when stated that 'the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs"'[1262]. The applicant in this case, OVESSG - an Environmental Austrian Association - aimed to research the impact of transfers of ownership of agricultural and forest land on society in order to give opinions on draft laws. In 2005, the Association twice requested to have access to the decisions of the Tyrol Real Property Transaction Commission, which is

[1258] Ibid, at para 20.
[1259] *Law on Free Access to Information of Public Importance*, Official Gazette of the Republic of Serbia, No. 120/04, 54/07, 104/09 and 36/10.
[1260] *Youth Initiative*, supra note 978 at para 20.
[1261] Dirk Voorhoof & Rónán Ó Fathaigh, "The press and NGOs' right of access to official documents under strict scrutiny of the European Court of Human Rights", Strasbourg Observers, December 3, 2013, online: <http://strasbourgobservers.com/2013/12/03/the-press-and-ngos-right-of-access-to-official-documents-under-strict-scrutiny-of-the-european-court-of-human-rights-2/> [Voorhoof & Ó Fathaigh].
[1262] *OVESSG*, supra note 981 at para 34.

responsible for approving agricultural and forest land transactions. The Association only requested decisions issued over a certain period of time in anonymized form, and indicated that it would reimburse the resulting costs. The requests were refused on the ground that they did not fall within the scope of the *Tyrol Access to Information Act*. Moreover, even if the request did fall within its scope, pursuant to the Act an authority did not have the duty to provide the requested information if doing so would require so many resources that would affect its functioning, and would jeopardise the fulfilment of the Commission's other tasks. The applicant's complaints to the Austrian Administrative Court and the Constitutional Court were rejected. The OVESSG complained in the ECtHR about a violation of its right to receive information, guaranteed by Article 10 of the Convention. The Court emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the public, and society's "watchdogs". NGOs are characterized with such an important status, since they are involved in the legitimate gathering of information of public interest[1263] and therefore, their activities warrant similar Convention protection to that afforded to the press.[1264]

The recognition of a human right to ATD by the ECtHR is significant because it has created a body of case-law on the right to ATD as being enshrined in the Convention of Human Rights. This line of reasoning of the Court has extended the recognition of the freedom of expression, as including a right of ATD. Through an interpretative exercise the Court has gradually accommodated an access right under Article 10 of the Convention, and as such has enriched the European legal framework. This framework has influenced the developments of jurisprudence of the CJEU and the activism of the NGOs in the area of transparency and ATI. The ECtHR has distinguished the civil society's important contribution to the discussion of public affairs.[1265]

10.3 Comparisons and conclusions

The role of the courts in transparency and ATI is important in two ways. First, courts are critical in protecting citizens' rights of access and serving as a remedy against any abuse of such

[1263] OVESSG, supra note 981 at para 36.
[1264] Ibid, at para 34.
[1265] Voorhoof & Ó Fathaigh, supra note 1261.

rights by the government. Second, the role of the courts becomes exceptional when they act as reformers in transforming access rights from a statutory right into a fundamental right.

The first role of the courts relates to the traditional way courts make justice - courts are considered to be mechanisms that uphold the rule of law and resolve disputes. In this role, the courts interpret the laws written by the legislature. A more creative role of the court is when they create law through an interpretative exercise. This is particularly true in a common law system such as Canada, where case law constitutes a source of law. But even in most European countries where most of the legislation is codified, courts play a significant role. The fact that the public's right to know amounts to a fundamental right in EU law, and it is considered a quasi-constitutional right in the Canadian law is, in part, attributed to the courts. This role makes the judiciary a very powerful institution which protects citizens when all other measures have failed. In any case, whether cases are won or not, the public can benefit from the very nature of legal proceedings for they allow for scrutiny of public policies and practices. In this context, litigation can be used to obtain practical advantages on transparency, raising public consciousness of the merits of a case and building up political pressure in support of it. According to Article 19, litigation has an added value since it can attempt to reassert constitutional priorities and to maintain and influence policy formulation when other channels of communication are being closed.[1266]

The examples from the EU and Canada show that courts have the potential not only to safeguard citizens' rights but also to raise the status of transparency and ATI to a higher level. In the EU, the Court of Justice (CJEU) has retained a significant role in the interpretation of the right of ATD, and the Court of Human Rights (ECtHR) has made a meaningful contribution to the concepts of access and transparency as principles guiding the European human rights legislation. According to Birkinshaw, "the case law of the EU courts has been supportive of transparency and openness and there have been some very important decisions."[1267]

[1266] Article 19 and ADC, "Access to Information: An instrumental Right for Empowerment", July 2007, at 25.
[1267] Birkinshaw, "FOI & UK", supra note 797 at 319.

When looking at the European way of judicial interpretation of the right of ATD, the Canadian courts can take an example. But, how can the Canadian judiciary act in a creative way to raise the access rights to a constitutional level, when the law limits to a certain extent the power of the courts to intervene? As some of the judgments have acknowledged, the intervention asked from the courts is better suited for the legislature. The reasoning in some of the Supreme Court's decisions confirm that the courts can only go that far in the interpretation of the access laws in Canada. In *Minister of National Defence*, Justice Kelen, J. argued that the Supreme Court is often faced with the reality that some documents are not currently accessible under the existing law, which makes the question "should they be?" invalid. He emphasizes that the Court does not legislate or change the law; it interprets the existing law[1268]. However, the Supreme Court experience has demonstrated that in many cases the Court has engaged with questions of how the law should be, not just how it is.

There is a remedy invoked in some cases by the Supreme Court - the "reading in". This remedy has been very controversial among lawyers and scholars because of the significant power it gives to the Supreme Court to change the Charter and control legislature by creating its own constitutional provisions. Many scholars argue that the "reading in" marks a dramatic shift in the once clear delineation of the separation of powers in the Canadian constitutional democracy. It also signals a dramatic shift away from the traditional principle of judicial deference. The power to "read in" is relatively new in the Canadian jurisprudence, having been enunciated for the first time by the Supreme Court of Canada in 1992 in *Schachter*[1269], and then used in *Vriend*[1270] in 1998. The question for this research is whether the Supreme Court can read-in at the Canadian Charter of Rights and interpret any of its provisions as including a right of ATI. The Court has already found a right of ATI under s. 2(b) freedom of expression of the Charter, but that provision has limited application. The Court can push further in this provision to accommodate access rights.

[1268] *Minister of National Defence, supra note 966* at para 12.
[1269] *Schachter v Canada,* [1992] 2 SCR 679.
[1270] *Vriend v Alberta,* [1998] 1 SCR 493.

The power of "reading in" is an exception for the Court rather than the rule because the responsibility of enacting legislation that accords with the rights guaranteed by the Charter rests with the legislature. The rule is that except in the clearest of cases, the court should not dictate how the under inclusive legislation must be amended. However, it is apparent that even if the ATIA is reformed fundamentally, access rights will still remain at the statutory level, and will not be shaped by the government of the day, as Chapter 7 demonstrates. In addition, as the practice of the Supreme Court indicates the traditional notion of restricting the "reading in" remedy to the "clearest of cases" is no longer the threshold for intruding into the legislative sphere. Despite of the controversy around the "reading in" power of the Supreme Court its jurisprudence has shown many examples when the use of this power has made significant changes (as in *Schacter* and *Vriend*) . Especially in the Canadian context, making use of the "reading in" power could be the only way to raise the right of ATI at the status of a constitutional right. Considering that Canadian federalism hinders any constitutional amendment that requires provincial consent, the process of reading-in the Charter takes essential importance.

PART IV

THE VALUE OF TRANSPARENCY AND ACCESS TO INFORMATION

CHAPTER 11: DEVELOPING A TYPOLOGY OF INFORMATION, MODELS OF TRANSPARENCY AND A PERSPECTIVE OF ACESS TO INFORMATION AS A HUMAN RIGHT

This chapter reflects on the issues surrounding transparency and ATI in the jurisdictions of study. It develops a typology of information access and a typology of information delivery. The chapter explains transparency as a process taking place in three jurisdictions (Canada, the EU and Albania) drawing from experiences in these jurisdictions, and develops three models of transparency. In addition, the chapter introduces new definitions for transparency and the right of ATI based on the typology of information. Furthermore, the chapter advances a perspective of ATI as a human right based on the Habermas's discursive theory of law and Pateman's democratic participation theory.

The purpose of the chapter is to make a case for the recognition of ATI as a constitutional right in Canada drawing from the EU experience and international advancements in transparency and access rights.

11.1 Developing a typology of information and models of transparency

11.1.1 Challenges and tensions of transparency

Transparency is regarded as central to a democratic polity[1271] and has attained a "quasi-religious significance."[1272] It is often presented as a solution to problems and inequalities of power, such as those concerning access and participation, and as a form of control that will solve

[1271] Birkinshaw, FOI, supra note 1125; Patrick Birkinshaw & Mike Varney, Government and Information: The Law Relating to Access, Disclosure and Their Regulation (Bloomsbury Publishing, 2011) [Birkinshaw & Varney, "Government"].
[1272] Hood & Heald, *Transparency*, supra note 91, at 3.

problems of illicit conduct and corruption in government. However, not everyone agrees that transparency is a panacea to such problems. Recent research has argued that the effects of transparency are not only overrated, but also poorly understood. Transparency is a slippery concept, but important enough that it should be handled with some degree of precision. As such, to calibrate an optimal practice of open government, transparency theory must abandon equating the best government with one that is the most transparent according to its formal commitments.

The liberal constitutional democracy is founded on the idea of limiting the powers of government and entrenching the basic individual rights.[1273] However, what we have today is a disparity in power between governments and its citizens. Information sharing can improve such disparity, and Justice McLachlin warns that "unless the public…. is informed about the workings of government and government agencies, democratic debate will be stifled."[1274] Considering the amount of information that government owns, there certainly exists an information asymmetry which, according to Stiglitz "may give rise to a disparity between, … the actions of those governing and those they are supposed to serve"[1275] and "allows government officials the discretion to pursue policies that are more in their interests than in the interest of citizenry."[1276]

The evolution in information technology has tremendously benefited transparency and the dissemination of information. However, it has produced a false perception that technology will put an end to secrecy. Roberts argued that "the claim that 'the 2010 WikiLeaks disclosures mark 'the end of secrecy'…[is] overstated,…the simple logic of radical transparency….can be defeated in practice. WikiLeaks only created the illusion of a new era in transparency."[1277] The commercial and political considerations routinely compromise the free flow of information now, just as they did before Internet. WikiLeaks released a vast amount of information and a large set of confidential documents into the public domain.[1278] What happened next was that many companies, like Amazon, Apple, MasterCard, PayPal, etc, withdrew their services from

[1273] Harlow, "Citizen Access", supra note 212 at 28.
[1274] McLachlin, "ATI", supra note 228 at 7.
[1275] J. Stiglitz, "Transparency in government. The Right to Tell" (2002) World Bank, Washington, DC, at 32.
[1276] Ibid, at 28.
[1277] Alasdair Roberts, "WikiLeaks: the illusion of transparency" (2012) 78(1) International Review of Administrative Sciences 116–133, at 116 [Roberts, "WikiLeaks"].
[1278] See WikiLeaks Cablegate, online: <https://wikileaks.org/plusd/?qproject[]=cg&q=#result>.

Wikileaks.[1279] Even more surprising was the public's reaction that was mute. The release failed to generate "universal outrage and pressure for reform."[1280] On the contrary, many people turned on WikiLeaks accusing that it had manipulated the video to bolster its allegations of military misconduct. "This strategy for stirring up public interest was a mistake", Domscheit-Berg agreed. "A lot of people [felt] . . . that they were being led around by the nose."[1281] Indeed, the more WikiLeaks disclosed in 2010, the more American public opinion hardened against it. In August, 42 percent of respondents to an ABC News poll were prepared to say that WikiLeaks' releases served the public interest. By December, this had dropped to 29 percent.[1282]

The American public reaction to Wikileaks gives the impression that the public does not care about information. However, this reaction more than an expression of apathy demonstrates the inability of the common citizen to digest a huge, unstructured amount of information. The data of the Wikileaks was just raw data, released in huge quantity, which made it harder for the public to understand it, and even less react to it. Instead, just a few people could make sense of it. Referring to the WikiLeaks, John Lanchester observed that the release of information was unprecedented, but the data needed to be interpreted, studied, made into a story.[1283] The Wikileaks is a good example to respond to claims of governments that they are being more transparent when they release more data to the public. Of course, the public perception on the data will depend on how complex is the information released to the common citizen.

Another problem that technology has created is the phenomenon of the "empty archives". As I explained in Chapter seven, tight rules on government transparency have created an adverse effect – institutions not recording documents, or not keeping archives on the records. The so-called "empty archives" phenomenon has been noticed in the EU[1284] and Canada as well. One study found that in 2002 Canada's 150,000 federal public servants exchanged about 6 million e-

[1279] For details see Roberts, "WikiLeaks", supra note 1280 at 120-121.
[1280] D Leigh & L Harding, *WikiLeaks: Inside Julian Assange's War on Secrecy* (New York: PublicAffairs, 2011) at 70.
[1281] Domscheit-Berg D, *Inside WikiLeaks* (New York: Crown Books, 2011) at 163.
[1282] Roberts, "WikiLeaks", supra note 1280 at 127.
[1283] J Lanchester, "Let us pay" (2010) 32:24 London Review of Books, at 5–8.
[1284] See Andrew Flinn & Harriet Jones, *Freedom of Information: Open access, empty archives,* 1st ed, (London: Routledge, 2009).

mails every working day.[1285] About a decade later, in 2013, Canada's Information Commissioner expressed concern that the use of around 98,000 Blackberry phones by Canadian public officials was putting information out of the reach of the Freedom of Information Act.[1286]

A. Transparency and participation

Academic debates on transparency are made around the idea that transparency and ATI include a right to participation in the decision-making process. For instance, Debbasch distinguishes three dimensions of freedom of information, and participation is one of them.[1287] In addition, Braibant has described the concept of "transparence administrative" as comprised by seven pillars, possibilities of participation being among them.[1288] Although transparency and ATI may lead logically, but not necessarily to participation, participation is clearly distinct from them. Participation means that a public authority gives to citizens the possibility to express their views on a decision that has to be taken, and makes it possible by giving sufficient information on time. It also means that the administrative body takes knowledge of the expressed views and gives them a role in the balancing of interests in the decision making process.

Open government laws do not automatically produce the presumed product of transparency, an informed, participatory democracy, because they do not necessarily create venues for the participation of citizens, the presumed user and beneficiary of open government. Transparency laws are not designed to promote participation – they are mainly focused on maximizing the release of "government information", a technical concept that, even if the laws prove successful in forcing disclosure, still leaves unmet the normative and utilitarian goals of better, more democratic government[1289] As such, transparency is a necessary but not a sufficient condition for increasing participation and the nature of institutional arrangements actually militates against citizen engagement. In the EU case, Ciborra argued that the complexity of navigating the EU's

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[1285] Rankin, "ATI 25 years later", supra note 113 at 12.
[1286] Jim Bronskill, "Info Czar Suzanne Legault: Ban Instant Messaging On Government BlackBerrys", Huffington Post, 28 November 2013, online: <http://www.huffingtonpost.ca/2013/11/28/suzanne-legault-instant-messaging_n_4356163.html>.
[1287] Ch. Debbasch, *La transparence administrative en Europe*, Centre national de la recherche scientifique Paris, 1990, 331; J. Rideau, ed, *La transparence dans l'Union européenne: mythe ou principe juridique?*, LGDJ, Paris, 1999, at 12-13.
[1288] G. Braibant, "Réflexions sur la transparence administrative, *A.P.T.*, 1993, at 58 – 59.
[1289] Fenster, "The Opacity", supra note 50 at 934-935.

"labyrinths of information"[1290] requires a degree of commitment and an understanding of the sometimes complicated processes enjoyed only by those familiar with EU working practices. Hence, transparency measures may result in scrutiny being delegated to groups acting on behalf of EU citizens to police the activities of policy-makers. To avoid the capturing of transparency by specific groups with specialized knowledge on institutional processes, the right of ATI should be recognized. This right would give everyone a venue to gain knowledge on the working of the government, and possibly affect it by means of participation.

Arnstein offered a ladder of citizens participation, which can be applied to transparency. Employing this ladder, guideline information by the government enables powerholders to "educate" or "cure" citizens.[1291] Informing citizens about some details of decision-making process, which, according to Arnstein, is the third ladder, does not really lead to participation, but only allows for citizens to hear and be heard. At this stage, these hearings do not have any consequences in decision-making. This is only a "one-way flow of information" - from officials to citizens - with no channel provided for feedback and no power for negotiation. Under these conditions, particularly when information is provided at a late stage, people have little opportunity to influence programs.[1292] Only at the sixth, seventh and eighth level, meaningful participation occurs and citizens become partners in making decisions. Arnstein ladder of citizen participation serves as a conceptual framework for me to develop the typology of information.

11.1.2 Developing a typology of information

Many scholars have attempted to describe transparency schematically in order to simplify its understanding. Florini looked at transparency as one end of a long continuum of behavior[1293] - total transparency is at one end, and total secrecy at the other. The aim should be to move closer to the transparency end of the spectrum. However, this is a rather simple description which does not account for other factors that influence transparency.

[1290] C. Ciborra, *The Labyrinths of Information. Challenging the Wisdom of Systems* (Oxford: OUP, 2001).
[1291] Arnstein, "A Ladder", supra note 134 at 217.
[1292] Ibid, at 219.
[1293] Florini, "Increasing transparency", supra note 867 at 4.

Other scholars have described transparency as a value, as an instrument, as an attitude, etc. First, it has a democratic value - it is a goal in itself, as its public nature is seen as one of democracy's essential characteristics. Second, transparency has an instrumental function - it is used by government to control information, and used by the public to hold government accountable. Third, transparency has an attitudinal function – it indicates an openness to public input from outside, and a readiness to listen. According to these functions of transparency, transparency does not by itself enable people to do anything with information.

Based on what I observed regarding the behaviour of insiders and outsiders in the process of transparency, I develop two typologies. From an outsider's perspective I introduce a "typology of information access" – this is a seeking-receiving-reflecting-engaging process. Citizens might seek information using ATI, or if information is already available, they may simply access it. This second stage depends on many factors which can be subjective (previous knowledge, education, interests, beliefs, culture, etc) or objective (economic status, time available, format of information, etc). At the third stage, citizens process information – a psychological process that helps in organizing and understanding information. It leads to a process of reflection, followed by forming opinions and drawing conclusions based on what citizens have processed. This stage constitutes a real access since only at this point citizens have clearer ideas about what the information is about, its value and connect the information with broader themes. This process is mainly individual, and subjective and objective factors play an even bigger role here. At the fourth stage, citizens make a decision to engage with others, in a process of exchanging opinions and participating in open debates. In this process citizens are exposed to other views and they may constantly change their ideas or those of the others. This is the highest form of access in which citizens may find themselves repeatedly involved with information seeking and receiving, which opens up new windows of engagement with government of other actors interested in public matters. Up to stage three citizens fit the profile of someone seeking information for private interests (although public interests are not excluded). Only at stage four citizens have the potential to become experts on issues of public importance, gain consciousness of their status as citizens, and develop the wisdom to apply their knowledge in being active participants in democratic processes.

From an insider's perspective, I develop a "purposive typology of information delivery"- a collecting-staging-framing-steering process. Governments are the institutions that either produce or collect information that are object of ATI laws. They may decide to disclose raw information as a means of strategic political advertising, and setting the stage for information absorption. This usually happens when governments want to spread the good news on their achievements and successes. Governments may also disclose information selectively with the purpose of instilling ideas in political debates, and thus framing certain issues according to their preferences. In this case, information is manipulated in a way that reveals certain aspects of information, but not others, thus creating illusions of how certain matters should be understood. Lastly, governments may use information as a source of power and control, and thus steering the outcome of certain issues by controlling the amount of information available publically.

11.1.3 Developing models of transparency

Studying all cases in this research, I have noticed certain behaviours that characterize respective jurisdictions. I have come up with models to describe transparency in each case. Discussed in the context of a value driven approach, Canada (federal) follows what I call "an individualistic elitist approach to transparency" – individuals or groups want to know about government working for their own individual interests and benefits. However, because they have to pay for the service the system has become elitist since not everybody can afford it. This explains the data in Chapter seven where most requests came from business. There is not much discussion of transparency as a public value, and not many organizations are dedicated entirely to transparency and ATI, because as John Hinds put it, it has become too expensive for most of the small organizations.[1294]

Looking at the degree of information control, Canada follows what I call "a paternalistic model of transparency" - where government chooses what to disclose, and when to do so. This has caused the legal framework in Canada (federal) to be wearing out. Because of the double standards used to disclose information, which is, at times, dependent on who requests information, I visualise the Canadian ATI regime as a process of "Nuanced access" - where

[1294] Interview with John Hinds, April 16, 2015.

requesters are considered as clients, as opposed to citizens, and therefore do not have equal access.

From a value driven perspective, discussed in the context of human rights, ATD follows a "fundamental right's approach", based on transparency by design. This type of transparency considers citizens as stakeholders in the democratic process. The EU seems to follow, what I call "a public ethical approach of transparency" – used as a participatory tool to affect governance, and address the democratic deficit. The European model is constitutionally embedded and originated in the need to close the disconnection between the EU and its citizens - it is related to the right of citizenship and it has some moral grounds.

From a value driven perspective ATI in Albania follows a "hollow right's approach" where access rights exist in paper, but are not properly enforced and not taken seriously by the public institutions. Regarding institutional attitudes, the Albanian case follows, what I call "a Mimicking approach of transparency", which follows what others have done, but not substantiate its value in the everyday use of the principle of transparency or access rights. This type of transparency is utilized as a tool to achieve other goals and has been pressured by outside political actors, mainly the EU. This type of behaviour has brought what I call a "Trophy transparency competition" with Albania having an advanced new law on ATI, which is praised internationally, but only serves as a facade to cover the troubled practice in transparency and ATI. This has caused pressured access in some cases, and a transparency shut-down in others. Citizens are considered outsiders in this process, with little to no opportunity to actively participate in institutional processes. This has been the situation, at least until lately. The new law may bring changes in the institutional culture because of the high sanctions and the new oversight commissioner with order-making powers.

These differences between models demonstrate how transparency and ATI are perceived and practiced in different jurisdictions, even if they are guided by similar rules and laws. Studying these models informs a lot about the factors influencing the ATI regimes and especially how the political and cultural institutional environment shape the responses to transparency demands. Although the EU and Albania have similar legal provisions on transparency and both recognize a

constitutional status of access rights, the status of these rights in Albania is much further behind than that of the EU. The letters of the law have had little bearing in the Albanian institutions, but this situation could be explained with the short experience of these institutions with democratic governance in the last twenty years.

Comparing transparency and ATI in Canada and the EU, despite many differences in the legal framework, I noticed one thing in common. There are trends on both jurisdictions towards a deterioration in upholding a transparency principle. Because of the pressure on transparency requirements in both jurisdictions I call this situation a "transparency depreciation" or a "transparency fatigue". This has been demonstrated on the resistance for law improvement in Canada, and the freezing of the review process of Regulation 1049 in the EU. This fatigue speaks a lot about the limited level of empathy that transparency enjoys among governments across jurisdictions. This is expectable, because as Birkinshaw puts it "FOI laws will always be unpopular with governments in power and some of the officials who serve them. That is probably the true test of their importance."[1295] As this research has demonstrated transparency and access laws in the two jurisdictions have come into life through political struggles, and the political influence has accompanied them throughout their life. Political leaders will not be active promoters of these laws because it is not in their interest. Hence, it is not surprising that these trends exist. However, the success of access laws depends on how the rest of the society reacts to the political moves on transparency, how much citizens, media, organizations and other groups of civil society engage in protecting their rights against the interests of their governments. I would say, that the societal response to political control is the true test of success for transparency and access laws.

Departing from these typologies and models I have come up with new definitions of transparency and aATI which I introduce below.

[1295]Birkinshaw, "FOI and Openness", supra note 2 at 217.

A. Definitions of transparency and ATI

As I have explained in the first and second chapter of this research, transparency exists in a conceptual muddle. ATI is also affected by the uncertainty that exists in the field. At this point, this research gives me enough background information to contribute to the literature with another definition on the two terms. These definitions consider the two typologies of information that I developed in the previous section and focus on the right of access as a source of knowledge and ideas that shape the public space.

I define transparency as a process through which governments, either proactively or by request enable the dissemination of information in the public domain, where it can be picked, administered, or utilized by various actors as a means of exercising control over government, and expanding knowledge, shaping ideas or exercising rights in the name of private or public interests.

In addition, I define ATI as the public's legal right to request legally releasable government-held information in order to enable the realization of other rights or simply as a self-standing right which helps protect private or public interests while facilitating the exchange, shape or advancement of ideas in the public domain.

11.2 A perspective of Access to information as a human right

Generally, the value of rights can be defended from either an instrumental or intrinsic approach. On the instrumental account, rights are morally derivative from other values, while on the intrinsic account rights represent fundamental values. Below, I provide arguments that ATI should be considered a human right from both perspectives.

11.2.1 An instrumental perspective of a right of access to information

Many advocates defend access rights on the basis of their instrumental value. Accountability, democratic governance and government effectiveness are some of the arguments used for considering ATI a human right. Florini argued for a right of access deriving from the recognition of democratic rights in instrumentalist terms saying that "a broad right of access to information is

fundamental to the functioning of a democratic society. The essence of representative democracy is informed consent, which requires that information about political practices and policies be disclosed."[1296] Others argue that access rights can assist improve lives in many ways. Susman explained: "We need to know about air and water pollution, new drugs and medical technologies, floods and storms, tainted meat and faulty tires."[1297] In many occasions, this information could only be provided by making use of ATI. NGOs like Access Info Europe, have developed their activity based on the philosophy that ATI is an instrumental right which should play a key role in modern democracies. They promote ATI in order to defend other human rights, to hold governments to account."[1298]

The case for an ATI right is made mostly in correlation with political rights. One of the rights that an access right has been more associated with is the freedom of expression, considering an access right as an adjunct of this freedom. According to Roberts, this association is more evident in some cases. When government agencies have exclusive control over critical information required for intelligent discussion of the policy, if no right of access is recognized, the right to free expression is hollowed out. Citizens will have the right to say what they think, but what they think will not count for much, precisely because it is known to be grossly uninformed.[1299] The same opinion is shared by the Canadian Journalists for Free Expression which advocates that "without ATI, freedom of expression is a hollow freedom."[1300] Other arguments support that freedom of speech and press also includes a right of ATI.[1301] This is based on the proposition that if the purpose of the freedom of speech and press is to have an informed democracy, the purpose cannot be fulfilled unless the press, the primary medium of information about government, has ATI about government.[1302]

[1296] Florini, "Introduction", supra note 27 at 3.
[1297] Thomas M. Susman, "The good, the bad, and the ugly: E-government and the people's right to know". Keynote Address to the 2001 Annual Conference of the American Library Association, San Francisco, California, June 16, 2001. Reprinted in Vital Speeches of the Day, Vol. LXVIII, No. 2; Nov. 1, 2001, at 3-4 [Susman, "The good"].
[1298] Interview with Helen Darbishire, Executive Director of Access Info Europe, August 10, 2015.
[1299] Roberts, "Structural Pluralism", supra note 12 at 261.
[1300] Canadian Journalists for Free Expression, "A hollow right: Access to information in crisis, A submission by Canadian Journalists for Free Expression to the Office of the Information Commissioner concerning reform Of Canada's Access to Information Act", January 2013, at 3.
[1301] Evan B. Smith, "Open Government in the United States and Canada: Public and Press Access to Information", (1985) 9 Can.-U.S. L.J. 113 at 117.
[1302] See Address by Justice William Brennan Jr, (1979) 32 Rutgers Law Review 173.

The jurisprudence of the ECtHR has now recognized a right of ATD as closely associated with the freedom of expression. However, an explicit recognition of a positive obligation to disclose information within the right to freedom of expression was proposed and rejected by governments during the drafting of the 1950 European Convention on Human Rights.[1303] The ECtHR early attempts to read a right of ATD into the Convention's guarantee of freedom of expression, could only be successful in 2009.

There is also an association between ATI and the right to life. In the EU, if there is a causal relationship between the right to life and the failure of the state to provide information, this could result in a breach or article 10 of the Charter. However this link is difficult to establish. In *Öneryildiz*, the European Court of Human Right pointed out that "the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."[1304] The case was about the failure to provide the appropriate information to the population of an affected area. The Court found that it was a violation of their right to life by not providing the slums inhabitants with information enabling them to assess the risks they might run as a result of the choices they had made.[1305]

In addition, an ATI right can also be established as a corollary of other basic rights, not just political. Indeed, empirical work done by Hazell, Worthy and Glover on the use of FOI n in the UK, showed that the UK FOI Act is put to a variety of uses and that it is used "as much a tool for 'non-political' activity or personal activity as it is for political activity."[1306] It would be unusual if the case for ATI was not made and the same logic was not applied in the treatment of other equally fundamental interests. Barber argued that rules to assure access then become part of the institutional arrangements - the "civic architecture"[1307]- that must be built and maintained by government so that individuals have the capacity to fulfil their rights. The rights that may

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[1303] C.J. Radcliffe, *Freedom of Information: A Human Right* (Glasgow: Jackson, 1953); See also H. Brucker, *Freedom of Information* (New York: Macmillan, 1949).
[1304] *Öneryildiz v. Turkey*, ECHR 30 November 2004, Reports 2004-XII, at para 89.
[1305] Ibid, at para 108.
[1306] Hazell, Worthy & Glover, *Does FOI work? The Impact of the Freedom of Information Act 2000 upon British Central Government* (London: Palgrave Macmillan, 2010) at 237. This conclusion was based on the results of a survey of requesters.
[1307] B. Barber, *A Place for Us* (New York: Hill & Wang, 1998) at 37, 67.

demand the recognition of a positive obligation to provide ATI include privacy and personal data, personal safety, economic security, the right to a fair trial, to a healthy environment, the right to health and education, and the right to the security of the person.

In *Guerra and Others*[1308]the ECtHR held that not providing information that would have allowed residents to assess the risks of living near a chemical plant was a violation of Article 8 of the European Convention, which protects the right to privacy and family life. In addition, the Court has ruled in *Gaskin* that governments have a positive obligation to establish procedures allowing reasonable ATI contained in foster care files, arguing that individuals are entitled "to know and to understand their childhood and early development."[1309].

In Ontario, in *Doe* the court found that the police force was under an obligation to provide information regarding threats to public safety under the right to security of the person[1310]. Canada's Federal Court of Appeal has recently ruled in *Ruby* that constitutional guarantees against unjustified invasions of personal privacy imply "a corollary right of access" to personal information collected by government, so that citizens can check its accuracy.[1311]

The EU Data Protection Directive (Article 12) gives people a right to access their personal data and how their data are processed. In *Sison* the CJEU did not deny the possibility that *Sison* had an individual right of ATI. However, making a request for access based on Regulation 1049 was not the appropriate way to realize this right. According to the Court, individuals should have a right of access to personal information held by public or private organizations because individuals have a property right in this information and should consequently be entitled to control its use. The same recognition is acknowledged in Canada in relation to personal information, according to which "Everyone is the rightful owner of their personal information, no matter where it is held, and this right is inalienable."[1312]

[1308] *Guerra and Others v. Italy* 14967/89, (1998) 26 EHRR 357, [1998] ECHR 7 [Guerra].
[1309] *Gaskin, supra note 1249.*
[1310] *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (1998), 49 O.R. (3d) 487, 160 DLR (4th) 697 (Ont Ct Gen Div) [Jane Doe].
[1311] *Ruby v. Solicitor General,* [1996] 3 F.C. 134, 136 D.L.R. (4th) 74 (F.C.T.D.) at para 165 [Ruby].
[1312] House of Commons Standing Committee on Human Rights, *Privacy: Where Do We Draw the Line?* (Ottawa, April 1997). See also J. Litman, "Infornmation Privacy/Information Property" (2001) Sun.L.Rev.

Rights of education and health are also facilitated by ATI. If a citizen wishes to know if the State is developing policies to counter discrimination in access to education, it is necessary to have access to certain information related to those policies. For example, to evaluate the extent to which the right to education is realized, it is necessary to have access to literacy rates, enrollment rates, commuting times, dropout rates, and budgets, not only in the aggregate but disaggregated by gender, social class, geographic centers (urban, rural), religion and ethnicity.[1313] In relation to health, in order to know if the government is developing a campaign that aims to prevent certain illnesses, it is necessary to know how public health policies are being implemented.[1314] Information about pricing policies on drugs, or the nutrition of children is important for the enjoyment of a right to health.

Information is important for learning about the existence and protection of social rights. Individuals should know about public policies and measures that the government has taken in relation to these rights, in order to control the development of policies. Without information about the scope and content of their rights to housing or work (information about wages and benefits), social security (right to welfare or other government benefits) citizens are unable to determine whether their rights are being respected. They should also be aware of the content of said policies, so as to analyse how measures are considered in the budget and how budgetary commitments are delivered.[1315]

ATI may also assist in the enforcement of equality rights. In Canada, in advocating for substantive equality rights for the poor, Bruce Porter, Director of the Social Rights Advocacy Centre, stressed that concreteness is critical. If welfare benefits are being cut, activists should bring specific evidence demonstrating families' financial inflow and outflow and how many homes will be lost as a result.[1316]

[1313] Circle of Rights: Economic, Social & Cultural Rights Activism: A Training Resource. International Human Rights Internship Program and Asian Forum for Human Rights and Development, (2000) at 309 [Circle of Rights].
[1314] Article 19 and ADC, Access to Information: An instrumental Right for Empowerment, July 2007, at 17.
[1315] Ibid.
[1316] Circle of Rights, supra note 1313 at 74.

All these examples demonstrate that ATI is essential for the realization of both political and social rights, and as such, it is important that governments recognize access rights instrumentally. However, this recognition should not be limited to the instrumental approach, but stretched to the extent that includes an intrinsic approach as well.

11.2.2 An intrinsic perspective of a right of access to information

It has been argued many times in this research that ATI is a pre-condition for public participation. Arnstein advised that "Informing citizens of their rights, responsibilities, and options can be the most important first step toward legitimate citizen participation."[1317] In this sense, access allows citizens to get informed, so they can participate on a more equal footing in public decision-making. This democratising function of the right to ATI is recognized by the United Nations as "essential for persons to realize their basic right to participate in the governing of their country and live under a system built on informed consent of the citizenry."[1318]

It is widely acknowledged that participation depends on information, and there exists an information asymmetry in the public domain. Transparency reduces this asymmetry between the participants in public debates. Access Info Europe has emphasized that "Assuring the fundamental right of all persons to access information is essential to prevent discrimination and reduce information disparities."[1319] However, many argue that information benefits some dominant actors more than others, which could exacerbate the information asymmetry, instead of reducing it. This argument cannot be used as an excuse to limit the exercise of access rights. The opposite can be argued instead - the lack of information, like any form of artificially created scarcity, gives rise to rents. Public officials have an incentive to create secrets, which earns them rents. Secrecy raises the price of information - in effect, it induces more citizens, who may not have special interests in particular information, not to participate actively, thus, leaving the field more to those with special interests. According to Access Info Europe, it is not only that special interests exercise their nefarious activities under the cloak of secrecy, but that the secrecy itself

[1317] Arnstein, "A Ladder", supra note 134 at 219.
[1318] See Articles 19 and 21 of the United Nations Declaration of Human Rights.
[1319] Access Info Europe, "Open Government Standards: Transparency Standards" at 2, online: <http://www.access-info.org/wp-content/uploads/Transparency_Standards12072013.pdf>.

discourages others from providing an effective check on the special interests through informed voting.[1320] Susman goes even further in his argument by raising the ownership question of government information. He considers information produced, gathered, and processed by public officials as intellectual property, no less than a patentable innovation would be.[1321] These property rights belong to citizens, and as such, there is no excuse to protect secrecy and hide information.

Availability of information, which is facilitated by access rights enables people to access knowledge on processes of governance. Elias and Alkadry recognized that "The ability of citizens to participate is contingent on their access to a participation venue and their knowledge of the issues at hand."[1322] Government officials possess knowledge that citizens do not have. As such, it is essential that public officials, who are privy to technical knowledge, and citizens, who are privy to experiential knowledge of problems at the local level, make sense of shared concerns and resolve them as a whole.[1323] Dahl has characterized modern democracy as the specialization of the technical steering knowledge used in policymaking and administration. Such specialization keeps citizens from taking advantage of politically necessary expertise in forming their own opinions. This creates a type of paternalism grounded in the monopolization of knowledge. Privileged access to the sources of relevant knowledge makes possible an inconspicuous domination over the colonized public of citizens cut off from these sources and placated with symbolic politics.[1324] Possession of knowledge, as I have described in the typology of information access, makes citizens more politically and socially conscious about issues of public matters, enables to form opinions and exchange ideas in the public space. Public opinion that is shaped by information and knowledge in the public domain represents political potentials that can be used for influencing parliamentary bodies, administrative agencies, and courts. Habermas argued that political influence supported by public opinion is converted into political power.[1325] Public opinion is often developed from acts of participation. However, Sossin

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[1320] Ibid, at 13.
[1321] Susman, "The good", supra note 1297 at 7.
[1322] María Verónica Elías & Mohamad G. Alkadry. Constructive Conflict, Participation, and Shared Governance, Administration & Society 2011 43(8) 869–895, at 879 [Elías & Alkadry].
[1323] Ibid, at 871.
[1324] Dahl, *Democracy*, supra note 190 at 339.
[1325] Habermas, *Between Facts and Norms*, supra note 128 at 363.

explained that "the mere act of participation does not assure engagement."[1326] He differentiated between the two acts and looked at their potential. According to Sossin, "For there to be the capacity to engage, there must be a public sphere in which people can interact, communicate and recognize each other as citizens, and additionally as members of diverse….communities."[1327] I build on this argument and argue that the "public sphere", to which Sossin is referring to, is informed by ATI and transparency, since both of them are essential to the process of information exchange. According to Pasquier and Villeneuve "transparency is a tool that encourages the involvement of the people in the development and implementation of public policies."[1328] Habermas recognized the potential of the political public sphere as it "can fulfill its function of perceiving and thematizing encompassing social problems only insofar as it develops out of the communication taking place among those who are potentially affected."[1329]

Following this logic, information leads to knowledge, which influences the shaping of ideas, which encourages participation, which enables more control on public issues, which, in turn, translates into more power over these issues. This chain of reactions validates the old expression that information is power. Democracy depends on a knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life.[1330] Amartya Sen argued that the relationship between information and power is profound, and that inequality in ATI is a form of poverty. Without knowledge, you cannot act.[1331] For citizens, especially the poor, it is a chance to reclaim ground in their struggle for a more just existence [and] greater power.[1332] Other scholars have emphasized the link between transparency and power. Florini looked at transparency as a tool for the empowerment of ordinary citizens.[1333] Nagel emphasised the need for a recognition of ATI institutionally or conventionally "in order to provide

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[1326] Sossin, "Redistributing", supra note 777 at 38.
[1327] Ibid, at 39.
[1328] Pasquier & Villeneuve, "Organizational Barriers", supra note 30 at 149.
[1329] Habermas, *Between Facts and Norms,* supra note 128 at 365.
[1330] The Carter Centre, "Access to Information: A key to democracy", November 2002, at 5, online: <http://www.fesmediaasia.org/fileadmin/user_upload/Access_to_Information/Access_to_Information_manual_Carter_Center_09.11.2009.pdf>
[1331] Amartya Sen, *Development as Freedom*, (New York: Random House Inc., 1999), at 152.
[1332] The Carter Centre, Access to Information: A key to democracy, November 2002, at 26, online: <http://www.fesmedia-asia.org/fileadmin/user_upload/Access_to_Information/Access_to_Information_manual_Carter_Center_09.11.2009.pdf>.
[1333] Florini, "Behind Closed Doors", supra note 71 at 20.

individuals with the security and discretion over the conduct of their own lives necessary for them to flourish, and in order to protect against the abuse of governmental and collective power."[1334]

As argued above, the main argument for an intrinsic value of ATI is based on the idea of exercising power which relates to the key normative question on whether transparency strengthens or undermines our constitutional democracies. Three core value clusters are pertinent in this regard, according to Bovens, Schillemans, and Hart,[1335] the democratic perspective, the constitutional perspective, and the social learning perspective. In the democratic perspective, a key issue is whether transparency arrangements strengthen the informational position of citizens. The position of citizens refers to their electoral role but also to their direct engagement in political agenda-setting, policy deliberation, and decision making. Information enhances citizens' position and opens up opportunities of engagement. In the constitutional perspective,[1336] the key issue is whether transparency strengthens or undermines institutional checks and balances. Good governance arises from a dynamic equilibrium between the various powers within the state. Transparency is needed to curtail the abuse of executive power, and transferring some of that power to the citizens. In the social learning perspective, the key issue is whether transparency strengthens the quality of public debate and collective problem-solving capacity.[1337] This perspective is very important for this research. As I have explained above in the typology of information ATI enables the acquirement of knowledge which contributes to the shaping of ideas and a dynamic public discourse. The enriched public debate makes citizens more aware of the problems present in the public space, cultivates skills for solving those problems, and equips them with expertise in certain issues.

The first two of the above perspectives point to the correlation between information and power which is enabled through processes of transparency and ATI. Cain, Egan and Fabbrini refer to this correlation, as the "information game" arguing that FOI laws introduce citizens as

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[1334] Thomas Nagel, "Personal Rights and Public Space" (1995) 24(2) Philosophy & Public Affairs 83-107, at 86 [Nagel, "Personal Rights"].
[1335] M. Bovens, T. Schillemans &,P. 't Hart, "Does public accountability work? An assessment tool" (2008) 86 *Public Administration* 225-242 [Bovens, Schillemans & Hart]
[1336] Ibid, at 231.
[1337] Ibid.

players in this game.[1338] From this point of view, citizens are not spectators, but players that can influence the outcome of the information game. However, in this game, bureaucracy has an "information advantage" which, according to Weber, enables bureaucratic power.[1339] If this power is not counterbalanced, Birkinshaw argues that it can "easily lead to an abuse of power, as in any one-sided relationship."[1340] He explains that power asymmetry leads to inequality, and suggests that ATI helps achieve greater equality.[1341] This can viewed in two ways: equal protection under the law, and the right for equal opportunities.

The UN Declaration considers the right of ATI as an instrument for discouraging arbitrary state action and protecting the basic right to due process and equal protection of the law.[1342] Calland and Tilley push the equality argument even further by arguing that ATI is a pro-active right that serves our common pursuit of social, political, and economic equality.[1343] Indeed, if one looks at the information as a source of power, lack of it will lead to power imbalances. Hence, without information, it is nearly impossible to exhort inclusion and equality.

11.2.3 The instrumental vs the intrinsic perspective

Different authors have been part of the debate which values access rights either from an instrumental or intrinsic perspective. Kamm suggested that intrinsically valuable rights are status-based while utilitarian rights are interest-based[1344]. Bentham justified instrumentalism with an utilitarian approach to rights which concentrates on maximising overall happiness.[1345] However, this approach has been criticised as paying insufficient attention to individuals. For instance, Rawls argued that "utilitarianism does not take seriously the distinction between

[1338] Cain et al, supra note 377 at 117.
[1339] H.H. Gerth & C.Write Mills, ed. *From Max Weber, essays in sociology* (London and New York: Routledge, 2009) at 233-234.
[1340] Birkinshaw, "FOI and Openness", supra note 2 at 195.
[1341] Ibid, at 195.
[1342] See Articles 7, 10, and 12 of the United Nations Declaration of Human Rights.
[1343] Calland & Tilley, *The right to Know*, supra note 129
[1344] Frances Kamm, 'Rights', in Jules L. Coleman & Scott J. Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 508 at 508-509.
[1345] Bentham, *Introduction to the Principles of Morality and Legislation* (London: T. Payne and Son, 1789); and Stuart Mill, Utilitarianism (London: Parker, Son and Bourn, 1863)

persons."[1346] As such, the instrumental view of rights cannot reasonably account for the strength of individual rights.

One of the opponents of the instrumental view, Nagel, described the instrumental account of rights as assuming that rights are morally derivative from other more fundamental values: the good of happiness, self-realisation, knowledge, ignorance, repression and cruelty.[1347] From this perspective, rights are important because they nurture those other goods, but they are not themselves fundamental. Nagel contrasts the instrumental and intrinsic accounts of rights arguing that in the latter rights are a non-derivative element of morality.[1348] He supports the intrinsic view of rights, which is associated with individualism.[1349] Referring to the freedom of expression Nagel favours the intrinsic account of this right on the basis that it confers a form of inviolability on everyone, "not as an effect but in itself in virtue of its normative essence."[1350] This approach, he suggests, "becomes important if we wish to extend the justification of free expression substantially beyond the domain of political advocacy, where its instrumental value is clearest."[1351]

Wenar, explained the two perspectives by arguing that they approach rights from opposite directions. A status-based (intrinsic) reasoning begins with the nature of the right-holder and arrives immediately at the right, without paying much attention to the negative effect that respecting the right may have on others' interests. The instrumental approach starts with the desired consequences (like maximum utility) and works backwards to see which right-ascriptions will produce those consequences.[1352] If we take the freedom of speech as an example, the intrinsic approach to rights views freedom of speech as content-neutral. Wenar described Nagel's account of speech rights as flowing immediately from the nature of persons as reasoner beings, and not from the interests that people may have in speaking on particular topics or in listening to others speak on particular topics.[1353] However, an instrumental account of speech rights will not

[1346] Rawls, A Theory of Justice (Boston: Harvard University Press, 1971), at 27.
[1347] Nagel, "Personal Rights", supra note 1334 at 86.
[1348] Ibid, at 87.
[1349] Ibid, at 87.
[1350] Ibid, at 96.
[1351] Ibid, at 96.
[1352] Wenar, "The Value of Rights", in O'Rourke, ed, *Law and Social Justice* (Boston: MIT, 2005) 179, at 181.
[1353] Ibid, at 183.

be content-neutral because "people have very different interests in speaking and in hearing speech on different topics."[1354] Despite the shortcomings of the instrumental approach in coming to terms with individual rights, Wenar leaned more towards this account explaining the right to freedom of expression.

An instrumental account of ATI is in many cases based on the right to take part in public affairs, which is justified with a well-functioning democracy that requires an informed electorate. Stiglitz argued that "meaningful participation in democratic processes requires informed participants."[1355] Florini supported a right to ATI deriving from the recognition of democratic rights in instrumentalist terms when she says that "a broad right of access to information is fundamental to the functioning of a democratic society. The essence of representative democracy is informed consent, which requires that information about political practices and policies be disclosed."[1356] Roberts favoured this rationale for the recognition of a right to ATI over one based solely on the right to freedom of expression. He argued that "the logic suggests that access right is better understood as a corollary of basic political participation rights, rather than the right to freedom of expression alone."[1357] Roberts recognised an instrumentalist basis for a right to ATI suggesting that political participation rights "have little meaning if government's information monopoly is not regulated."[1358] Article 19 also supported the idea that "The right to access public information about one's economic, social and cultural rights is not only related to these rights, it is a precondition for their realisation."[1359]

Another group of scholars support the intrinsic ground for the recognition of access rights. For instance, Florini argued that ATI is not only a necessary concomitant of the realization of all other rights but is also a fundamental human right.[1360] The idea of control and power to justify access rights on an intrinsic ground was highlighted by Curtin who referred to a "general right of access for citizens to public documents as facilitating the citizens' control of the actions and

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[1354] Ibid, at 184.
[1355] Stiglitz, "The Role of Transparency", supra note 131 at 30.
[1356] Florini, "Introduction", supra note 27 at 3.
[1357] Roberts, "Structural Pluralism", supra note 12 at 262.
[1358] Ibid, at 262.
[1359] Article 19, *Access to Information: An Instrumental Right for Empowerment* (London: Article 19, 2007), at para 8.1.
[1360] Florini, "Introduction", supra note 27.

inactions of public bodies."[1361] Bovens also acknowledged the role of information rights in enhancing social control and linked ATI to a broader conception of citizenship which "concern[s] first and foremost the social functioning of citizens, not only in relation to the public authorities, but also in their mutual relations and their relations with private legal entities."[1362] In this context, Boven introduced a revolutionary idea about a fourth group of citizens' rights: information rights on top of civil, political and social rights to achieve the citizenship ideal. According to him, this right should be constitutionalized. However, he refers mainly to the digitalization of information which aspires to provide another set of citizenship rights. Boven argued that "information rights are not only important because they support the traditional process of democratic steering and accountability, but because they can serve as a tool in helping to expand the reflexive nature of democracy."[1363] In addition, Boven also argued that information plays a role not only between public authorities and citizens, but also between citizens. He noticed that "those without access to information …generally wield very little political and administrative influence, run the risk of social exclusion, of losing ground on the labour market, and of encountering hindrances in their personal development."[1364] Boven calls the current rules on open government mainly a question of public hygiene. But I suggest that information rights are much more than that – they are an element of citizenship that allows for social functioning of citizens. Boven categorized the right of access to government information as "primary information rights."[1365] He looked at the citizen as a subject (information is thus necessary to establish the legal position of the citizen – knowing the legal rules); as a citoyen (important to have knowledge on different public policies); and as a member of society (information can assist to bolster the socio-economic position).[1366]

Although both the instrumental and the intrinsic approaches on ATI are recognized, I argue that an intrinsic approach serves as a better justification for its recognition. An intrinsic approach would remove the requirement to link access rights with other existing rights, which can limit the

[1361] Curtin, "Citizens", supra note 393 at 8.
[1362] Bovens, "Information Rights: Citizenship in the Information Society" (2002) 10 The Journal of Political Philosophy 317, at 327 [Bovens, "Information rights"].
[1363] Ibid, at 325.
[1364] Ibid. at 326.
[1365]Ibid, at 327.
[1366] Ibid at 328-329.

scope of the right to ATI, and can bring possible unforeseen negative consequences. For instance, McDonagh anticipated that linking the right to ATI to other rights may stretch the scope of those right beyond their appropriate limits.[1367] This stretch may cause the distortion of all the rights involved, altering their very nature and purpose. Furthermore, focusing on the right to ATI intrinsically moves this right away from the failure of the instrumentalist approach to pay sufficient attention to individuals who are frequent invokers of the right to ATI for personal purposes, and not necessarily for a public interest. Restraining access rights to the realm of public interest contexts gives rise to complications. Conceptually, such a limitation does not account for one of the basic principles of information access laws: that access rights accrue to everyone, regardless of their capacity to establish any particular interest in accessing the requested information.[1368] This principle is expressly protected in ATO legislation in all jurisdictions at study. Requesters may use the right to ATI to get information in situations where the broad public interest might not be evident, but it is nonetheless very important to them personally, but also to others who may find themselves in a similar position. The use of access rights motivated by personal concerns, does not mean that they cannot bring benefits to the wider community - for example, through enabling individuals to use the information in a way that sets a precedent for the treatment of others with similar concerns in the future. According to statistics on the categories of requesters (i.e statistic tables at Chapter seven) reveal that not all requesters use ATI in the name of a public good, and less of them qualify as "social watchdogs". Hence, an intrinsic approach would expand the recognition of access rights for public and private interests.

11.2.4 Arguments against the value of access to information

There are many arguments that are used against the recognition of a right to ATI. One of the main assertions is that people do not make a good use of access rights – indicating that access rights are non-effective or have little practical application. Hence, answering the question "why people do not make ATI requests?" is of great interest. The answer may include several factors. It may be simply because people do not have enough knowledge that such right exists, or they do not know the information is there to be requested, or they consider refusal an inevitable conclusion, or they consider the risk of official revenge too high, and so on. These problems are

[1367] McDonagh, "RTI", supra note 1247 at 52.
[1368] Ackerman & Sandoval-Ballesteros, supra note 860 at 93.

acknowledged by both ATI opponents and advocates. The lack of awareness on the existence of ATI rights is often a major problem contributing to the low numbers of access requests. Roberts argued that "One of the most substantial [barriers to the more frequent use of the right to information] is a simple lack of awareness about rights."[1369] In addition, the idea of knowledge often surfaces on discussions around access rights' limited use by the general public. Roberts admitted that "making a request requires knowledge about the bureaucratic routine....also requires a strong sense of political efficacy and persistence….and may require money."[1370] Curtin and Meijer observed that as a matter of practice only those citizens with expert knowledge of the policy subject make use of the possibility to read information about policy, the process and the policy actors. Most people are missing that kind of knowledge.[1371] Curtin and Meijer warned about the danger that the opportunities created by ATI mechanisms be hijacked by the more educated and skilled sectors of society, in detriment of the less well off.

Other authors argue that the lack of knowledge is exacerbated by the lack of skills or capacities to navigate a highly complex legal environment, such as that created by access rights. Mooseburger, Tolbert and Stansbury used the notion of "information literacy" to describe one's ability to recognize when information can solve a problem or fill a need and effectively employ information resources. According to them, individuals differ in their ability to notice, absorb, retain and integrate information.[1372] Therefore, to make open government information relevant, it is critical to move one step forward from making information available to making information understandable and applicable. In addition, Khagram, Fung and De Renzio argued that peoples' access and responses to information may be different according to their cognitive capacities, and availability of information means nothing for those who do not have the skills needed to find, understand and elaborate it.[1373] Fenster went a step further by establishing a link between knowledge and social frames. He noted that the public's pre-existing knowledge and capacity to understand information is limited, and the public in turn understands information within existing

[1369] Alasdair Roberts, "A Great and Revolutionary Law? The First Four Years of India's Right to Information Act" (2010) 70 Public Administration Review 925-933 [Roberts, "A Great Law"].
[1370] Roberts, *Blacked Out*, supra note 84 at 117.
[1371] Curtin & Meijers, "Does Transparency Strengthen Legitimacy?", supra note 35109-122.
[1372] K. Mossenburg, C. Tolbert, & M. Stansbury, *Virtual Inequality: Beyond the Digital Divide*. (Washington: George Washington University *Press*, 2003).
[1373] S. Khagram, A. Fung, & P. De Renzio, eds, *Open Budgets: The Political Economy of Transparency, Participation, and Accountability* (Brookings Institution Press, 2013).

cultural and social frames, meaning that individual social and cognitive structures of understanding are in part determined by race, class, gender, educational background, and the like.[1374] Zaller makes the case that knowledge is influenced by the level of education and the higher the level of education, it can be assumed, the stronger the capacity of people both to access and process information.[1375] While it is true that access rights highly depend on the knowledge, capacities, education and social frames of the requesters, this should not be used as an argument against a recognition of a fundamental right of ATI. The same argument can be used for other human rights that have a recognized fundamental status in the Canadian Charter, such as freedom of expression, of peaceful assembly or association.

Some of the concerns regarding the limited use of access rights can be addressed by employing the participatory democratic theory of Pateman which emphasizes the need to participate in the democratic process in a repetitive way. The idiom "people learn to participate by participating" is a great lesson to be learned by all actors in the public domain. Only by participating citizens will learn how to navigate complex information and better participate in future discussions. They will gain the knowledge necessary, will acquire the capacities required to put that knowledge into practice and overcome the obstacles of social barriers.

Another argument against the value of access rights is that they are used for private reasons, rather than for the public good. Banisar noted that ATI laws are not primarily designed to help protect individual rights.[1376] Research suggest, however, that most requests are concerned with access that has some personal relevance to the applicant rather than with the promotion of democracy and accountability.[1377] Critics argue that since applicants who require information for private purposes do not contribute to the public debate, these requests do not add to the realisation of the goals underlying the legislation. In other words, they are a waste of public resources.[1378] This position is based on an instrumentalist approach, and as I argued above it falls

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[1374] Fenster, "The Opacity", supra note 50 at 930.
[1375] See John Zaller, *The Nature and Origins of Mass Opinion*. (Cambridge: Cambridge University Press, 1992). (pointing out that the effect of information on public opinion is a function not only of exposure but also of reception, which in turn may be influenced by political awareness and ideological orientations).
[1376] Banisar, *FOI around the world*, supra note 145.
[1377] Heremans, "Public Access to Documents", supra note 31.
[1378] Ibid.

short of explaining a status-based right of ATI. Not always a public interest in ATI should be established, and even when it is not, it may ultimately serve to some public interest, because it may constitute a precedent to be used for future cases with similar circumstances.

Another reason against ATI relates to the strain it puts to the government and its resources. Maintaining an access rights' regime is expensive. However, if we consider ATI as a human right, then a human rights based approach accepts that the importance of realising human rights justifies sometimes significant disadvantages to government. In this regards, sacrifices are made in the name of protection of individual rights. Governments are required to respect the obligations associated with human rights, despite the fact that might not be advantageous, and at times even disastrous for them.

In the final lines of his book "Blacked out" Roberts asks: "Do we have a right to information?" His response is "Certainly. But we also have a responsibility to act on it."[1379] Two arguments can be made out of this response. First, access right exists even if no one uses it, so that any claim against its value based on its frequency, is weak based on an intrinsic approach of rights. The same argument can be made for other human rights as well, people may choose to use them or not, but their action does not affect their status. The potential of every right, including ATI, is revealed at the moment of their use, otherwise they will be dormant until practically applied. Second, access rights need action, they depend on the will of the people to give them life in their roles as private individuals or responsible citizens. Florini argued about transparency that "does little good if no one cares to do anything with the information."[1380] However, the situation is totally different if people do care. In that case, the conception of transparency is performative and a source of power. Indeed, information is power, and keeping information secret only serves to keep power in the hands of a few.[1381]

[1379] Roberts, *Blacked Out,* supra note 84 at 238.
[1380] Florini, "Increasing transparency", 867 at 15.
[1381] Gary D. Bass, Danielle Brian & Norman Eisen, "Why Critics of Transparency Are Wrong", Centre for effective Public Management at Brookings, November 2014, at 19.

Should access to information be considered a constitutional human right in Canada?

A positivist theory cannot respond to such question since neither the Canadian law, nor the jurisprudence recognize such right. However, I argue that the importance of ATI rights based on its use and its value demand a constitutional recognition. While discussing about ATI in public and private sector, Roberts asked a basic question: In what circumstances is it desirable to expand recognition of a right to information?[1382] He answered this question by referring to the harms that may be caused when ATI is denied. I have a similar concern in this research: Why is it important to recognize the right of ATI as a constitutional right in Canada? Certainly, a constitutional recognition is important since "Constitutional norms are not only higher order rules; they are prior organic rules; they constitute a given political community."[1383] The importance of having an ATI constitutional right has to be balanced against the consequences of not having it. Taking this approach requires a departure from the inflexible grounds of positivism.

In the following paragraphs I will not be looking at the benefits of having access rights considered a human right in Canada, but the harm of not having it, particularly the harm to the citizen's fundamental interests. Following this logic two questions are important. First, whether there is a significant interest at risk of harm if access rights are not guaranteed, and second, whether the risk of harm is substantial. In some cases, the connection between access rights and the fundamental interests of citizens is obvious. For example, we recognize a fundamental right to security of the person and, by implication, a right of ATI about potential threats to personal safety. This logic was recently adopted in *Doe* when the Court ruled that police forces have a positive obligation to provide information about threats to safety, an obligation rooted in the constitutionally recognized right to security of the person.[1384] The ECtHR adopted similar reasoning in its *Guerra* decision. It concluded that the Italian government unjustifiably violated

[1382]Roberts, "Structural Pluralism", supra note 12 at 245.
[1383] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*. (New York: Oxford University Press, 2000) at 20 [Sweet].
[1384] *Jane Doe*, supra note 1310.

the "physical integrity" of the residents of Manfredonia by withholding information about toxic emissions from a chemical factory in their community.[1385]

In addition, we guarantee a freedom of expression, as one of the fundamental freedoms that enhances the exchange of ideas in the public space. However, this freedom alone is not enough to guarantee a fruitful public debate. To engage in a meaningful exchange about public matters, there is need for information. Therefore, the right to impart and receive information is widely recognized as being part of the right to freedom of expression.[1386] The Supreme Court in Canada (in *Criminal Lawyers' Association*) and the ECtHR[1387] have interpreted that freedom of expression includes a right of ATI. Since the government holds a significant amount of information access rights are necessary for an informed debate about public matters, and as such the recognition of these rights gains prominence. Although, the Supreme Court in Canada has recognised a right to ATI, its application is limited to certain cases.

Furthermore, ATI facilitates the realisation of other individual rights. Information helps in accomplishing basic rights such as the right to food, health, employments, education, etc. We need information in matters of employment (i.e investigations or selection process in hiring), tax purposes (i.e tax deductions), health rights (i.e introduction of new drugs), conviction charges and prosecution (i.e. prosecution's disclosure obligations in the criminal proceedings), access to personal information, etc. The realization of these basic rights through ATI follows an instrumental approach to rights. From this perspective, ATI is essential for personal autonomy – hence, lack of information hampers one's ability to pursue goals, whether faced with criminal prosecution or life threatening pollution in one's backyard. Because of the importance that ATI has for the realization of other rights, every limitation on access rights, will impinge on a significant interest, and hence will pose a risk of harm to the individuals. This harm could become substantial if implicates rights such as the right to life and security of the person, right to health, employment and so on. As such, ATI is an individual right. The Information

[1385] *Guerra*, supra note 1308.
[1386] Banisar, *FOI around the world*, supra note 145 at 9.
[1387] See Társaság, supra note 975.

Commissioner John Reid has recognized the right as the "Parliament's gift of power to each and every citizen and person in Canada."[1388]

If one wants to draw parallels between an individual and a public perspective to ATI, one can say that access contributes to the realization of individual rights in the same way in which it contributes to the realization of democracy in general. In both cases, information is needed to facilitate decision-making, either by citizens as a collective body or by individuals. In fact, in many cases, it is not possible to make a difference between a person as a citizen and as a private person or between a special interest and a public interest. A right to ATI is necessary in both dimensions of human life, public and private. As explained by Birkinshaw, ATI enables us to fulfill our potential as humans.[1389]As such, a characterization of ATI as a human right derives from its human nature, which can be understood as having a private as well as a public dimension. According to Weinberger, human liberty can be considered from two sides, first, as personal liberty or the freedom to choose the way of life, and second, as political liberty or the freedom to choose the way of governing public affairs. The realm of political liberty concerns the participation of the citizen in public matters, while personal liberty is an element that postulates political liberty.[1390] Both of these sides require information to achieve full potential. From this perspective, we see two sides in each person, an individual being and a social being. Both of these qualities of humans necessitate information to make decisions, either at the individual level, or at social/political level.

Looking at ATI from a public perspective, the need for a recognition of a constitutional status of this right becomes necessary, since not doing so extends the risk of harm to a much broader platform, that of a public space. ATI proponents argue that this right "produces an informed public, a responsive government, and as a result, a functional society."[1391] The lack of information, on the other hand, produces an ignorant, passive society and a secretive

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[1388] John Reid, Information Commissioner of Canada, "The Access Act Moving Forward: A Commissioner's Perspective", September 8, 2005, online: <http://www.oic-ci.gc.ca/eng/media_room-speeches-2005-september_8.aspx>.
[1389] Birkinshaw, "FOI and Openness", supra note 2 at 216.
[1390] Ota Weinberger, "Information and Human Liberty" (September 1996) 9:3 Ratio Juris, 248-57, at 255 [Weinberger].
[1391] Fenster, "The Opacity", supra note 50 at 902.

government, which are premises for authoritarian regimes. For example, the inherited culture of secrecy in Albanian governance today is due to the long history of communism in which accessing government information was a taboo, and even punishable by law. Keeping information secret from the public, gave the government a strong tool to keep society under total control for fifty years, and guaranteed political power and ruling for half a century. The secretive culture created a passive society and secretive bureaucracy which still considers government information its own property, even today, twenty six years after the regime change. Albania is a perfect example to demonstrate that not recognizing access rights may cause substantial damage and be detrimental to a democratic society. The risk of harm in this scenario multiplies and produces not only apathetic individuals, but a lethargic society, which is certainly not the spirit of a dynamic vital democracy. For this reason, ATI has been recognized as a fundamental human right in the EU, Albania, and many other jurisdictions across the world.

The *ATIA* in Canada is recognized to have a quasi-constitutional nature. It receives this characterization because it protects values central to the preservation of a free and democratic society. Its quasi-constitutional status is also highlighted by the section 4 paramountcy clause of the Act which guarantees that the right of access exists "notwithstanding any other acts of Parliament."[1392] Section 4 provides that the right to ATI prevails over conflicting legislation.[1393] The quasi-constitutional status is recognized by the Crown[1394] and has been repeatedly affirmed by the Federal Court, including the Courts below.

Because the ATIA is quasi-constitutional, the object and purpose of the Act are the principal factors that courts consider when interpreting its provisions. As such, the courts should always adopt the interpretation of the Act that is most consistent with its objective that "government information should be available to the public."[1395] This means that access should be the norm, and not the exception when applying the provisions of this Act. Any ambiguity around the access

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[1392] *ATIA*, supra note 587, s.4.
[1393] This court has previously characterized such clauses as confirming the quasi-constitutional status of the laws; *Tranchemontagne v Ontario*, 2006 SCC 14 (CanLII), [2006] 1 SCR 513 at paras 33-34; *Lavigne*, supra note 512 at paras 23-24.
[1394] Privy Council Office, "Guide to Making Federal Acts and Regulations", 2nd ed. (Ottawa: PCO, 2001), online: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation.chap1.2-eng.h>.
[1395] *ATIA*, supra note 587, s.2(1).

right must be resolved in favour of advancing the aims of the Act. The Supreme Court has recognized that ATI is one of the cornerstones of our democratic system, it is essential to ensuring information necessary for participation and accountability.[1396] The Supreme Court also acknowledged the necessity of access to permit meaningful discussion on a matter of public importance.[1397]

From this perspective, ATI can be considered as a window of participation, or a ticket that allows for participation. If one can draw comparisons I would compare ATI with a ticket to a sport game. Just like a ticket to a game match, it will only give you the information you need to watch the game, the when, where, and what. It also offers an opportunity to enter the facility where the game with be played. The ticket will only get you inside the stadium, but how much you pay attention and engage with the match, how passionate you are, and how your emotions play out - these reactions are subjective and will vary a lot from person to person. The reactions will depend on the past experiences, affections, feelings and previous knowledge about the game. Some people will cheer loudly when the favourite team scores, some will laugh and some others even cry, while others will watch indifferently, without engaging a lot with the environment. This is, in fact, the human nature, so diverse and with lots of variations. Just because people do not cheer, or laugh, or cry, the stadium cannot deny them the ticket to the game. Only by watching a game, people will understand the rules and why players do certain moves. Only if they watch the game for several times, they will understand better. The more they watch it, the more experts they become, and if they like the game enough, they will be interested to play it. Some will even become so interested that they will become professional players. But, it all starts with first getting the ticket to the stadium, and then watching and understanding the rules of the game. Depending on many factors, from human capacity, to interests and objective factors, some people will stop at the first match; some will watch several times, some will become players, and some will join sport teams.

Just like the game, the Pateman participatory democratic theory explains that the more people participate in the decision-making process, the more they will be willing to participate. The more

[1396] *Dagg*, supra note 630 at paras 65-66; *Heinz*, supra note 1034 at para 28; *Lavigne*, supra note 512.
[1397] *Criminal Lawyers' Association*, supra note 970 at para 31.

people know (either by accessing information available from the governments, or by filing access requests) about the decision-making process, the more they understand, and the more they will be willing to become active players in this process. As Pateman puts it, people will learn to participate by participating. If I were to draw comparisons with the game, the responsibility is two folded, on the government to provide venues of participation, and on the people to take advantage of opportunities made available to them. In this context Fenster argued that transparency does not just occur as a natural consequence of a democratic system: is requires championing, support, organization, and imposition.[1398] Meijer, Curtin and Hillebrandt described this support in terms of "vision and voice". They conducted an analysis of the relationship between vision and voice, and found that "Vision and voice come together in the idea of informed debate: participants can voice their opinions on the basis of knowledge about decision-making processes."[1399] Hence, people first have to get informed, then have a voice in how decisions are made.

The importance of participation stands on the opportunities it creates for introducing, shaping and pushing ideas in the public space. Weinberger argued that participation in public affairs is not restricted to formal principles of democracy, like voting in elections. The efficiency and reasonableness of democratic rule depend essentially on discursive processes institutionalized in society.[1400] Weinberger links these processes with democracy and human liberty claiming that they "can flourish only if the frame for an open society is established. Formal democracy is not sufficient. We need a discursive mind, tolerance, and room for free discussion."[1401] What Weinberger emphasized is the importance of transparency and information for public discourse.

Now, let's turn again to the question of the constitutional recognition of access rights in Canada. As I discussed in Chapter ten, the Canadian common law has traditionally not been concerned with giving access rights to individuals, except in very special circumstances of litigation. Mainly, the common law was concerned with the publication of law and with legal

[1398] Mark Fenster, "Transparency Advocacy, From Rights to Bits", Paper prepared for the 1st Global Conference on Transparency Research, May 19-20, 2011.Rutgers University-Newark (NJ), USA, at 1 [Fenster, "Transparency Advocacy].
[1399] Meijer et al, "Open government", supra note 28 at 11.
[1400] Weinberger, supra note 1390 at 256
[1401] Ibid, at 257.

certainty, setting limits to arbitrary actions that undermined individual security.[1402] In Canada, constitutional arguments for a right of access are based either on the freedom of speech or the freedom of the press. The Québec Commission d'Accès à l'Information released an excellent report in 2002 entitled "Choosing Transparency" where then-President, Jennifer Stoddart recognized the right to know as a basis and a prerequisite for the exercise of other rights in a democracy.[1403] Around the same time the Supreme Court recognized the right to ATI as quasi-constitutional. In 2010 this Court acknowledged (in *Criminal Lawyers' Association*) a limited constitutional right of ATI under the freedom of expression. This trend shows signs of maturity of the Canadian law towards the status of ATI. However, this limited constitutional recognition is not enough considering that many jurisdictions have gone a long way in this direction.

As I stated at the beginning of this section positivism cannot be used for advancing a human right argument of ATI in Canada. It is a fact that a legislative reform of the *ATIA* has been lingering for so many years in parliamentary committees. This puts into question the validity of a legality argument for human rights in the Canadian case. According to the positive theory of law, legality is conferred only to formal process of positively enacting law via certain procedures – only those are believed to be legitimate in an existing political regime. Following this logic, human rights can only gain their legitimacy if they are guaranteed by norms of the positive law, meaning that they are transformed into positive law. That is the case if they are taken up as binding law into the catalogue of basic rights of a constitution. Referring to the right to ATI, this is clearly a difficult case to make in Canada, where this right cannot be directly inserted in the Constitution as a stand-alone human right because of complex amendment processes. To address this dilemma, I look at the two perspectives on human rights offered by Alexy. In justifying the human rights Alexy distinguishes between a problem of form and a problem of substance. The problem of substance is concerned with the question of which human rights are necessary. The problem of form is concerned with the necessity of transforming this concept into positive law.[1404] In the Canadian context, I see no problem of substance related to an ATI right – the

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[1402] Birkinshaw, "FOI and Openness", supra note 2 at 197.
[1403] Commission d'accès à l'information, "Report on the implementation of the Access Act and the Private Sector Act – Summary", November 2002, at 4, online:
<http://www.cai.gouv.qc.ca/documents/CAI_RQ_2002_res_eng.pdf>
[1404] Robert Alexy, "Discourse Theory and Human Rights" (September 1996) 9:3 Ratio Juris, 209-35 at 220 [Alexy, "Discourse Theory"].

analysis that I have made in Chapter ten (Jurisprudence) and in this Chapter provides considerable explanations for the recognition of the right of ATI as necessary from both a private and public perspective. What remains to be established for access rights is a problem of form – how can we incorporate this fundamental right into the constitutional fabric of the country?

It is evident, as I have argued in other chapters, that there is a lack of political will in Canada to enhance the status of ATI rights. The *ATIA* is weak, and the constitutional protection is limited or absent, which has caused serious violations of access rights in Canada, as evidenced in Chapters seven, eight and nine. Sen has a very compelling argument in this regard. He argued that if a government is accused of violating some human rights that accusation cannot really be answered simply by pointing out that there are no legally established rules in that country guaranteeing those rights. What might be at issue it is not whether the established legal rights have been violated, but whether we should not go beyond the scope of the established legal rights to encompass the demands in question.[1405] So, the question that one might ask is if the law is exactly what the political legislator enacts as law. The Habermas's discursive theory of law serves as a good theoretical explanation on why and how to make the move to the transition of ATI to a fundamental human right in Canada.

Habermas challenged the idea that law is what legislator enacts, and argued that the belief in legality does not per se legitimize.[1406] He rejected any attempt to reduce law to politics and advised that "as soon as legitimation is presented as the exclusive achievement of politics, we have to abandon our concepts of law and politics."[1407] Instead, Habermas suggested that the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.[1408] That is done through open informed public discussions that offer many venues of participation.

[1405] Amartya Sen, "Legal Rights and Moral Rights: Old Questions and New Problems" (June 1996) 9:2 Ratio Juris, 153-67 at 153-154 [Sen, "Legal Rights"].
[1406] Jurgen Habermas, *Legitimation crisis*, (Thomas McCarthy trans., Beacon Press 1975) (1973) at 97-99 [Habermas, *Legitimation crisis]*. See also Habermas, *Between Facts and Norms*, supra note 128 at 202.
[1407] Jurgen Habermas, "Law and Morality", in The Tanner Lectures on Human Values (Sterling m. McMurrin ed. & Kenneth Baynes trans., 1988), at 267 [Habermas, "Law and Morality"].
[1408] Habermas, *Between Facts and Norms*, supra note 128 at 104; see also Habermas, *Theory of Communicative Action* (Thomas McCarthy trans., Beacon Press, 1984) (1981), at 261.

The most intriguing idea in Habermas's theory for the purpose of this research is the explanation of how human rights become part of the constitutional fabric of a country. He used claims of communicative freedom in the form of freedoms of opinion and information which make their way to the legal system slowly over time. Habermas extrapolated that the system of rights "is not given to the framers of a constitution in advance as a natural law. Only in a particular constitutional interpretation do these rights first enter into consciousness at all....every constitution is a living project that can endure only as an ongoing interpretation continually carried forward at all levels of the production of law."[1409]. On the same argument Habermas disputed that "the constitutional state does not represent a finished structure but a delicate and sensitive-above all fallible and revisable-enterprise, whose purpose is to realize the system of rights anew in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically."[1410]

So, if law is not exactly what the legislator enacts as law, and the law should not be reduced to politics, which is the opposite of what has happened in the Canadian case (ATI has been reduced at what the legislator has enacted, and especially what the government has dictated), we have a scenario in which two branches of the government (executive and legislature) are less likely to bring changes in the ATI rights. What is left is the Canadian judiciary, which in order to achieve true success in recognizing a constitutional status of access rights, should think outside the box, and beyond what law and politics offer. According to Habermas, courts should review the procedures of constitutional democracy, since it is natural for them to carry out this function. First, they have special competencies for maintaining legal coherence among a complex system of legal norms while interpreting and applying abstract norms - including constitutional norms and rights. Second, the judiciary - precisely because it is not directly accountable democratically – is able to police impartially the very procedures of democracy which legitimate laws in the first place.[1411] According to Zurn, constitutional courts should be concerned to foster democratic procedures: namely, the openness, full inclusion, deliberation and wide dialogue and communicative exchange that are necessary ingredients of a healthy system of deliberative

[1409] Habermas, *Between Facts and Norms,* supra note 128 at 129.
[1410] Ibid, at 384.
[1411] Christopher F. Zurn, "Habermas's Discourse Theory of Law", SSRN, at 214.

constitutional democracy.[1412] In addition, Kazmierski argued about the role of the courts in controlling the discretion of public officials while dealing with ATI requests, stating that "ensuring that government officials properly exercise their discretion pursuant to access legislation also depends on the role of the judiciary"[1413].

The recognition of a stand-alone fundamental right to ATI in Canada certainly depends on the existence of the political will. However, this has not happened for many years, and I doubt it will happen any time soon. Birkinshaw advised that "FOI laws will always be unpopular with governments in power and some of the officials who serve them. That is probably the true test of their importance. FOI deserves constitutional protection"[1414]. However, to achieve such protection, access rights should either be organically added to the Constitution or indirectly inserted through judicial interpretation. Amending the Canadian Charter to include a right of ATI is unlikely for the foreseeable future because of the tough requirements for such procedure to occur. The general amending formula[1415] requires the consent of two-thirds of the provinces with at least fifty percent of Canada's population, and an approval of the Parliament and the Senate for any changes in the Canadian Constitution. As such, it raises a very high bar that is very difficult to meet. Nevertheless, such an unlikelihood should not detract from the hope that changes could be made. The common law in Canada has given signs that it is incrementally recognizing such rights, and limited success has already been achieved. However, there is need for a greater push towards a constitutional recognition. The continuous growing acknowledgement of the right to ATI as a constitutional right in the international level should render the establishment of such status attractive to the Canadian jurisprudence. The Canadian courts should respond to such developments, especially prompted by the jurisprudence of the CJEU or the ECtHR.

The experience in the EU demonstrated that the right of ATD has advanced a long way, from a voluntary right left on the hands of bureaucracy, to a fundamental right. The jurisprudence of the CJEU and the ECtHR have substantially influenced such advancement with an expansive

[1412] Ibid, at 214-215.
[1413] Kazmierski, supra note 655 at 51.
[1414] Birkinshaw, "FOI and Openness", supra note 2 at 217.
[1415] Constitution Act, 1982, s 38, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

interpretation of the right to ATD found under the freedom of expression, and as a stand-alone right. This consideration of access rights may be of value for Canadian courts which may follow the same path in the future by accommodating a constitutional right of ATI through an interpretative exercise. Hence, the EU legal framework and especially the way it came into being, may serve as a good example for Canadian future developments in transparency and ATI. Canada could benefit from knowledge on the developments in the EU and incorporating them into its own system.

CHAPTER 12: SUMMARY OF THE FINDINGS AND CONCLUSIONS

12.1 Summary of the findings

This dissertation has examined the nature and value of transparency as a principle of governance and ATI as an individual right through a comparative analysis of Canada and the EU. It provided some level of comprehensibility to the conceptual and practical use of the two terms, and offered a framework for the recognition of ATI as a constitutional right in Canada. It addressed the conceptual muddle of the concepts of transparency and information, and offered a definition and models of transparency, and a definition and typologies of information.

In addition, this dissertation focused on the way transparency and ATI is perceived and applied. The research demonstrated that the approach towards transparency and ATI is grounded on their perceptions as political, social and cultural constructs. It found that the value assigned to ATI socially and politically informed and prescribed its level of legal protection and application. To arrive to such conclusion I analyzed how access laws developed historically, how they were perceived and valued politically, how they were handled administratively, how they were applied practically, how they were supervised institutionally and how they were interpreted judicially.

Furthermore, the dissertation examined the protection of the right of ATI in Canada and the EU, and argued for a constitutional status of ATI in Canada. In order to do so, I engaged in doctrinal research, used a comparative exercise, using the EU legal framework, and employed two theories of democracy, the deliberative theory of Habermas and the participation theory of Pateman. They provide standards against which the rhetoric of transparency and ATI can be measured. The dissertation thus makes a claim for a constitutional right of ATI in Canada by looking at the value it upholds in a modern democracy and by drawing a connection between information and knowledge. This relationship creates better capacities, opportunities and venues for the citizens to exercise their rights, participating in public discussions and ultimately exercising control of government decision-making.

This research found that the political and institutional culture of the government and historical traditions in Canada and the EU had a major influence in their approaches towards transparency. The timing of the ATI legislation was dependent not only on government inspired policies, but also on other forces outside the government. The comparison showed that these forces were different in the two jurisdictions. Also, the ATI laws were guided by different principles, the EU an expansive access regime, and Canada a narrow complementary regime. The study of the legal framework of ATI revealed that the bureaucratic practices in all jurisdictions circumvent legal requirements by giving life to new rules of access. The questionnaire sent to some of the federal agencies in Canada, and some of the EU institutions revealed remarkable trends about how institutional culture shapes the rules of an access regime. In Canada, the very low number of responses and the way they were handled exposed a centralized system where decisions about information requests had to be approved at the upper levels of the government.

The data on the users of ATI gathered for Canada and the EU showed that the access rights are expansively used by the public in Canada and the EU, but in the EU they were surpassed by academia, and in Canada by business. Also, media requests were not significant in both jurisdictions. However, research demonstrated that some of the biggest scandals in the Canadian history, have been illuminated by journalists. Regarding other actors, this research showed that the EU NGOs have been more active and successful in their attempts to affect legislative or policy changes. The interviews I had with some of the groups in Canada revealed that media and NGOs found the system elitist, time-consuming, frustrating and expensive, which made it inaccessible for many small organizations, with little support and resources available.

The study of the oversight bodies in Canada and the EU displayed that although both had only the power to make recommendation, the European Ombudsman has been more successful because of the moral authority it has established and the support from the European Parliament. The involvement of Parliament in the investigation process of the Ombudsman is an interesting difference compared to the Information Commissioner in Canada, where such support has been missing. The authority of the Commissioner has continuously declined over the years, because her authority has been taken less seriously by the government. The Commissioner seems to be fighting a lonely battle because of the lack of strong allies in the mission for the protection and modernization of the access regime in Canada.

This dissertation also examined the jurisprudence of the main courts in Canada and the EU as it pertains to ATI cases. On the one side, in Europe, the CJEU has retained a significant role in the interpretation of the right of access, and the ECtHRs has made a meaningful contribution to the advancements of the access rights and transparency. On the other side, in Canada, the Federal Court and the Supreme Court have facilitated some advancements on the right of ATI, raising it to the quasi-constitutional status, and providing some limited applicability for a constitutional recognition. However, the Canadian judiciary has moved carefully towards an expansive interpretation of the *ATIA* because of the limitations posed in the Act for such interpretation. When compared to the European approach of judicial interpretation of the right of ATD, the Canadian courts can learn how to accommodate access rights into the Canadian Charter by the stretching the existing legal provisions though an expansive interpretation.

12.2 Limitations of the research

One of the main concerns in this research has been the recognition of a constitutional right of ATI in Canada. The research showed that access rights are surrounded by political controversy. Chapter five demonstrated that the administrative practices in the EU and Canada revealed a similar trend – there is recently a tendency towards a restriction of the right of ATI. These results demonstrate that beside the recognition of a constitutional right of ATI (as it is the case of the EU), it still remains a highly contested area which heavily depends on government politics. That means that a constitutional recognition would not be a panacea for the problems with the access rights' regime in Canada. Nonetheless, this reasoning should not serve as a deterrent for not pushing towards this recognition. Of course, the constitutional status gives the access rights a whole new level of protection which will require a careful reasoning for every case when these rights will be limited. Constitutional rights get a different level of attention from an institutional and judicial perspective which would potentially change how access rights are perceived, discussed and applied by all branches of the government, and would alter future trajectories.

As explained in Chapter five, it would be best that the *ATIA* be modernized. This change would also allow the Supreme Court to expand the recognition of access rights towards a constitutional status. Certainly, better laws make a better start, but they do not guarantee a successful access rights regime in and on themselves. Sometimes the gap between law and

practice, as this research demonstrates, is surprisingly much wider than expected, and deeply affects law implementation. The practices in all jurisdictions in this study exposed how everyday operations of public administration are continuously trying to circumvent legal requirements. However, having a good access law in place is the first step to building an effective access regime because it institutionalizes both the principle of transparency and the right of ATI.

It has been established that the right of ATI is important for many reasons, both from an individual interest and a public interest perspective. However, it is also undeniable that they can also bring unintended consequences, like the "empty files" phenomenon or constraints for government operations. While it is true that access rights might cause some burden to the government, this argument could be made for many other human rights, such as the right to health or education. The costs they are associated with cannot be a convincible argument when compared to their value. One should think beyond the principles of good governance to appreciate the importance of transparency and ATI in the public and private sphere. One should look at their value from a human rights perspective, which is an approach little explored in the literature but hardly contestable from any group of both advocates and academics. This approach is appealing and only a rights-based transparency and ATI regime would justify their normative value.

12.3 Recommendations for future research

While it is undisputed that transparency is better than secrecy and ATI is an important tool to ensure government accountability and democratic participation, more research is needed to shed light into the relationship between access rights and accountability and participation. There is a necessity for a systematic empirical investigation of how these legal principles interact with each other, and what the role of access rights in facilitating those principles is.

In addition, it has come up in this research that frequent users of ATI rights complain that neglect and adversarialism have become more serious problems within the federal government. This evidence of deteriorating compliance suggests that a reassessment of the methods used to enforce the *ATIA* is necessary.

Furthermore, this dissertation has argued about a human right approach to ATI departing from the value it holds in the private and public sphere. To arrive in such conclusion this study engaged in a doctrinal research of ATI. However, a more analytical examination is necessary to untangle the real value of information in public sphere in Canada. A further and comprehensive study would reveal how ATI is used by individuals or groups for personal interests or public interests. This dissertation could not engage in further research for lack of time and resources.

12.4 Conclusions

This dissertation, through the study of two jurisdictions, Canada and the EU, has provided some basis for the legal conceptualization of the principle of transparency and ATI, and some practical understanding on how they work in practice. It also offered some standards against which the rhetoric of transparency and access are measured – it did so departing from a value-based perspective. The dissertation made a case for a recognition of a constitutional right of ATI in Canada as time is ripe to move forward towards such recognition. Indeed, we are well beyond the point at which it can disputed that a properly defined right of ATI is essential to our system of constitutional rights. The time has passed that one could downgrade access rights to a lesser status.

There are many reasons why governments resist the idea of ATI - power and control are two of the most prevailing incentives for such resistance. As Cain et al put it "Controlling information, governments have learned, is an effective way to manage public opinion."[1416] Exactly for this reason access rights should be protected, in order to equalize the balance of power between government and citizens. As such, access rights become a powerful tool for providing a rich public space which enables individuals to become citizens and to exercise their rights in debating, shaping and steering the direction of their government. The ATI use for private interests and realization of personal rights will then allow the individuals to use their rights for the good of the entire society. According to this logic, a person who has been denied his own rights, will not be capable to engage his public rights and duties as a citizen - he will be a dormant citizen. The idea of information as knowledge carries the potential to create capacities

[1416] Cain et al, supra note 377 at 116.

for rational judgment, and thus engagement in public space, and further participation in public affairs.

However, transparency and ATI do not just occur as a natural consequence of a democratic system. As Fenster suggests, it requires championing, support, organization, and imposition.[1417] Hence, democracy has to involve the responsibility of the public to act upon the information it apparently has a right to.[1418] Pateman advised that "people learn to participate by participating, and that feelings of political efficacy are more likely to be developed in a participatory environment."[1419]

Considering the evolution of democracy and the system of citizens' rights in Canada, rights are always in evolution. Just like the right to vote which did not belong to all Canadians in the 60s (like aboriginals) in Canada, but evolved to a constitutional right, access rights could evolve to having a constitutional status. The time is ripe that this level of protection is not any more an extraordinary idea, but a practical and necessary one.

Canada has all the potential to establish a strong ATI right, it has a long experience with democracy, but it seems to resist the idea. It looks like it is staying true to its Westminster traditions of secrecy. However, the situation has changed so much at the international sphere. The growing recognition of the right to ATI both domestic and international level should render the establishment of a constitutional access right difficult to resist. Ninety eight countries now have laws which recognize a right of ATI, and of these over fifty have constitutional provisions confirming this right as a fundamental right. Hence, Canada has to revisit its position to the approach towards ATI, and re-evaluate its potentials to raise its status to a constitutional one.

[1417] Fenster, "The Opacity", supra note 50 at 895-902.
[1418] Roberts, *Blacked Out*, supra note 84 at 238.
[1419] Ibid, at 105.

APPENDIX 1: ATIP QUESTIONNAIRE

Confidential

Questionnaire on Transparency and Access to Information (ATI).

There are thirteen questions in this questionnaire. Please answer them to the best of your knowledge. Click at the square(s) (to activate them) for the answer that applies. You may choose more than one in some occasions. If you have comments for questions, use the comment box at the bottom of each question.

Thank you in advance for completing the questionnaire!

Part I. Government transparency (4 questions)

1. **Proactive disclosure** is considered to be important for government transparency. To what extent do you agree or disagree to the statements below:

	Strongly disagree	Disagree	Agree	Strongly agree	Neither disagree or agree	Don't know
Proactive disclosure ensures that the public is more informed about decisions that affect them.	☐	☐	☐	☐	☐	☐
Early proactive disclosure[1420] allows and encourages public participation in decision-making.	☐	☐	☐	☐	☐	☐
Early proactive disclosure sparks fruitful debate in the public sphere.	☐	☐	☐	☐	☐	☐
Early proactive disclosure ensures a better understanding of the rationale behind decision making.	☐	☐	☐	☐	☐	☐
Early proactive disclosure establishes more public trust to our institution.	☐	☐	☐	☐	☐	☐

[1420] Note: Early proactive disclosure refers to the disclosure at the early stages of decision-making, not just the final decisions.

Early proactive disclosure leads to a public information overload.	☐	☐	☐	☐	☐	☐
Early proactive disclosure increases the workload & expenses of our institution.	☐	☐	☐	☐	☐	☐
Early proactive disclosure doesn`t allow for a space to think for public officials.	☐	☐	☐	☐	☐	☐
Early proactive disclosure contributes to more public confusion about choices in decision-making.	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

2. When **providing information proactively** my agency/unit:

	Never	Sometimes	Depending on the issue	Often	Always
Takes into account the public needs when providing information.	☐	☐	☐	☐	☐
Specifically highlights the positive elements in the information to facilitate the public's understanding.	☐	☐	☐	☐	☐
Provides information, even if it is damaging to our organization.	☐	☐	☐	☐	☐
Organizes information in ways that are easy to digest by the general public.	☐	☐	☐	☐	☐
Leaves out information details if that information is controversial.	☐	☐	☐	☐	☐
Provides lots of information which is not adequately organized to conceal certain issues.	☐	☐	☐	☐	☐
Frames information in certain ways which are beneficial to the institutional interests.	☐	☐	☐	☐	☐
Chooses a technical language that needs a certain level of education to make sense of.	☐	☐	☐	☐	☐

Comment: Click here to enter text.

3. The following statements refer to the **proactive disclosure policies** in the agency/department where I work. How do you respond to the following statements:

	Strongly disagree	Disagree	Agree	Strongly agree	Neither agree or disagree	Don't know

My agency's management values making information proactively available.	☐	☐	☐	☐	☐	☐
My agency makes information widely available if there are many ATI requests.	☐	☐	☐	☐	☐	☐
There are regulations & policies in place to stimulate proactive disclosure.	☐	☐	☐	☐	☐	☐
My agency's management invites my unit to propose or join in initiatives for proactive disclosure.	☐	☐	☐	☐	☐	☐
There is a sufficient number of people in my unit dedicated to transparency	☐	☐	☐	☐	☐	☐
There is sufficient funding allocated in my agency's budget to transparency.	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

4. The following statements refer to the **proactive disclosure daily activities** in the agency/department where I work. How do you respond to the following statements:

	Never	Rarely	Sometimes	Often	Very often	Always
We announce information available proactively through the press.	☐	☐	☐	☐	☐	☐
We proactively place information on the agency's website.	☐	☐	☐	☐	☐	☐
We make information available proactively through public information campaigns.	☐	☐	☐	☐	☐	☐
We make information available proactively through social media e.g. Facebook, Twitter and blogs.	☐	☐	☐	☐	☐	☐
We make information available proactively through traditional media e.g. brochures, radio, televison.	☐	☐	☐	☐	☐	☐
We make information available proactively through open meetings.	☐	☐	☐	☐	☐	☐
We ask feedback from the public about the quality of the information provided using the above sources.	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

Part II: Access to Information (6 questions)

1. It is established that ATI is significant for the functioning of democratic institutions. How to you respond to the following statements regarding **the value of ATI from your agency/unit's perspective**?

	Strongly disagree	Disagree	Agree	Strongly agree	Neither agree or disagree	Don't know
My agency's management values ATI as central to democratic governance.	☐	☐	☐	☐	☐	☐
There are regulations & policies in my agency for the administration of ATI requests.	☐	☐	☐	☐	☐	☐
My agency/unit provides information in a timely fashion.	☐	☐	☐	☐	☐	☐
ATI requests help us in decision-making by providing important public input.	☐	☐	☐		☐	☐
My agency provides sufficient guidance to my unit to deal with ATI requests.	☐	☐	☐	☐	☐	☐
There is a sufficient number of people in my unit dedicated to ATI.	☐	☐	☐	☐	☐	☐
There is sufficient funding allocated in my agency's budget to ATI.	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

2. How would you categorize **the purpose of the ATI requests** made to your institution?

	Never	Rarely	Sometimes	Often	Very Often	Always
Journalistic (making headlines in the media)	☐	☐	☐	☐	☐	☐
Protecting human rights (Mobility, legal, democratic rights, or other Charter Rights)	☐	☐	☐	☐	☐	☐
Making an institution accountable	☐	☐	☐	☐	☐	☐
Participating in decision making	☐	☐	☐	☐	☐	☐
Stimulating more transparency	☐	☐	☐	☐	☐	☐
Preventing/fighting corruption	☐	☐	☐	☐	☐	☐
Furthering business interests	☐	☐	☐	☐	☐	☐

Furthering political interests	☐	☐	☐	☐	☐	☐
Embarrassing government	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

3. How would you consider **the interaction between your institution and these categories of requesters**[1421]:

	Adversarial	Brittle	Functional	Friendly	Close	Depends on the information requested
Media	☐	☐	☐	☐	☐	☐
Academia	☐	☐	☐	☐	☐	☐
Private sector	☐	☐	☐	☐	☐	☐
Organizations	☐	☐	☐	☐	☐	☐
Public	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

4. Based on your experience with ATI requesters, what do you think of their **knowledge on ATI legal framework**?

	They don't know much	They have some basic knowledge	They have a strong knowledge	They are experts	Can`t say
Media	☐	☐	☐	☐	☐
Academia	☐	☐	☐	☐	☐
Private Sector	☐	☐	☐	☐	☐
Organizations	☐	☐	☐	☐	☐
Public	☐	☐	☐	☐	☐

Comment: Click here to enter text.

5. Please indicate, from your experience, to what degree you agree with the following statements regarding **ATI requests**.

	Never	Rarely	Sometimes	Often	Very Often	Always	Depends on the type of requests
Responding needs consultation with superiors	☐	☐	☐	☐	☐	☐	☐
I find myself in trouble when trying to respond to sensitive requests	☐	☐	☐	☐	☐	☐	☐

[1421] Note: This categorization is used by the Treasury Board Secretariat in its Annual Reports.

Releasing information leads to embarrassment of my institution	☐	☐	☐	☐	☐	☐	☐
Information requested benefits certain groups rather than the general public	☐	☐	☐	☐	☐	☐	☐
Requests lead to making information proactively available	☐	☐	☐	☐	☐	☐	☐
Information helps requesters advance some other human rights	☐	☐	☐	☐	☐	☐	☐
Requests keep our institution accountable to the public	☐	☐	☐	☐	☐	☐	☐
Requests help improve our relationship with groups of requesters & gain their trust	☐	☐	☐	☐	☐	☐	☐

Comment: Click here to enter text.

6. Who would you **seek advice from** when you are in doubt regarding ATI requests? (Choose three that apply the most).

a) Nobody, I use my discretion ☐
b) A colleague in your office ☐
c) The head of your office ☐
d) A colleague in your department ☐
e) The head of your department ☐
f) Someone in your institution ☐
g) The head of your institution ☐
h) The minister ☐
i) Another ATIP coordinator outside your institution ☐

Comment: Click here to enter text.

PART III: General questions (3 questions)

1. How long have you been **working for the current agency**:

a) less than a year ☐
b) 1-3 years ☐
c) 3-5 years ☐

d) 5-10 years ☐
e) more than 10 years ☐
Comment: Click here to enter text.

2. How many **hours of training** do you get on a yearly basis on how to deal with ATI requests? (Consider the last three years)

a) None ☐
b) 1-5 hours ☐
c) 5-10 hours ☐
d) 11-15 hours ☐
e) 16-20 hours ☐
f) Over 20 hours ☐

Comment: Click here to enter text.

3. How many **persons are assigned** to deal with ATI requests exclusively in your office?

a) none ☐
b) 1 ☐
c) 2-3 ☐
d) 4-5 ☐
e) Over 5 ☐

Comment: Click here to enter text.

4. Do you have any **comments** you would like to share pertaining to your experience with the administration of ATI requests at your agency? Please feel free to share any information you deem useful and appropriate.

Comment: Click here to enter text.

APPENDIX 2: TABLES

Table 3: Comparison between the *ATIA* and Regulation 1049

Elements	**Canada**	**Ontario**	**EU**	**Albania**
Act was passed in	1982	1988	2001	1999, 2014
Existence of recitals	no	No	Yes (17 recitals)	No
Number of articles	77	70	19	28
Purpose of the act	to extend the present laws of Canada to provide a right to ATI in records under the control of a government institution[1422]	- to provide a right of access to information under the control of institutions - to protect the privacy of individuals[1423]	To give the fullest possible effect to the right of public ATD[1424]and ensure the widest possible access to documents[1425]	to guarantee the recognition of a public's right to information, in the framework of exercising the rights and freedoms of individuals in practice, and the formation of ideas on the state of the country and the society"[1426].
Principles	Government information should be available to the public,..necessary exceptions to the right of access should be limited and specific and decisions	- information should be available - necessary exemptions should be limited and specific	Principle of openness to create an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as	To promote integrity, transparency and accountability of public authorities[1430]

[1422] Article 2(1) of ATIA, RSC, 1985, c.A-1
[1423] Section 1 of the FIPPA
[1424] Recital (4) of Regulation 1049/2001, Official Journal of the European Communities, L.145/43
[1425] Article 1(a) of Regulation 1049/2001
[1426] Article 1 (b) of Law 119/2014
[1430] Article 1(3) of Law 119/2014

	on the disclosure of government information should be reviews independently of government[1427]	- decisions should be reviewed independently of government[1428]	possible to the citizen. Openness enables citizens to participate more closely in the decision-making process…[1429]	
Institutions covered	Any department or ministry of state of the Government of Canada and parent Crown corporations	government ministries, most public agencies, boards, commissions and advisory bodies, colleges and universities, some publicly funded organizations	The EP, the Council, the Commission, CJEU[1431] & ECB[1432] when acting in their administrative capacities, and all EU agencies	any administrative body provided for in the current legislation on administrative procedures, legislative bodies, legislative, judicial and prosecution bodies at any level, local government units at any level, state authorities and public entities, created by the Constitution or by law
Meaning of documents	"record" –any documentary material regardless of medium or form[1433]	any record of information however recorded, whether in printed form, on film, by electronic means or otherwise[1434]	"document"- any content whatever its medium(written in paper or stored in electronic form or as a sound, visual or audiovisual recording)[1435]	"public information"-any data recorded in any form or format, during discharge of the public function, whether or not prepared by a public authority[1436].

[1427] Article 2(1) in ATIA
[1428] Section 1 of the FIPPA
[1429] Recitals (1) &(2) of the Regulation 1049/2001
[1431] Court of Justice of the European Union
[1432] European Central Bank
[1433] Article 3 of ATIA "Definitions"
[1434] Section 2 of FIPPA
[1435] Article 3(a) of Regulation 1049/2001 "Definitions"
[1436] Article 2.2 of Law 119/2014

Subjects	Every person who is a Canadian citizen or permanent resident[1437]	every person has a right of access to a record[1438]	Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State[1439]	any natural or legal person, local or foreign, as well as any stateless persons[1440].
Times for handling requests	30 days after the request is received[1441]	30 days after the request is received[1442]	15 working days from registration[1443]	10 working days from the day of submission[1444]
Extensions of time limits	Not limited (reasonable period of time[1445]	for a period of time that is reasonable[1446]	15 working days[1447]	5 working days[1448]
Exemptions	Laid down in Articles 13-24; Cabinet confidences (s.69) court records, intergovernmental relations, personal information, third party information,	Listed in section 12-22 of the Act -excludes Cabinet confidences (s.12) court records, certain law enforcement information, intergovernmental relations, personal information, third party information, most labour relations records	Clearly listed in Article 4. Paragraphs 2,3,4 of Article 4 are assessed against an overriding public interest (balance test required)	Restrictions all laid out in Article 17, all tested against a public interest override

[1437] Article 4(1) of ATIA "Access to government records"
[1438] Section 10(1) of FIPPA
[1439] Article 2 of the Regulation 1049/2001 "Beneficiaries and scope"
[1440] Article 2.3 of Law 119/2014
[1441] Article 7 of ATIA
[1442] Section 26 of FIPPA
[1443] Article 7(1) of the Regulation 1049/2001
[1444] Article 15.1
[1445] Article 9(1) of ATIA
[1446] Section 27(1) of FIPPA
[1447] Article 7(3) of the Regulation 1049/2001
[1448] Article 15.3

Overview bodies	Information Commissioner, exclusively to ATIA (power of recommendations)	Information and Privacy Commissioner	Ombudsman, broadly responsible for good administration in the EU (power of recommendations)	Commissioner for the FOI and Protection of Personal Data
Costs for requests	Application fee not exceeding $25. Currently $5 application fee set by regulations+ payment for every hour in excess of 5 hours of searching[1449]	$5 application fee set by regulations +several costs[1450]	No application fee; Copies of less than 20 pg A4 are free of charge (over that costs of producing and sending documents may be charged)[1451]	No application fee -cost for the reproduction of the information request and, where appropriate, the cost of delivery[1452]

[1449] Article 11 (1) & (2) of ATIA
[1450] Section 57 (1) and (3) of FIPPA
[1451] Article 10(1) of the Regulation 1049/2001
[1452] Article 13.1 of Law 119/2014

Table 6: Source of ATI requests received

	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Total requests	60,105	55,145	43,194	41,641	35,154	34,041	31,487	29,182	27,269	25,207
Business	23,129	21,242	18,648	18,477 (44.4%)	17,047 (48.5%)	14,958 (43.9%)	13,202 (41.9%)	12,868 (44.1%)	13,360 (49%)	11,910 (47.2%)
Public	23,723	22,274	16,893	15,673 (37.6%)	12,387 (35.2%)	11,656 (34.2%)	10,762 (34.2%)	9,461 (32.4%)	9,108 (33.4%)	8,213 (47.2%)
Media	8,421 (14%)	8, 321 (13%)	5,133 (9%)	5, 234 (12.6%)	3, 693 (10.5%)	4,804 (14.1%)	4,411 (14%)	3,617 (12.4%)	2,451 (9%)	2,680 (10.6%)
Organization	2,898 (4.8%)	2, 415 (3.8%)	1, 946 (3.7%)	1, 706 (4.1%)	1, 559 (4.4%)	2,097 (6.2%)	2, 850 (9.1%)	2,932 (10%)	1,980 (7.3%)	2,107 (8.4%)
Academia	1,934	893	574	551 (1.3%)	468 (1.3%)	526 (1.6%)	262 (0.8%)	304 (1%)	370 (1.4%)	297 (1.2%)

Source: Table drawn by author using data of the Government of Canada at InfoSource. Available at http://www.infosource.gc.ca/index-eng.asp

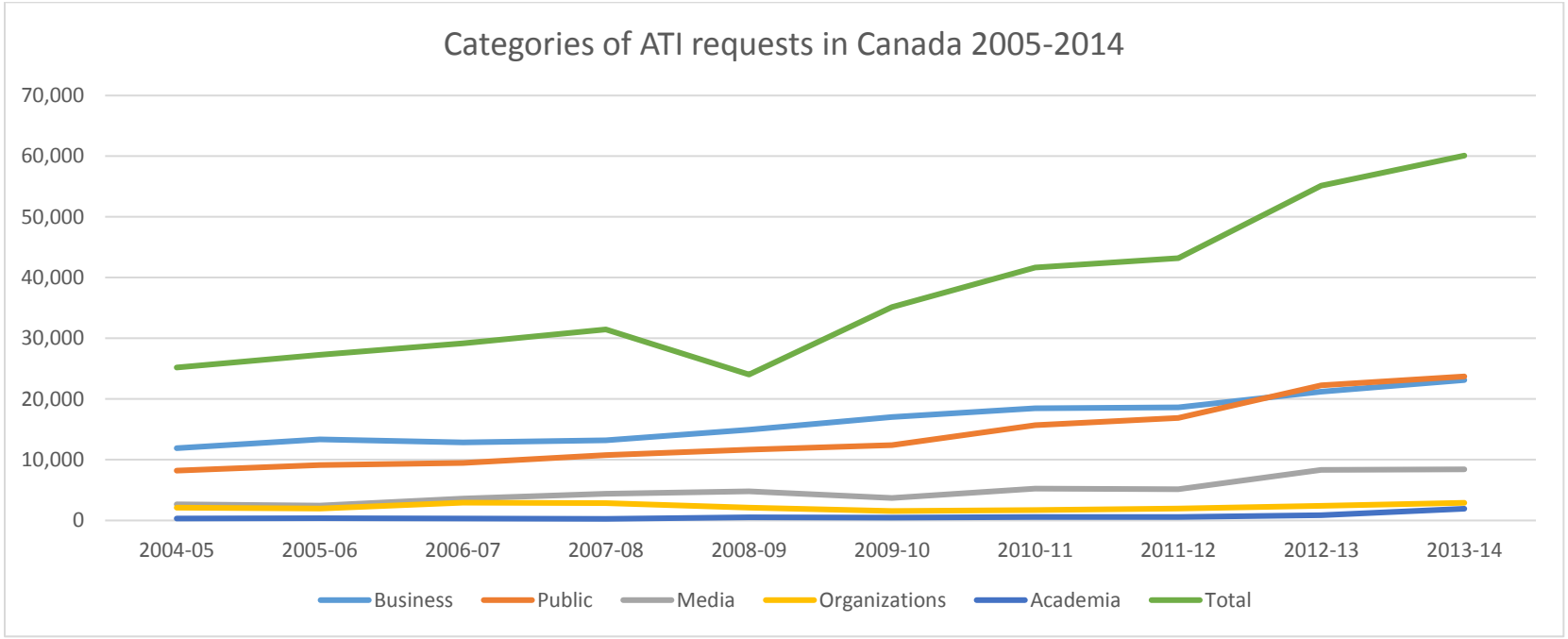
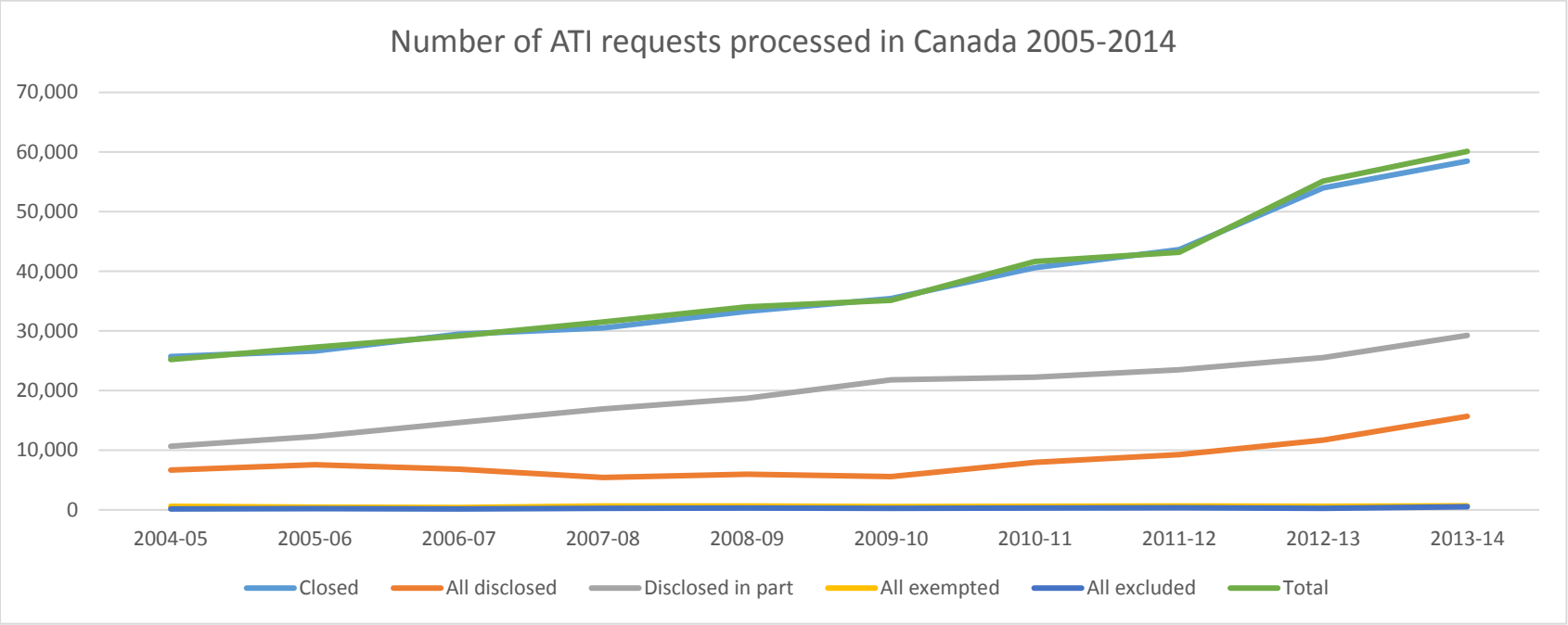


Table 7: Number of ATI requests processed

	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Requests received	60,105	55,145	43,194	41,641	35,154	34,041	31,487	29,182	27,269	25,207
Requests closed	58,475	53,993	43,664[1453]	40,616	35,427	33,284	30,530	29,473	26,621	24,709
All disclosed	15,684 (26.8)	11,681 (21.6)	9,272 (21.2%)	7,955 (19.6%)	5,597 (15.8%)	5,976 (18%)	5,430 (17.8%)	6,808 (23.1%)	7,569 (28.4%)	6,696 (27.1%)
Disclosed in part	29,250 (50%)	25,534 (52.8%)	23,468 (53.7%)	22,848 (56.3%)	21,810 (61.6%)	18,726 (56.2%)	16,915 (55.4%)	14,650 (49.7%)	12,311 (46.2%)	10,667 (43.2%)
All exempted	679 (1.2%)	602 (1.1%)	636 (1.5%)	589 (1.4%)	570 (1.6%)	640 (1.9%)	633 (2.1%)	395 (1.3%)	435 (1.6%)	612 (2.5%)
All excluded	521 (0.9%)	278 (0.5%)	346 (0.8%)	311 (0.8%)	263 (0.7%)	307 (0.9%)	264 (0.9%)	151 (0.5%)	184 (0.7%)	154 (0.6%)



[1453] Note that the number reflects requests received in the given year and outstanding requests from previous reporting period. Every time that the number of requests completed is bigger than those received, it reflects outstanding requests being processed.

Table 8: Time of reply

	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Replied on time (30 days)	35,653 (61%)	34,997 (64.8%)	24,128 (55.3%)	23,107 (56.9%)	19,874 (56.1%)	18,991 (57.1%)	17,476 57.2%	17,028 (57.8%)	15,877 (59.6%)	15,254 (61.7%)

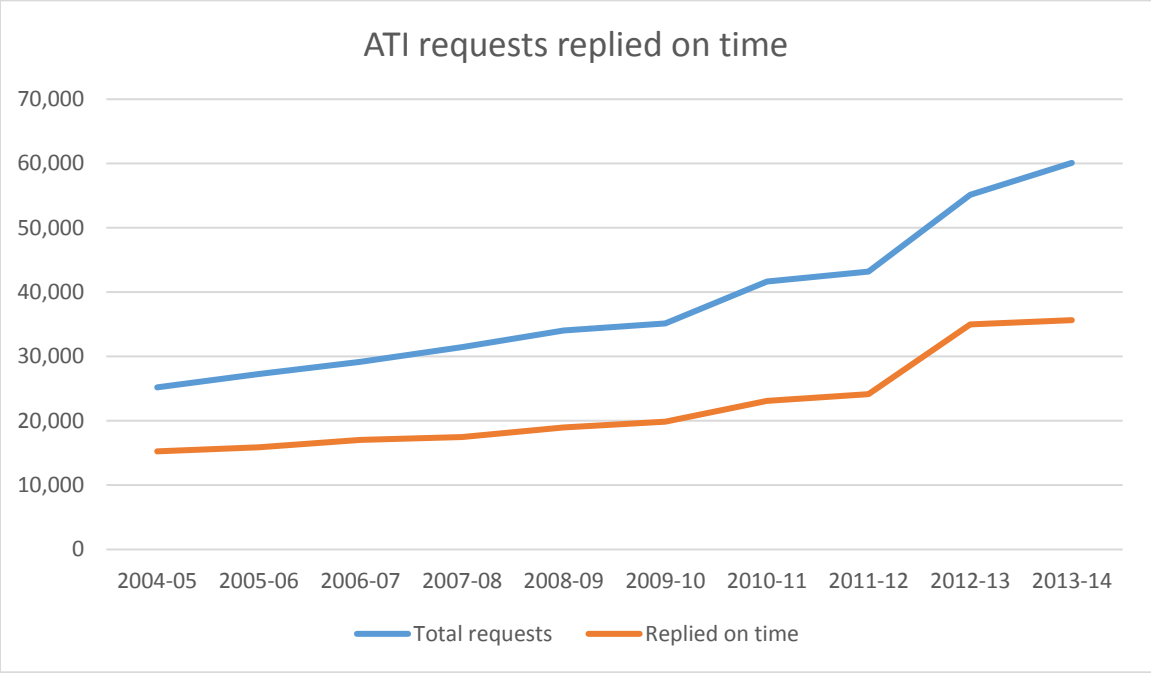


Table 9: Exemptions applied under the ATIA

Exemptions	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Information obtained in confidence (sec.13)	2,474	1,945	1,687	1,875 (3.7%)	1,744 (3.6%)	1,733 (3.9%)	1,686 (4.1%)	1,582 (4.4%)	1,455 (4.9%)	1,193 (4.5%)
Federal-Provincial Affairs (sec.14)	991	687	657	715 (1.4%)	487 (1%)	820 (1.8%)	1,063 (2.6%)	921 (2.6%)	593 (1.9%)	543 (2.1%)
International Affairs and Defence (sec.15)	11,136	10,669	8,722	7,773 (15.4%)	10,724 (22%)	9,080 (20.2%)	8,365 (20.4%)	5,158 (14.5%)	3,563 (11.9%)	2,020 (7.6%)
Law Enforcement and Investigations (sec.16)	7,946	7,079	6,490	6,752 (13.4%)	5,896 (12.1%)	5,720 (12.8%)	4,924 (12%)	4,160 (11.7%)	3,729 (12.5%)	3,351 (12.7%)
Safety of Individuals (sec.17)	169	176	109	143 (0.3%)	140 (0.3%)	119 (0.3%)	96 (0.2%)	79 (0.2%)	108 (0.4%)	79 (0.3%)
Economic Interests of Canada (sec.18)	1,327	1,248	852	820 (1.6%)	842 (1.7%)	900 (2%)	619 (1.5%)	657 (1.8%)	535 (1.8%)	540 (2%)
Personal Information (sec.19)	20,702	20,797	18,665	18,392 (36.5%)	16,544 (34%)	13,985 (31.2%)	12,119 (29.5%)	10,755 (30.2%)	9,098 (30.5%)	8,499 (32.1%)
Third Party information (sec.20)	5,308	4,914	3,862	3,934 (7.8%)	3,961 (8.1%)	3,786 (8.4%)	3,790 (9.2%)	4,374 (12.3%)	3,962 (13.3%)	4,099 (15.5%)
Operations of government (sec.21)	9,991	8,157	6,556	6,465 (12.8%)	5,740 (11.7%)	6,062 (13.5%)	5,685 (13.8%)	5,297 (14.9%)	4,682 (15.7%)	4,259 (16.1%)
Testing Procedures, tests & Audits (sec.22)	364	388	347	318 (0.6%)	250 (0.5%)	283 (0.6%)	221 (0.5%)	171 (0.5%)	141 (0.5%)	140 (0.5%)
Solicitor-Client Privilege (sec.23)	2,248	2,082	1,822	1,811 (3.6%)	1,464 (3%)	1,465 (3.3%)	1,381 (3.4%)	1,398 (3.9%)	1,271 (4.3%)	1,111 (4.2%)

Statutory prohibitions (sec.24)	2,019	1,963	1,592	1,275 (2.5%)	877 (1.8%)	820 (1.8%)	1,005 (2.5%)	1,009 (2.8%)	634 (2.1%)	568 (2.1%)
Information to be published (sec.26)	128	123	81	98 (0.2%)	84 (0.2%)	95 (0.2%)	97 (0.2%)	97 (0.3%)	81 (0.3%)	69 (0.3%)

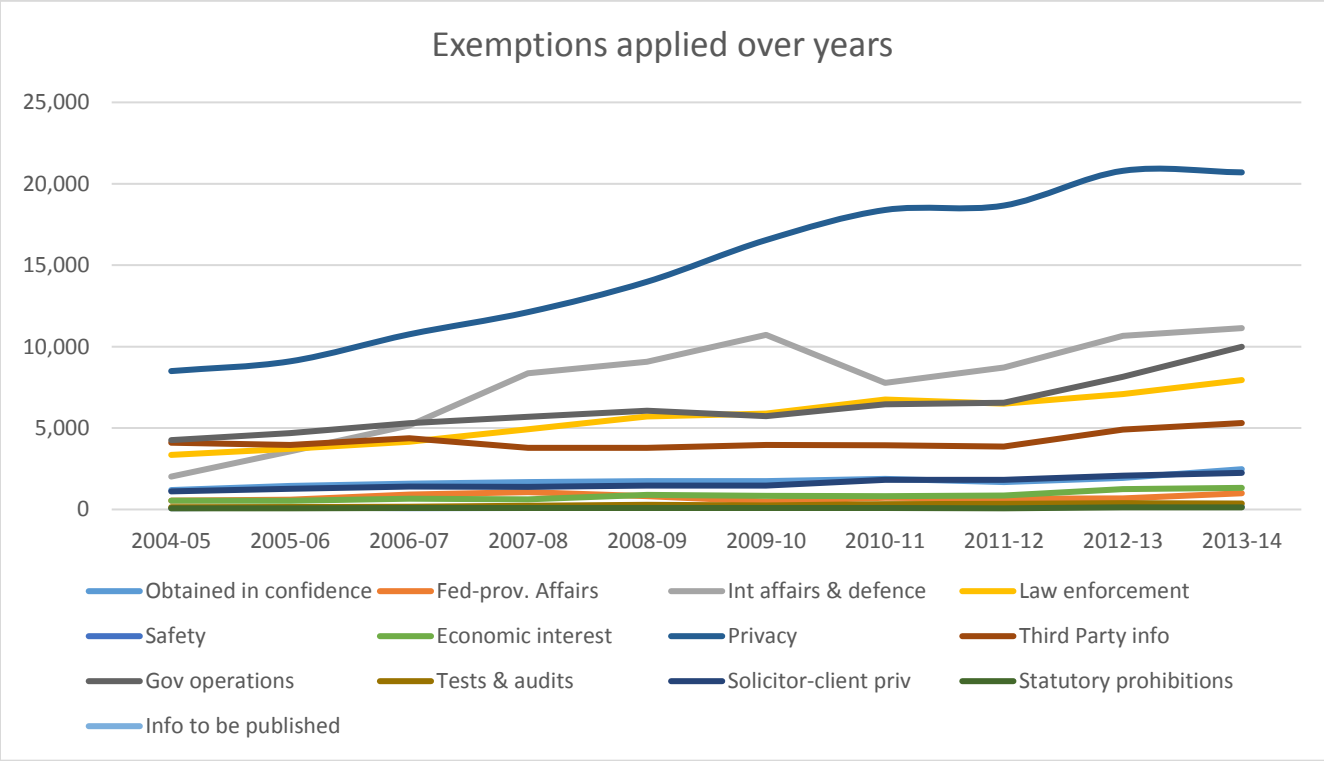


Table 10: Exclusions applied under ATIA

Exclusions	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Non-application to certain materials (sec.68)	769	484	378	626	376	398	269	222	230	211
Cabinet confidences (sec.69)	3,168	2,158	1,842	1,575	1,719	2,237	2,115	2,063	1,661	1,405

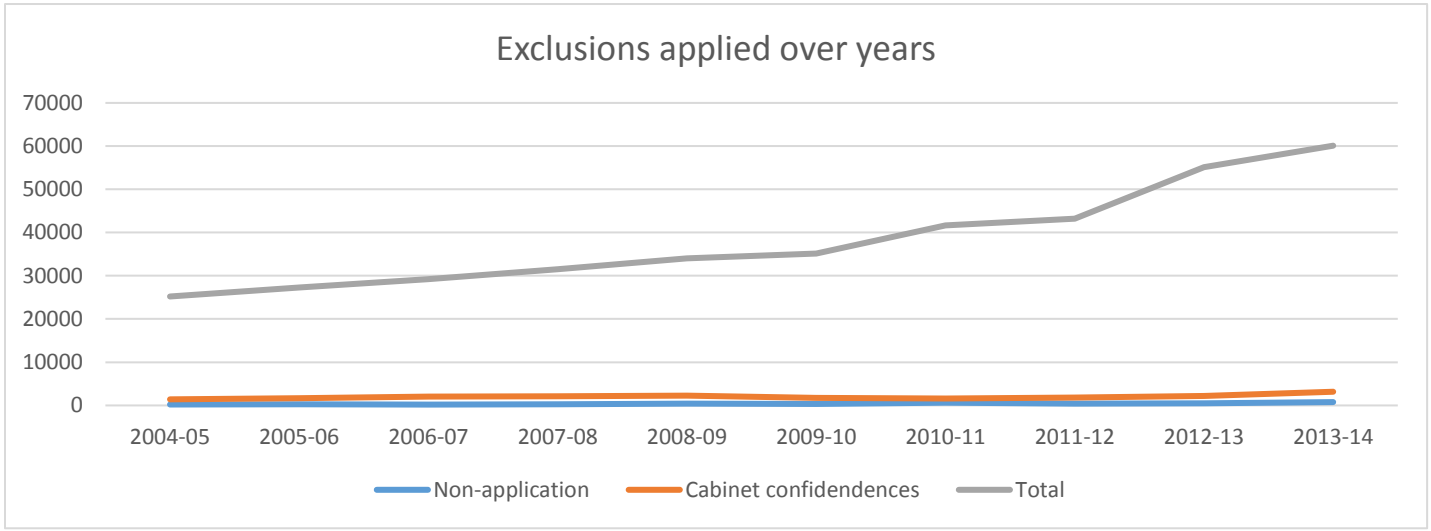


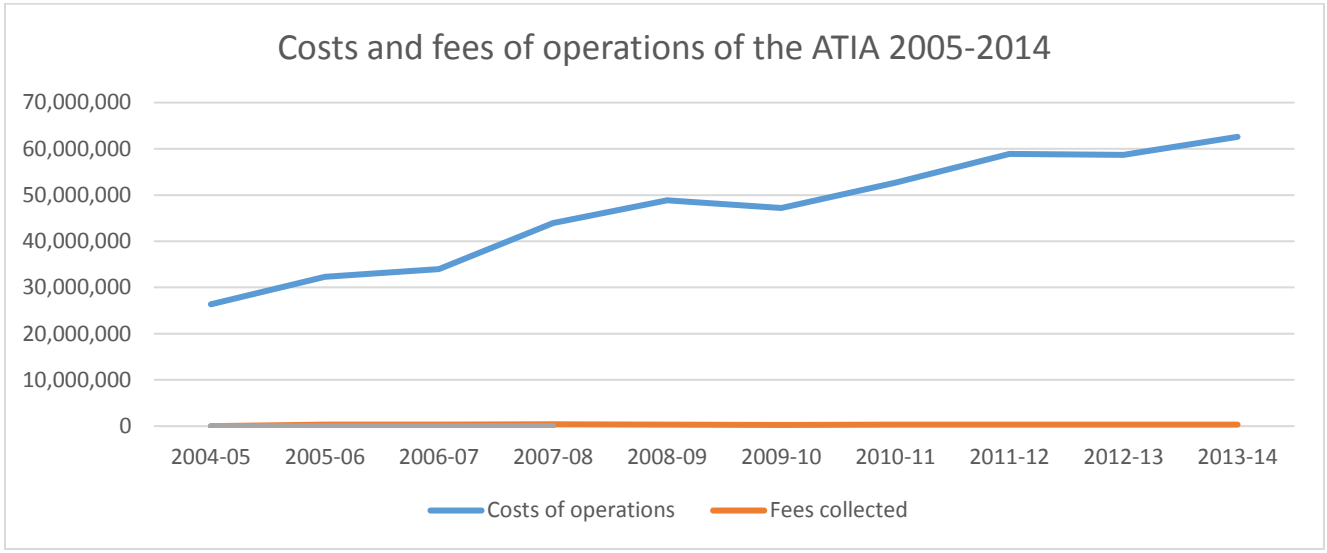
Table 11: Institutions that received most ATI requests

Most requests	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006	2004-2005
Total requests	60,105	55,145	51,332	41,641	35,154	34,041	31,487	29,182	27,269	25,207
1.	Citizenship and Immigration (CI) 29,281 (48.8%)	CI 25,010 (45.3%)	CI 20,575 (47.6%)	CI 18,862 (45.3%)	CI 16,647 (47.3%)	CI 14,034 (41.2%)	CI 11,434 (36.9%)	CI 10,497 (35.9%)	CI 10,309 (37.8%)	CI 9,034 (35.8%)
2.	Canada Border Services Agency (CBSA) 4,671 (7.8%)	CBSA 3,147 (6%)	CRA 2,237 (5.2)	CRA 2,589 (6.2%)	CRA 1,798 (5.1)	RCMP 2,009 (5.9%)	CRA 1,903 (6.1%)	ND 1,808 (6.2%)	HC 1,842 (6.8%)	CRA 1,861 (7.4%)
3.	Canada Revenue Agency (CRA) 2,751 (4.6%)	CRA 3,137 (5.6%)	CBSA 1,866 (4.3%)	RCMP 1,657 (4%)	RCMP 1,547 (4.4%)	CRA 1,770 (5.2%)	ND 1,779 (5.7%)	CRA 1,604 (5.5%)	CRA 1,772 (6.5%)	HC 1,363 (5.4%)
4.	National Defence (ND) 2,231 (3.7%)	TC 197 (4%)	HC 1,763 (4.1%)	CBSA 1,607 (3.9%)	HC 1,481 (4.2%)	ND 1,669 (4.9%)	RCMP 1,662 (5.4%)	HC 1,442 (4.9%)	ND 1,131 (4.2%)	ND 1,284 (5.1%)
5.	Royal Canadian Mounted Police (RCMP) 1,730 (2.9%)	ND 2,044 (3.7%)	ND 1,645 (3.8%)	HC 1,602 (3.8%)	CBSA 1,292 (3.7%)	HC 1,158 (3.4%)	TC 1,217 (3.9%)	TC 1,298 (4.5%)	RCMP 924 (3.4%)	RCMP 1,085 (4.3%)
6.	Health Canada (HC) 1,563 (2.6%)	EC 1,827 (3.3%)	RCMP 1,434 (3.3%)	ND 1,483 (3.6%)	ND 1,142 (3.3%)	CBSA 1,155 (3.4%)	HC 1,147 (3.7%)	CBSA 945 (3.2%)	TC 901 (3.3%)	PWGS 876 (3.5%)
7.	Environment Canada (EC) 1,459 (2.4%)	HC 1,765 (3.2%)	EC 1,421 (3.3%)	EC 1,128 (2.7%)	EC 890 (2.5%)	TC 1,069 (3.1%)	CBSA 1,030 3.3%)	RCMP 911 (3.1%)	PWGS 832 (3.1%)	TC 779 (3.1%)
8.	Transport Canada (TC) 1,091 (1.8%)	RCMP 1.218 (2.2%)	FAIT 892 (2.1%)	LAC 907 (2.2%)	LAC 761 (2.2%)	EC 892 (2.6%)	FAIT 736 (2.4%)	PWGS 869 (3%)	LAC 745 (2.7%)	EC 653 (2.6%)
9.	Privy Council Office (PCO) 907 (1.5%)	FAIT 1,148 (2.1%)	LAC 821 (1.9%)	PWGS 798 (2.1%)	PWGS 724 (2.1%)	FAIT 665 (2%)	PCO 688 (2.2%)	EC 851 (2.9%)	EC 728 (2.7%)	LAC 629 (2.5%)

10	FATDC[1454] 904 (1.5%)	LAC[1455] 900 (1.6%)	PWGS[1456] 736 (1.7%)	FAITC[1457] 798 (1.9%)	FAIT 638 (1.8%)	Industry Canada (IC) 660 1.9%)	EC 659 (2.1%)	LAC 744 (2.6)	CBSA 670 (2.5%)	CSC[1458] 613 (2.4%)

Table 12: Fees and costs of operations of the ATIA

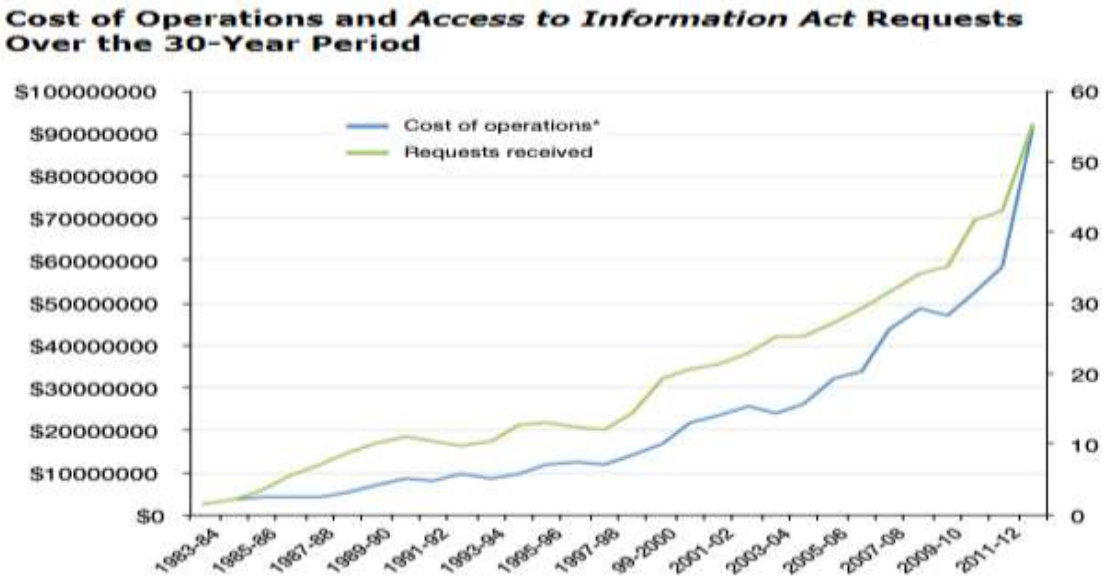
	2013-2014	**2012-2013**	**2011-2012**	**2010-2011**	**2009-2010**	**2008-2009**	**2007-2008**	**2006-2007**	**2005-2006**	**2004-2005**
Cost of Operations	62,585,847	58,658,040	58,929,246	52,633,834	47,196,030	48,891,400	43,910,746	33,947,815	32,305,312	26,365,457
Fees Collected	331,782	314,205	319,000	326,869	286,996	305,684	404,209	296,827	305,155	265,382



1454 Foreign Affairs, Trade and Development Canada
1455 Library and Archives Canada
1456 Public Works and Government Services Canada

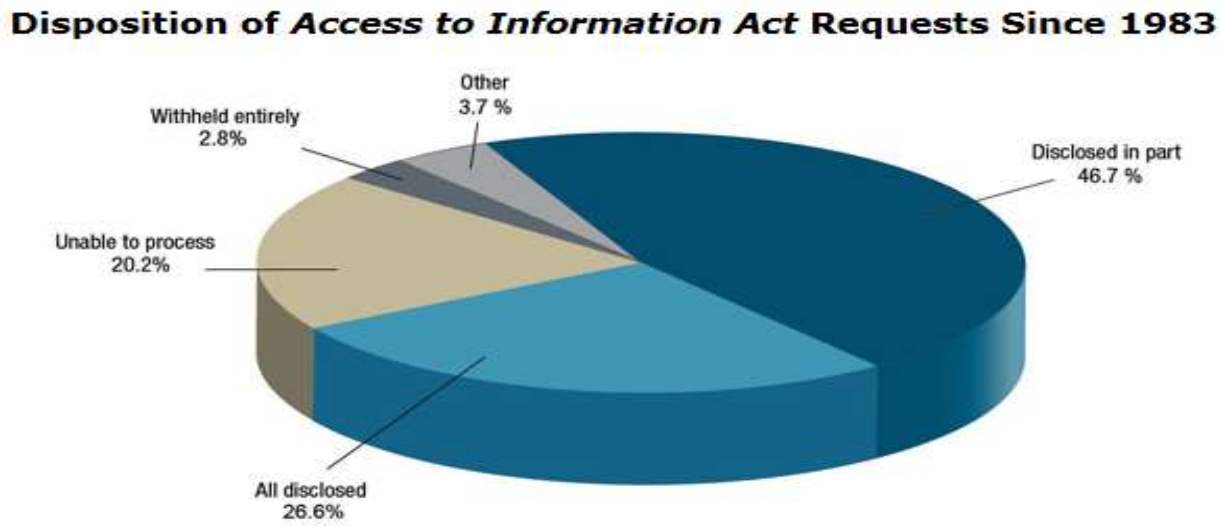
1458 Correctional Services Canada

Table 13:



Source: Treasury Board Secretariat, Info Source Bulletin Number 36B – Statistical Reporting. Online: <http://www.infosource.gc.ca/bulletin/2013/b/bulletin36b02-eng.asp#s2>.

Table 14: Responses to ATI requests 1983-2014

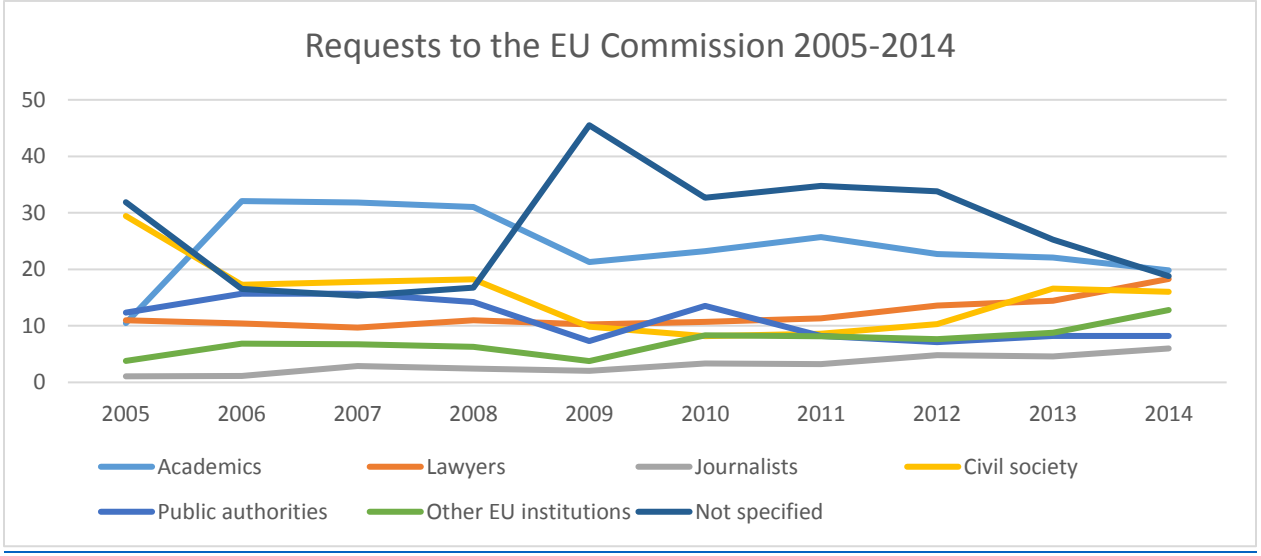


Source: Treasury Board Secretariat, Info Source Bulletin Number 37B – Statistical Reporting, online: <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37b02-eng.asp#aia>.

Table 15: Requests to the European Commission according to the social and occupational profile of requesters (%)

Years	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Total	6227	6,525	6,014	6,477	6,361	5,055	5,197	4,196	3,841	3,396
Academic	19.80	22.08	22.70	25.73	23.24	21.29	31.03	31.85	32.08	10.49
Lawyers	18.30	14.46	13.58	11.30	10.69	10.24	11.01	9.69	10.43	11
Journal.	6	4.58	4.81	3.25	3.35	2.02	2.46	2.90	1.14	1.07
Civil Society[1459]	16.04	16.62	10.32	8.59	8.18	9.85	18.26	17.77	17.27	29.44
Public authority	8.23	8.24	7.12	8.20	13.56	7.33	14.19	15.69	15.67	12.32
Other EU institute.	12.80	8.76	7.64	8.15	8.32	3.77	6.3	6.75	6.85	3.78
Not specified	18.83	25.26	33.83	34.78	32.68	45.5	16.75	15.33	16.55	31.89

Source: Chart drawn by the author using data from the European Commission, Access to Documents. Online: <http://ec.europa.eu/transparency/access_documents/reports_en.htm>.



[1459] Civil Society here includes: Interest groups, industry, NGOs, etc. online: <http://ec.europa.eu/transparency/access_documents/docs/rapport_2013/com-2014-619_en.pdf>.

Table 16: EU Commission requests processed (%)

	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Access refused	11.87	14.45	16.91	12.18	12.47	11.65	13.99	23.40	23.22	31.92
Partial access	15.36	10.68	8.61	7.62	5.37	4.11	3.33	3.88	2.94	3.65
Full Access	72.77	73.43	74.48	80.20	82.16	84.23	82.68	72.71	73.83	64.43

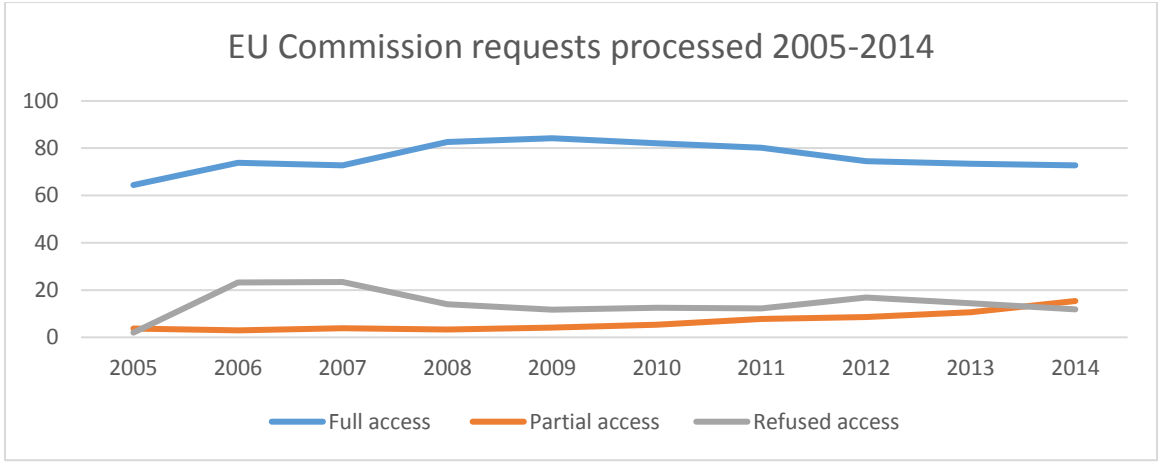


Table 17: EU Commission refusals by exceptions applied (%)

Exceptions	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Public security	0	0.92	1.31	1.33	2.67	2.55	0.42	1.19	1.53	0.28
Defence and security	2.84	3.69	0.65	2	0	0	0.42	2.23	0.60	0.21
International relations	0.71	0	7.19	4.67	6.67	4.38	5.91	10.98	7.06	4.17
Financial, ec and monetary policy	4.61	7.37	0	3.34	3.33	3.28	0.84	1.26	1.19	2.55
Privacy and integrity of Individuals	18.09	16.13	10.46	20.67	9.33	14.23	5.06	5.04	4.85	3.68
Commercial Interests	15.96	11.98	11.76	14.66	16.67	17.52	24.89	10.79	8.94	7.78
Court proceeding and legal advice	10.28	6.91	7.84	1.33	10	5.47	3.8	6.08	7.49	8.63
Inspection, investigations and audits	32.98	36.87	45.10	32.68	32	25.91	27.85	23.48	30.72	41.80
Decision-making process (no dec taken)	11.35	10.60	6.54	15.33	11.33	12.77	17.3	12.02	14.30	12.73
Decision-making process (dec taken, opinions)	3.19	5.53	9.15	4	8	13.87	12.24	19.29	19.06	14.36

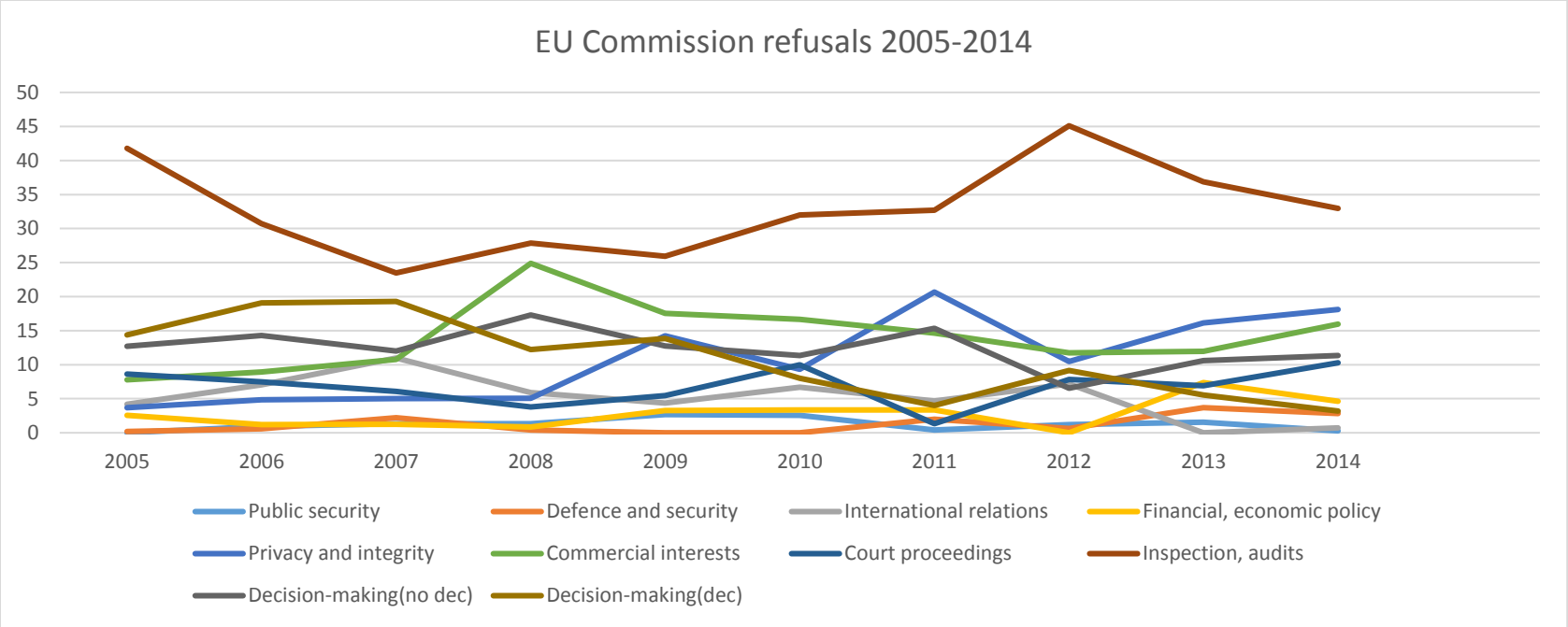
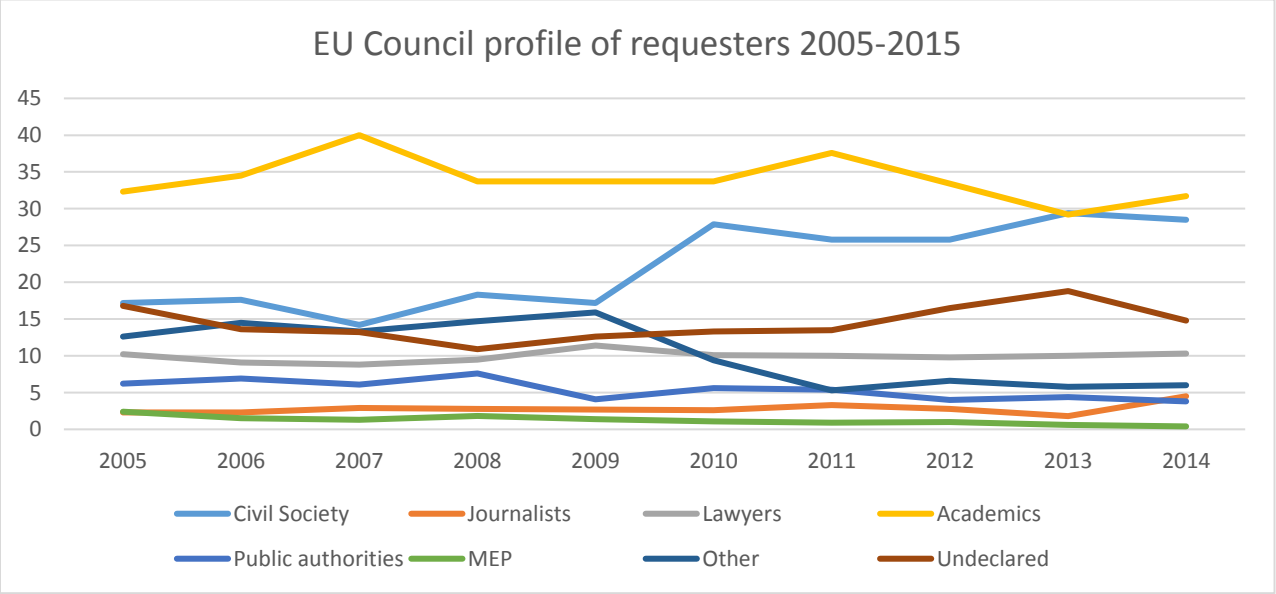

EU Commission refusals 2005-2014
50
45
40
35
30
25
20
15
10
5
0
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
Public security
Defence and security
International relations
Financial, economic policy
Privacy and integrity
Commercial interests
Court proceedings
Inspection, audits
Decision-making(no dec)
Decision-making(dec)

Table 18: EU Council personal profile of the requesters (%)

Years	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Total[1460]	10,839	7,565	6,166	9,641	8188	8,444	10,732	7,809	11,353	9,457
Civil Society	28.5	29.4	25.8	25.8	27.9	17.2	18.3	14.2	17.6	17.2
Journalists	4.5	1.8	2.8	3.3	2.6	2.7	2.8	2.9	2.3	2.3
Lawyers	10.3	10	9.8	10	10.1	11.4	9.5	8.8	9.1	10.2
Academics	31.7	29.2	33.4	37.6	33.7	33.7	33.7	40	34.5	32.3
Public Authorities	3.8	4.4	4	5.4	5.6	4.1	7.6	6.1	6.9	6.2
MEP	0.4	0.6	1	0.9	1.1	1.4	1.8	1.3	1.5	2.4
Others	6	5.8	6.6	5.3	9.4	15.9	14.7	13.3	14.5	12.6
Undeclared	14.8	18.8	16.5	13.5	13.3	12.6	10.9	13.2	13.6	16.8

Source: Table drawn by author using data from the Council of European Union, Access to Documents Annual Reports. Available at http://www.consilium.europa.eu/en/search/?q=access+to+documents+annual+reports



[1460] Note that the total number is not expressed in percentage.

Table 19: EU Council requests access

	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Requests received										
Access refused	1,875	1,613	1,308	1,135	1,341	1,991	1,607	1,686	1,747	1.922
Partial access	776	867	998	1,103	1,369	1,117	1,540	945	1,105	1,254
Full Access	8,188	5,084	3,860	7,403	6,478	5,336	7,675	5,178	8,451	6,281

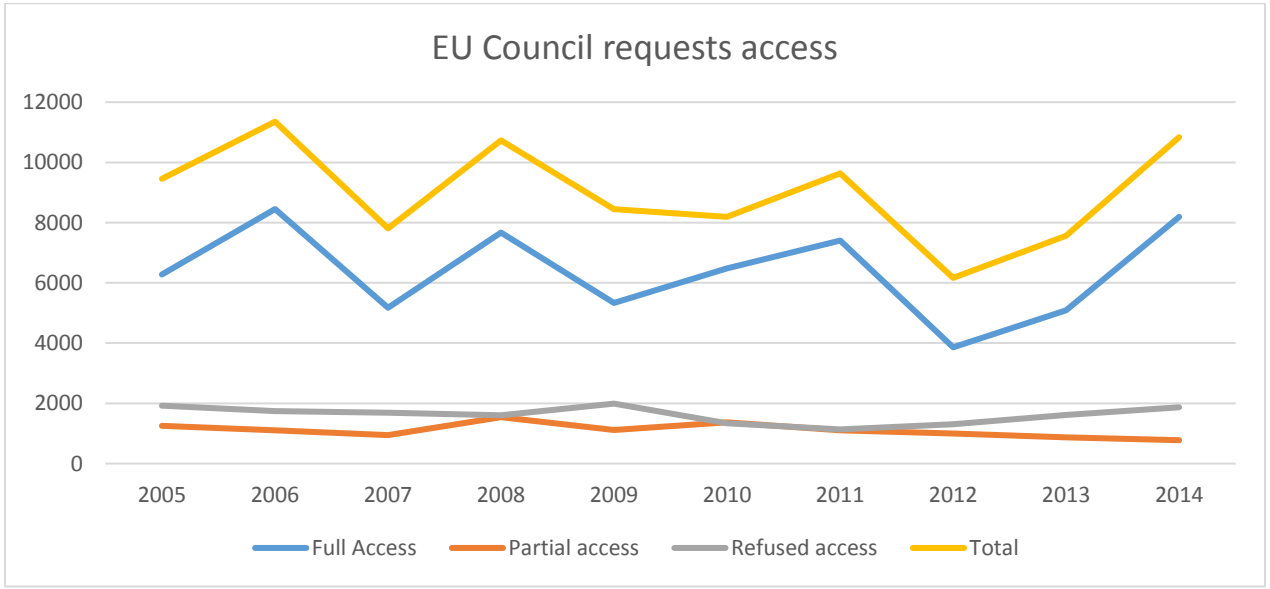


Table 20: EU Council refusals by exceptions applied (%)

Exceptions	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Public security	2	3.8	5.8	8.9	7	5.6	6.4	13.3	17.1	15.8
Defence and military	0.2	0.6	1.6	1.4	1.9	3.5	2.4	2.3	4.5	6.4
International relations	25.8	24.7	20.5	21.2	24.2	22.9	27.7	15.1	12.3	20.6
Financial, ec and monetary policy	0	0.3	0	1.1	0.5	0	0	0	0.1	0.8
Privacy and integrity of Individuals	0.2	0.1	0.2	0.2	0.4	0.3	0.5	0.2	0.3	0.2
Commercial Interests	0	0.1	0	0	0	0	0	0.1	0	0
Court proceeding and legal advice	0.7	0.5	0.6	1	0.8	0.4	1.5	0.5	2	1.8
Inspection, investigations and audits	0	0	0	0	0.3	0	0.1	0	0.3	0
Decision-making process	21.5	36.7	41.3	40.9	33.1	39.1	35.9	38	43.2	48.3
Other reasons	49.4	33.2	30	25.3	31.7	28.2	25.4	30.2	20.2	6.1
Not held by Council	0.2	0	0	0	0.1	0	0.1	0	0	0

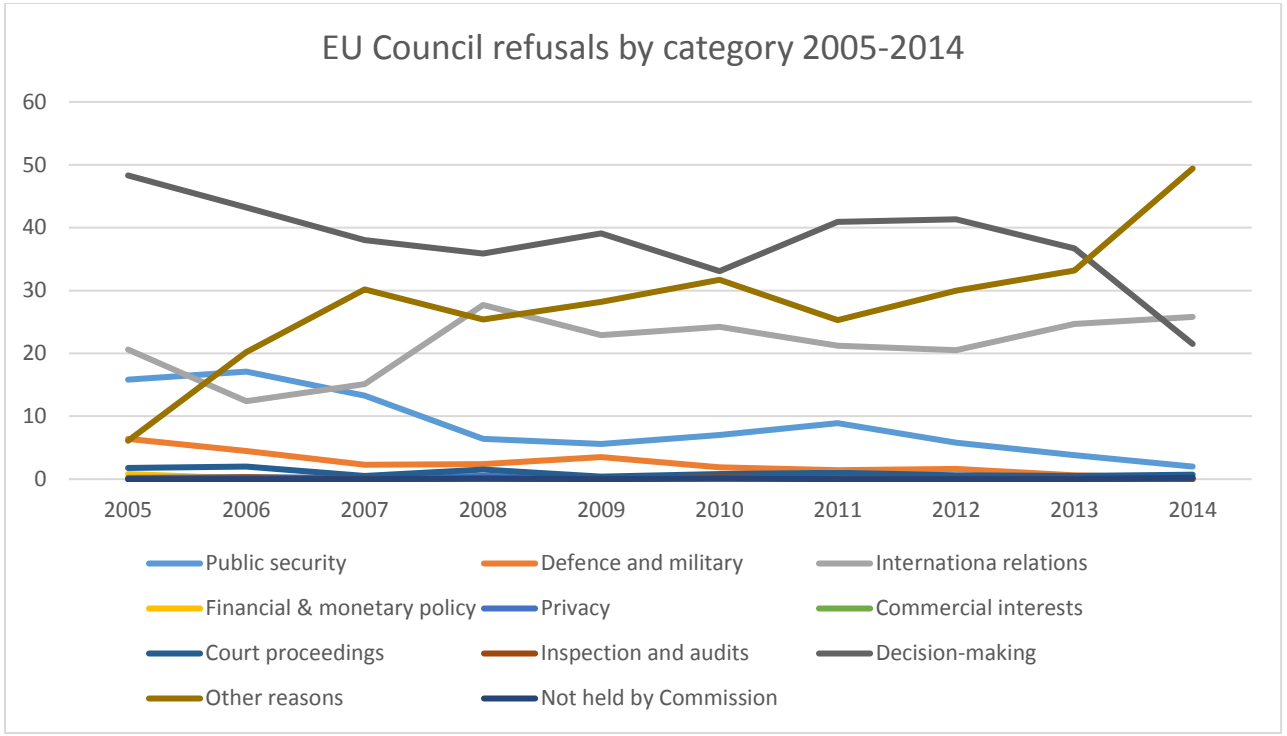

EU Council refusals by category 2005-2014
60
50
40
30
20
10
0
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
Public security
Defence and military
Internationa relations
Financial & monetary policy
Privacy
Commercial interests
Court proceedings
Inspection and audits
Decision-making
Other reasons
Not held by Commission

Table 21: EP professional profile of applicants (%)

Years	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Total	532	610	777	1,161	1,139	1,260	1,300	1,865	1,917	1,814
Civil society	-[1461]	18	16.95	10.36	20.47	21.75	54.06	21.95	21.39	20.59
Journal.	-	5	3	5.84	7.12	3.35	0.11	2.86	2.88	6.47
Lawyers	-	9	11.16	9.60	15.93	13.11	0.43	6.49	6.48	4.04
University research	-	43	33.48	45.39	38.47	41.36	27.41	36.69	39.39	34.60
Library research	-	2	2.36	1.69	2.33	1.42	2.28	4.03	3.49	2.79
Public authority	-	7	6.44	1.13	8.81	13.62	8.88	4.61	5.10	4.27
MEP	-	1	0	2.07	1.55	1.52	1.41	1.30	1.33	1.84
Others	-	15	26.61	23.16	5.31	3.86	5.42	22.08	19.94	25.40

Source: Table Drawn by the author using data from European Parliament, Register of Documents: Annual Report. Online: <http://www.europarl.europa.eu/RegistreWeb/information/report.htm>.

[1461] Numbers here are not available in the Annual Report.

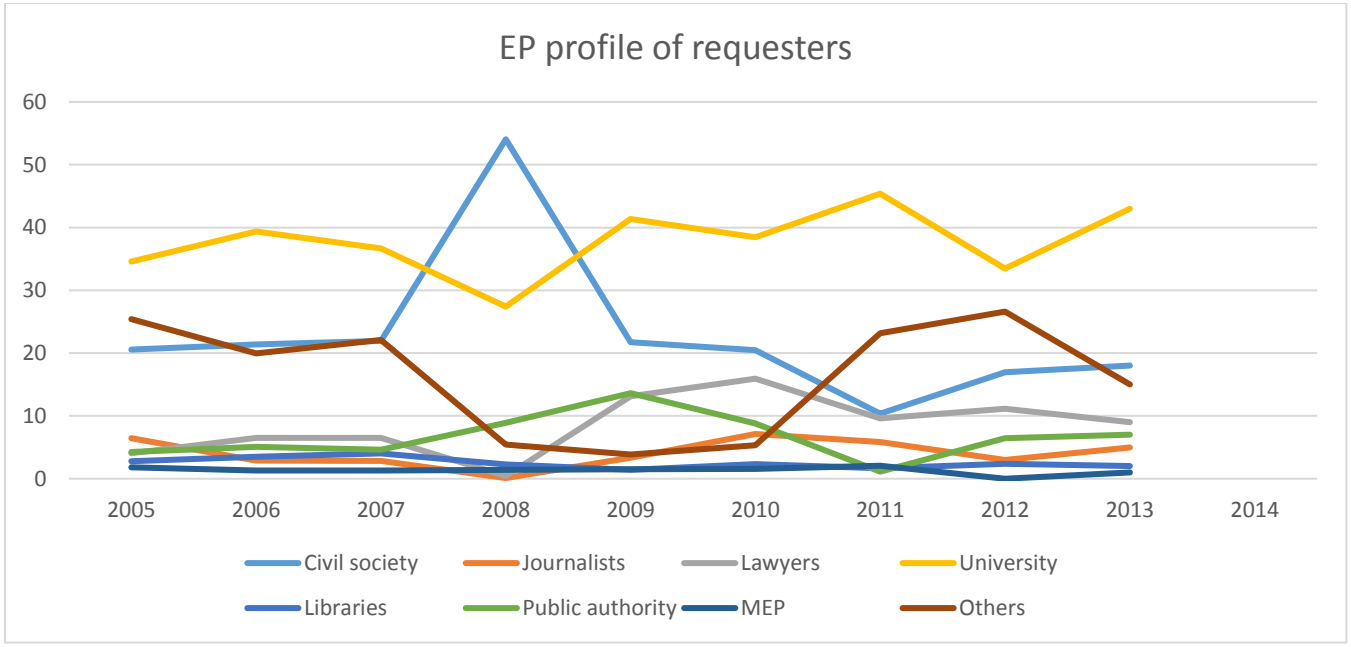

EP profile of requesters
60
50
40
30
20
10
0
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
Civil society
Journalists
Lawyers
University
Libraries
Public authority
MEP
Others

Table 22: EP refusals by exceptions applied (%)

Exceptions	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Public security	6	0	15.8	25.4	12.5	5.26	2.08	6.25	-	-
Privacy	39	50	31.6	16.3	25	26.31	21.88	39.58	24.44	77.78
Commercial Interests	17	0	10.5	3.6	8.3	2.63	1.04	10.42	8.88	1.85
Legal advice	6	0	10.5	14.5	12.5	10.52	2.08	8.33	24.44	12.96
Audits	6	0	10.5	5.4	4	15.78	15.63	2.08	-	1.85
Decision-making	28	50	21	34.5	37.5	39.47	57.29	33.33	40	5.56