Third Party Record Exemptions in Canada's Access to Information Act

Matt Malone

Key Points

→ Artificial intelligence (AI) and automated decision making (ADM) used by and on behalf of the Government of Canada pose significant challenges to Canada's Access to Information Act (ATIA).

→ While the ATIA's goal is to enhance accountability and transparency through the disclosure of records under the control of government, exemptions in the ATIA for third party records such as trade secrets make meaningful access difficult when it comes to AI and ADM. Several departments working at the epicentre of AI and ADM policy handle requests made to them through the ATIA by routinely invoking such exemptions.

→ Citizens' entitlements to transparency and accountability in such contexts are increasingly clashing with commercial actors' desire to avoid or block disclosure of records.

Introduction

This policy brief identifies how various exemptions in the ATIA — notably those for third party trade secrets, confidential information and information prejudicial to competitive position — serve as a key barrier to transparency and accountability of AI and ADM used by and on behalf of the Government of Canada. Following an overview of the purposes of the ATIA, the brief analyzes how the ATIA pertains to and regulates AI and ADM. It concludes with various recommendations to address identified challenges.

Objectives of the ATIA

At its core, the ATIA acknowledges that the disclosure of records under the control of the federal government is a prerequisite in holding federal government institutions accountable for their conduct. The ATIA's stated purpose is "to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of

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those institutions."[1] To achieve this purpose, the ATIA gives Canadian citizens and permanent residents a right of access to records under the control of federal institutions.[2] Except where noted and where exemptions operate, the ATIA applies to all records under the control of the government, including government and third party records.

At least this is how the ATIA is supposed to work. In practice, the system for the disclosure of records established by the ATIA has been called "broken" (Holman 2021), "busted" (Akin 2021) and "good at bureaucracy, bad at transparency" (Ling 2020). The Office of the Information Commissioner (OIC) responsible for investigating complaints involving the administration of the ATIA has repeatedly identified problems with government institutions failing to meet their basic obligations (OIC 2020a), has called out politicians for failing to update the law (OIC 2020b) and has recommended sanctions for political interference in its administration (OIC 2021). An overview of the outcomes produced by the current framework is provided in the Appendix.

Exemptions in the ATIA

The ATIA recognizes various types of information that are excluded from its disclosure obligations (hence, they are "exemptions" from the government's obligation to disclose.) The ATIA sets forth three main categories of exemptions for various types of information (see Table 1).

In the context of AI and ADM, exemptions for three types of information predominate: trade secrets, confidential information and information prejudicial to competitive position. While Canadian scholarship on how trade secrecy presents obstacles to access under the ATIA's current framework is rare (Law Commission of Ontario 2021), it is noteworthy that outside of this framework, AI and ADM subject matter tends to be highly susceptible to categorization as trade secrets. For example, the Canadian Intellectual Property Office (2021) advises that parties should consider trade secrets the main modality of legal protection for algorithms and data. As Sonia Katyal

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1   *Access to Information Act*, RSC 1985, c A-1, s 2(1) [*ATIA*], online: <https://laws-lois.justice.gc.ca/eng/acts/a-1/>.

2   *Ibid*.

Table 1: Three Categories of Exemptions

Category of Exemption	Type of Information
Government records[a]	Information obtained in confidence from a foreign,[b] provincial,[c] municipal,[d] or aboriginal government,[e] or an international organization;[f] information related to federal-provincial affairs;[g] information related to international affairs and defence;[h] information related to law enforcement and investigations;[i] information necessary to protecting "the safety of individuals";[j] information containing "trade secrets or financial, commercial, scientific or technical information that belongs to and has been consistently treated as confidential by" the government;[k] information relevant to "operations of government" consisting of advice;[l] testing procedures, tests and audits;[m] solicitor-client protected information;[n] and information protected against disclosure, as set forth in a schedule in the ATIA.[o]
Personal information[p]	"Information about an identifiable individual,"[q] such as their race, national or ethnic origin, colour, religion, age or marital status;[r] educational, medical, criminal, employment or financial background;[s] any other identifying "number, symbol, or other particular" about an individual;[t] an individual's address, fingerprints, or blood type;[u] their personal opinions or views;[v] implicitly or explicitly confidential correspondence sent by the individual to the government;[w] their views about another individual;[x] the views or opinions of another individual about a proposal for any grant to the individual;[y] and the name of the individual "where it appears with other personal information relating to the individual."[z]
Third party records[aa]	Trade secrets;[bb] "financial, commercial, scientific or technical information that is confidential";[cc] information supplied in confidence for preparation, maintenance, testing or implementation of emergency preparedness;[dd] information prejudicial to competitive position;[ee] information that would "interfere with contractual or other negotiations";[ff] as well as records related to testing to meet regulatory requirements.[gg]

Notes:

[a] *Access to Information Act*, RSC 1985 c A-1 at s 13–18, 21 [*ATIA*], online: <https://laws-lois.justice.gc.ca/eng/acts/a-1/>.

[b] *Ibid*, at s 13(a).   [c] *Ibid*, s 13(c).   [d] *Ibid*, s 13(d).   [e] *Ibid*, s 13(e).   [f] *Ibid*, s 13(b).

[g] *Ibid*, s 14.   [h] *Ibid*, s 15.   [i] *Ibid*, s 16.   [j] *Ibid*, s 17.   [k] *Ibid*, s 18.1.

[l] *Ibid*, s 21.   [m] *Ibid*, s 22.   [n] *Ibid*, s 23.   [o] *Ibid*, s 24.   [p] *Ibid*, s 19.

[q] *Privacy Act*, RSC 1985, c P-21, s 3, online: <https://laws-lois.justice.gc.ca/eng/acts/p-21/index.html>.

[r] *Ibid*, s 3(a).   [s] *Ibid*, s 3(b).   [t] *Ibid*, s 3(c).   [u] *Ibid*, s 3(d).   [v] *Ibid*, s 3(e).

[w] *Ibid*, s 3(f).   [x] *Ibid*, s 3(g).   [y] *Ibid*, s 3(h).   [z] *Ibid*, s 3(i).   [aa] *ATIA*, *supra* note a, s 20.

[bb] *Ibid*, s 20(1)(a).   [cc] *Ibid*, s 20(1)(b).   [dd] *Ibid*, s 20(1)(b.1).   [ee] *Ibid*, s 20(1)(c).   [ff] *Ibid*, s 20(1)(d).

[gg] *Ibid*, s 20(2).

(2019) has dissected in her expansive history of the legal protections offered to software, source code "is largely dominated by trade secrecy."

Several departments working at the epicentre of AI and ADM approach requests made to them through the ATIA by routinely invoking such exemptions. For example:

→ Innovation, Science and Economic Development Canada (ISED) — which is responsible for the Pan-Canadian AI Strategy — invoked an exemption for third party trade secrets, confidential information or information prejudicial to competitive position in an average of 23 percent of all requests that it processed between 2011 and 2020.[3] (The percentage was relatively consistent over this time period.)

→ In 2019–2020, Public Services and Procurement Canada (PSPC) — which is responsible for maintaining the Artificial Intelligence Source List[4] — invoked an exemption for third party trade secrets, confidential information or information prejudicial to competitive petition in 41 percent of all requests that it processed.[5] In 2020–2021, this percentage rose to 45 percent.[6]

Government data on compliance with the ATIA does not distinguish between requests that contain government records and those that contain third party records. Therefore, the above statistics only show third party records exempted as a percentage of all requests processed (i.e., government records and third party records). A better sample of how often trade secrecy is invoked exclusively in the context of third party records is observed by reviewing the ATIA requests processed by the Trans Mountain Corporation, a subsidiary of the Canada Development Investment Corporation, which claimed a trade secrets exemption in 64 percent of all requests it processed in 2019–2020. The Trans Mountain Corporation also exempted all records from disclosure in 82 percent of all requests it processed in 2019–2020.[7]

Recourse to these exemptions is particularly important because trade secrets are not even defined in the ATIA. For a term that is undefined, trade secrets receive a very strong degree of protection. For example, when a party makes a request for *government* trade secrets under the ATIA, there is no exception for disclosure in the public interest,[8] although the government "may"[9] still disclose the records if it wishes. By contrast, once information belonging to a *third party* is identified as a trade secret, the government "shall"[10] refuse to disclose it. The act's general exception for disclosure of third party records in the public interest specifically does not apply to third party trade secrets.[11] While the frequency of categorizing records as trade secrets is lower than the generic categorization of confidential information or information prejudicial to competitive position, which are subject to the public interest exception for third party records, this omission is concerning.

Several scholars have previously called attention to the importance of the public interest in the context of trade secrets in access to information frameworks. For example, David Levine (2011, 78) has argued it is inappropriate for governments to deal in labels like trade secrets at all, since "trade secrecy was not created with governments in mind." Instead, Levine argued the concept was developed to address the misconduct of parties in non-public commercial settings. Levine opined that the purpose and the goal of access to information frameworks was to orient governments toward disclosure and so applying a commercial definition runs contrary to this goal (ibid., 79–80). Likewise, Mary Lyndon (1993, 34) has noted that trade secrecy privileges in public contexts enshrine a power dynamic that is not present in commercial litigation settings. "Rather than an entitlement which the plaintiff seeks to vindicate," she has written, "secrecy becomes a defense to regulation; information is presumptively secret rather than available; as a practical matter, the burden of going forward and the burden of persuasion are shifted; and there are no commercial rivals present to provide evidence on the key issues of the information's availability and its value in the trade."

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3   See www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

4   *Ibid.*

5   *Ibid.*

6   *Ibid.*

7   *Ibid.*

8   *ATIA, supra* note 1, s 18.1.

9   *Ibid*, s 18.

10   *Ibid*, s 20(1).

11   *Ibid*, s 20(6).

Under the ATIA's current framework, when a party requests a record that a government institution knows to contain or reasonably believes to contain third party records, and it intends to disclose those records, the government institution must provide notice to the third party about the request and the government's intention to disclose.[12] The threshold for giving notice to the third party in these contexts is "low"[13] but not "automatic."[14] Specifically, the acting government official must give notice if they are "in doubt about whether the information is exempt,"[15] intend "to disclose exempted material to serve the public interest pursuant to [the public interest exception],"[16] or intend "to disclose severed material pursuant to [the provision on severability]."[17]

As noted, this does not apply if the government determines the subject matter are trade secrets, since third party trade secrets "shall"[18] not be disclosed under the act. If the third party receives notice, and they disagree with the categorization of the government — for example, if they seek to have records classified as trade secrets to prevent disclosure — they can contest the categorization[19] or file for judicial review with the Federal Court.[20] This process can be analogized to "reverse FOIA" in the United States, when third parties seek to enjoin the US government from releasing their information under the Freedom of Information Act. When a request for judicial review is made, the person who requested access "may appear as a party,"[21] although this rarely happens. This process is designed to protect the interests of the party exerting an exemption at nearly every stage.

12 *Ibid*, s 27.

13 *Merck Frosst Canada Ltd v Canada (Health)* [2012] 1 SCR 23 at para 63 [*Merck Frosst*].

14 *Ibid*.

15 *Ibid*, at para 84.

16 *Ibid*.

17 *Ibid*.

18 *ATIA, supra* note 1, s 20(1).

19 *Ibid*, s 36.3.

20 *Ibid*, s 44.

21 *Ibid*, s 44(3).

Addressing Conflicting Values

Ensuring transparency and accountability of AI and ADM through the ATIA's current framework puts several values in conflict. On the one hand, a citizen's inability to obtain records for AI and ADM technologies making government decisions that affect them profoundly constrains the citizen's ability to obtain the transparency or accountability intended by the act. A lack of transparency and accountability of government records in this context risks breeding distrust of government institutions and undermining public debate about the conduct of those institutions.

Additionally, there are concerns over AI and ADM technologies' potential to render and perpetuate unjust and unequal outcomes, as noted in Maroussia Lévesque's recent CIGI paper *Scoping AI Governance: A Smarter Tool Kit for Beneficial Applications*.[22] In particular, algorithms and predictive models have been identified as sites of concern about producing discriminatory outcomes and failing to obtain adequate consent for subsequent data use (Obar and McPhail 2018). Such outcomes risk going unaddressed without disclosure of records. There are also growing concerns about the concentration of economic power associated with such systems (Iyengar 2016). Several national security apparatuses have also flagged concerns around the vulnerability of AI and ADM to adversarial attacks (Defense Advanced Research Projects Agency 2021). These effects risk multiplying, as the government resorts to greater and greater use of AI and ADM to provide a roster of services more efficiently and at cost, including reducing immigration wait times, enhancing law enforcement and intelligence-gathering capacities, and determining eligibility for benefits such as employment insurance.

At the same time, third party commercial actors regularly underscore the competitive harms that ensue from disclosure of their records that are under the control of government. For example, Waymo, an autonomous driving technology company, zealously sought to prevent disclosure of regulatory safety information it submitted to

22 See Lévesque (2021).

the California Department of Motor Vehicles (DMV) to obtain a permit that allowed it to start offering autonomous driving services to passengers within designated parts of San Francisco beginning in September 2021. In October 2021, someone made a public records request for that information. After the DMV revealed its intention to disclose the records, Waymo challenged this decision and sought an injunction, arguing that its submissions to the DMV were "proprietary and trade secret information."[23] On February 22, 2022, the Superior Court for the County of Sacramento granted Waymo a preliminary injunction to block disclosure of the records on the basis that they were trade secrets, the disclosure of which would cause irreparable harm to the company (Wodinsky 2022).

Likewise, when California began using AI to screen millions of unemployment insurance claims in the state using services provided by Virginia-based ID.me, the author filed a public records request for any source code or algorithms used by the third party vendor in those decision-making processes and was informed by the Employment Development Department of California (EDD): "The EDD has no responsive records."[24] Informally, the author was told this response was because EDD did not retain any of the code. It was all retained by the developer, ID.me, in Virginia. Two American scholars have also described similar frustrating attempts to obtain access to predictive algorithms used by state governments. They shared that trade secrecy exemptions invoked by governments were a major obstacle to their effort (Brauneis and Goodman 2018, 153). They noted such justifications were "common in the field" (ibid., 154), leaving requesters with no recourse except intense probing with governments and the spectre of litigation (ibid.). Similar outcomes met the efforts of a researcher seeking to obtain information relating to the ShotSpotter technology deployed by police departments in cities around the United States (Drange 2016).

Addressing the conflicting needs of providing transparency and accountability while acknowledging concerns about competitive harm ensuing from the disclosure of trade secrets requires more than careful attention in the ATIA — it may require reconceptualizing the ATIA

altogether. Because the ATIA's stated objectives are "accountability and transparency,"[25] the act may not be properly tailored to face the real nature of the problem. As several authors have argued, in the context of AI and ADM, the transparency value may be less important than the accountability one — in particular because reviewing source code requires deep technical skill (Kroll 2020; Green 2021). In light of this barrier, it seems plausible that transparency may be less helpful than accountability in the form of explanations, audits, manuals, bug reports, validation studies and other means of providing accountability without providing transparency.

Either way, as the Treasury Board Secretariat (TSB) undertakes a review of the ATIA (a final report is anticipated in 2022),[26] the government must begin to acknowledge the growing reality of AI and ADM systems in this framework. Further, many of the challenges facing the ATIA also compound procurement dynamics whereby third party entities contracting with the government or submitting regulatory data to government often insist on legal protections for their business models premised on opacity and secrecy as a condition of doing business (Bloch-Wehba 2020, 1273–90; Ruskin 2018; Duncan and Luscombe 2021). For example, when the Royal Canadian Mounted Police (RCMP) purchased two licences from the facial recognition technology company Clearview, using the company's database of three billion images scraped from the internet without parties' consent, the data and the algorithms were not provided to the government (Privacy Commissioner of Canada 2021). Thus, they were not even accessible under the ATIA.

Policy Recommendations

In light of the concerns identified above, the following sections provide recommendations to amend the current framework.

Strengthen the Public Interest Exception

One major concern of the current framework is the lack of foregrounding given to the public interest

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23 *Waymo LLC v California Department of Motor Vehicles* (SC Cal 2022).

24 Email message from Brian Davis, EDD, to author (23 March 2021) titled "Your February 25, 2021 PRA Request."

25 *ATIA, supra* note 1, s 2(1).

26 See www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

exception. As noted above, the public interest exception does not apply to third party trade secrets at all. Excluding any third party subject matter susceptible to categorization as a trade secret from the public interest exception in the ATIA sends the wrong message about how government intends to use and regulate such technologies. As noted, trade secrecy has already become a "primary obstacle" for transparency of AI and ADM in other contexts (Bloch-Wehba 2020, 1272).

Recommendation: While the public interest exception must be strengthened, there may be reason to depart from the ATIA's stated purpose of transparency and accountability. If the act is amended to recognize the accountability value supersedes the transparency value in certain contexts, such as when it comes to applications of AI and ADM, the ATIA could overtly acknowledge two important points. First, it could acknowledge the arguments of those who maintain that transparency may be neither necessary nor sufficient for accountability in the context of AI and ADM. Second, it could attenuate the risk of competitive harms that would ensue from absolute transparency, which the current system's default to exemptions is designed to address (and which commercial actors zealously seek to enforce.) However, if the ATIA recognizes accountability as superseding transparency in this context, the ATIA should require supplementary records such as explanations, audits, manuals, bug reports and validation studies that can replace the need for, and be provided in lieu of, absolute transparency. The European Union's proposed Artificial Intelligence Act has a similar mechanism and refers to these supplementary records as "conformity assessments." In the ATIA, regulations set out and updated by the information commissioner — or perhaps the proposed data commissioner — could establish *what* supplementary records meet this threshold. If supplementary records meeting the threshold for accountability are not made available, however, absolute transparency of AI and ADM must remain the stated objective, as is currently the case.

Recommendation: Subject to the above recommendation, the government should include third party trade secrets under the public interest exception. If the government fails to do so, it should, at a minimum, create a public interest exception for applications of AI and ADM that are deemed "high risk." The public interest

exception should also explicitly reference and incorporate the Directive on Autonomous Decision-Making and the Directive on Open Government, so that the ATIA officers explicitly consider these directives in their decision making.

Repair the Notice System

The current notice system under the ATIA mutes the interests of parties requesting information. One problem with this approach is that the act does not sufficiently address the potential legal interests generated by requests made under the ATIA. Unless a requestor goes through a complaint with the information commissioner (or then initiates costly and time-intensive litigation after this process has concluded), it befalls the Government of Canada to defend the articulated status of the subject matter vis-à-vis third parties. In such cases, the requestor disappears from the process. For example, in *Merck Frosst*, the only place where the requestor appeared in the Supreme Court judgment was in a single sentence of paragraph five (out of 265 paragraphs).[27] The erasure of potential substantive and procedural rights of the requesting parties is a design flaw in the ATIA that contributes to a diminishment of the public interest analysis. One effect of this procedure is that it creates little opportunity to articulate *why* a public interest exception should operate. As Hannah Bloch-Wehba (2020, 1307) has argued, "the transparency problem raised by algorithmic governance as it is presented today results largely from procurement practices that fail to foreground the public interest."

The notice system in the ATIA should be reformed to bolster the involvement of the party requesting records at all stages. The ATIA already permits this involvement in judicial review, albeit in a weakened form.[28] Greater involvement of the requester will help foreground the interests behind a need for such information. The ATIA must create space for these interests to be heard. This would provide parties an opportunity to articulate not just what information they want, but also any interests served by the request. To accomplish this tweak, a device similar to a Wagg motion could be used. Wagg motions in Ontario are used in civil suits when parties seek disclosure of Crown briefings produced in the course of investigations

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27 *Merck Frosst, supra* note 13 at para 5.

28 *ATIA, supra* note 1, s 44(3).

in parallel criminal proceedings (for example, a police report of a car accident requested as part of a civil litigation) (Biscaro and Ahmed 2015).

Under the Wagg framework, there is no freestanding right of access to information, but courts recognize that parties other than those disclosing information have interests in gaining access to information held by the government. With Wagg, when a party seeks records, a burden-shifting process occurs: the party in possession or control of the information must disclose its existence and summarize its contents; they must articulate the nature of their objections to disclosure; and the parties must go to a tribunal or reviewing judge where the competing interests between disclosure and non-disclosure face off. The ATIA should incorporate a similar procedural device. Often, simply being made aware of the existence of a record is critical for requestors. More crucially, until we foreground the interests of the parties requesting the information, the interests of those invoking exemptions will unfairly predominate.

Recommendation: Requests made under the ATIA should explicitly permit parties to articulate *what* public interests are served by the disclosure of records. The current system completely mutes the public interest and leaves it to the officers administering the ATIA to adduce the public interest, which they may not be best situated to do. Requestors themselves may be suited to that task. Additionally, when the government gives notice to third parties that it may disclose trade secrets, confidential information or information prejudicial to competitive position, the process should involve the requestor at all stages. Government should give notice to the requester as well as the third party, providing the third party an opportunity to articulate further reasons for any categorization as such. If a third party applies for judicial review, they should be obligated to give notice of a record and describe in general terms the nature of the record to the party that requested it. Some figure in the government, such as the information commissioner — or perhaps the proposed data commissioner — should have final say over the acceptability of these descriptions.

Crack Down on Untimely Processing

Perhaps the greatest problem with the ATIA is that delays are very common. Against the backdrop of AI and ADM, which are often deployed to *accelerate* the delivery of services, these delays present a significant challenge to the ATIA's stated purpose to provide transparency and accountability. Accordingly, untimely processing must be addressed as part of the reform of the ATIA. Delays in the processing of requests present a clear disincentive to parties engaging in or relying on this framework to obtain information about AI or ADM used to govern them. While the ATIA states that most requests must be processed within 30 days,[29] media figures have noted these time frames are not firm (Beeby et al. 2021), and the appendix further highlights serious delays. Status letters are routinely dispatched to lengthen the legislated time frame.[30] Stories of absurdly delayed status letters are legend, such as the response received by reporter Alex Boutilier when he sought records from the RCMP. "You will note," said the status letter he received giving him an adjusted timeline, "the extension for volume would be…an 80-year minimum (bringing the due date to the year 2098)" (Boutilier 2018).

Recommendation: Filing fees for requests under the ATIA should be refunded if the government misses its 30-day requirement to respond to the request, just as requests invoking blanket exemptions to refuse disclosing anything at all should also be refunded. The information commissioner's approval should be required for all extensions beyond 60 days, to counter the routine ease with which extensions are currently claimed. Absolute caps should also be imposed, as they exist elsewhere in the justice system, to enable parties to file timely appeals with the information commissioner. The current framework permits requests to linger far too long. All requests should also be produced on the open.canada.ca website in full, with a stamp indicating length of processing time between request and production. Supplementing such measures, requestors should have the option to seek judicial review immediately at the conclusion of a request made

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29   *Ibid, s 7.*

30   *Ibid.*

pursuant to the ATIA, without first having to go through the process of filing a complaint with the information commissioner. Finally, the ATIA's compliance reports should be audited for their fulfillment of timeline requirements under the act.

Conclusion

The recommendations proposed in this policy brief are intended to supplement, rather than replace, other suggested amendments to the ATIA's framework.[31] These other recommendations include publishing the requests made under the ATIA online in full and publishing back-dated requests. Currently, only a summary of the completed requests is published online, and only going back to 2019. Parties must request from the respective department a copy of the record, placing further strain on the officers administering the ATIA. All of this contributes to a culture of complacency and delay (Boots 2021). Similarly, various departments respond to requests by providing records in outdated formats, where they could have simply made the information available online. More importantly, significant actors in government, such as the Prime Minister's Office, Cabinet and ministers' offices, are exempt from having to process requests made pursuant to the ATIA.[32] While many other changes have been proposed, these generally focus on requests for *government* records (Canadian Journalists for Free Expression 2013). By contrast, this brief has focused largely on *third party* records, given the centrality of such records in the government's design, development and deployment of AI and ADM.

To be sure, the ATIA is not the only place where the battle for transparency and accountability is occurring. In the 43rd Parliament, the Liberal government proposed a Consumer Privacy Protection Act that would require organizations within the scope of the act to provide an explanation for algorithms used to make a "prediction, recommendation, or decision" (Parliament of Canada 2021). The bill died on order paper because of the recent federal election (ibid.); however, on December 16, 2021, Prime Minister Justin Trudeau issued a mandate letter to the minister of innovation, science and industry to "introduce legislation to advance the Digital Charter," suggesting the bill will return (Prime Minister of Canada 2021). Likewise, it remains to be seen whether Canada will follow the European Commission by drafting a standalone Artificial Intelligence Act to govern transparency and accountability issues.

Still, the ATIA will play a unique role in confronting the injustices and inequalities resulting from applications of AI and ADM. These will become worse if we allow "contracts between the government and its vendors to remove the infrastructure of decision-making from public control" (Bloch-Wehba 2020, 1299), as occurred in the Clearview case. In light of the potential for adverse effects resulting from these technologies and the risks posed, AI and ADM must be accountable to those governed by such systems. Their use cannot subvert either the viability of the ATIA or the legislation's fundamental commitment to transparency and accountability (ibid., 1307). A lack of oversight and enforcement, and a legal infrastructure that has ossified to reflect "a formalistic approach that privileges the private sector's economic and political power while virtually eviscerating the purposes of the statutory protections" (ibid., 1299) has become, and will continue to be, a major concern as AI and ADM are used on a widespread basis by and on behalf of the government. The ATIA's role should be and, indeed, always has been, to provide transparency and accountability over such processes. Its failure to do so is a subtle and yet significant threat to Canadian democracy.

Author's Note

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31 See https://atiareview.ca/submissions.

32 *ATIA, supra* note 1, at schedule I.

Appendix

This appendix provides an overview of outcomes produced by the ATIA's current framework. While these outcomes speak to the ATIA as a whole, they also highlight the challenges for transparency and accountability in the context of AI and ADM.

Generally, measured against the act's stated objectives of transparency and accountability, government institutions covered by the ATIA do a poor job of meeting their obligation of granting access to records. This state of affairs is evidenced by three salient problems that emerge from a review of the compliance reports of federal institutions processing requests under the act: first, the current system fails to meet time requirements set out in the act; second, the current system results in a rising tendency to claim the non-existence of records; and, finally, the current system increasingly yields a response involving a refusal to share records.[33]

First, *untimely responses* are a major problem. The legislated requirement for processing an access to information request is 30 days.[34] However, in 2019–2020, of the 140 institutions that received an access to information request, only 22 responded to all requests within 30 days.[35] In 2020–2021, that statistic was 23 out of 140.[36] In both cases, most of these government entities were minor ones, handling just one or two requests.[37] Insufficient resources play a critical role in slowing down the processing of requests. For example, between 2013 and 2020, Global Affairs Canada (GAC) saw the number of requests increase by 680 percent (see Figure A1).[38]

By contrast, its workforce diminished in size during this period (see Figure A2).

In 2019–2020, GAC's average wait time for processing requests was 181 days.[39] During the same period, there was only a 0.2 percent chance of getting a record disclosed in full within two weeks of a request from GAC.[40] Requests for information at GAC routinely surpass 365 days (Akin 2021). In fact, in 2020–2021, one in four of all requests processed by GAC took over 365 days.[41] These outcomes are particularly notable, given that GAC was the top destination for media requests during that period (followed by Employment and Social Development, ISED, the RCMP and the Department of Finance.)[42]

Such delays are common across the system. Many core government institutions regularly take more than a year to process requests (see Table A1).

For 2020–2021, these numbers ticked even higher (see Table A2).

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33 See www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

34 *ATIA, supra* note 1, s 7.

35 See www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.
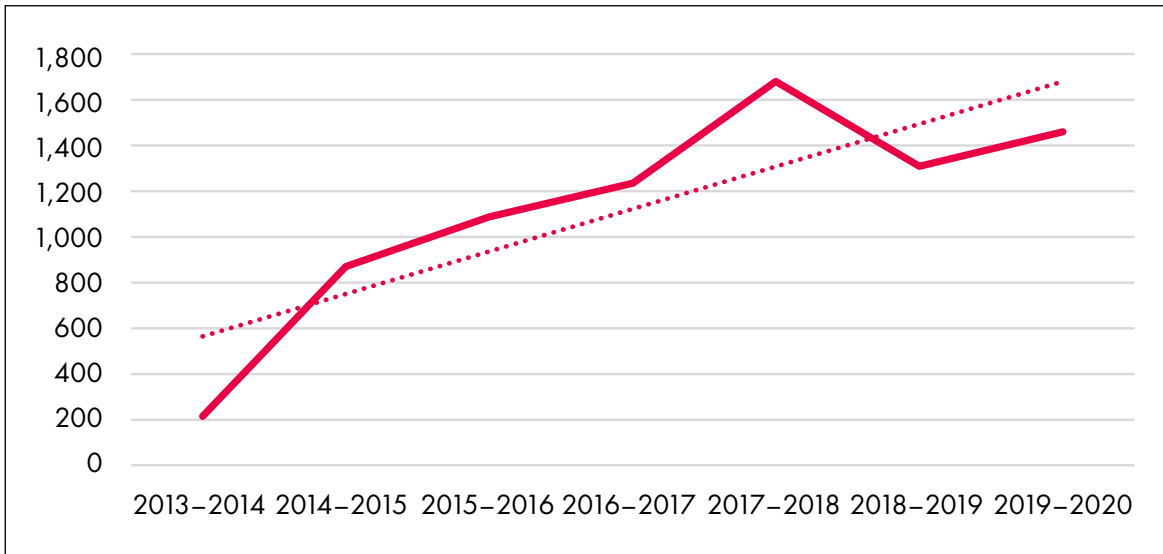
36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

Figure A1: Number of Access to Information Requests Received during Period (GAC), per Annual Reports

Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html; graph prepared by author.
Note: The solid line shows real data while the dotted line shows trend.

Figure A2: Employees Dedicated Full Time to Access to Information (GAC), per Annual Reports
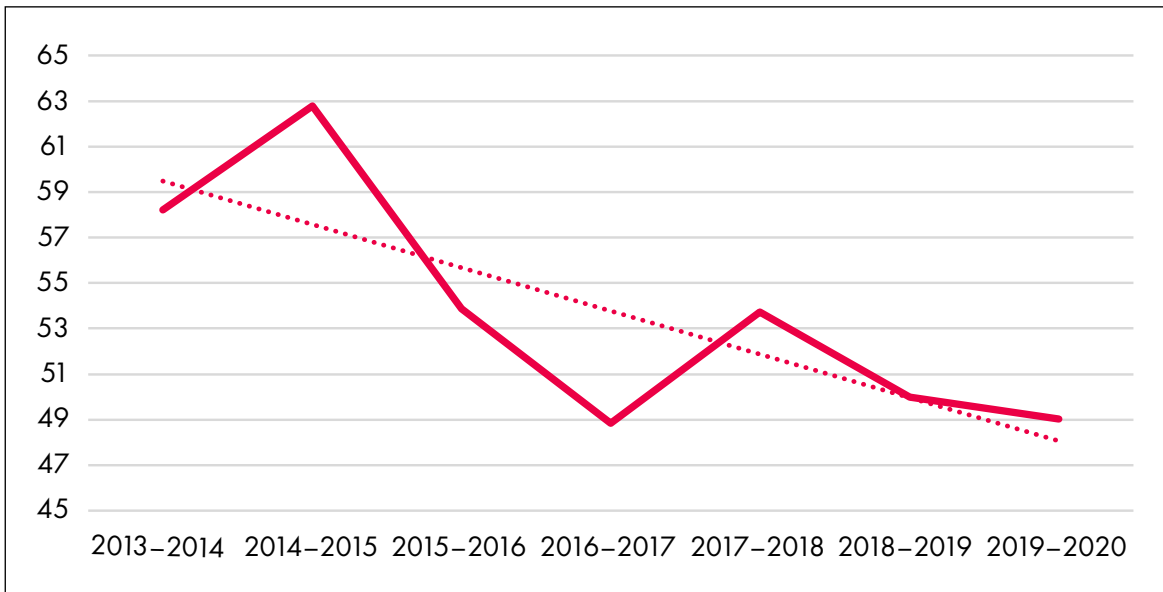
Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html; graph prepared by author.
Note: The solid line shows real data while the dotted line shows trend.

Table A1: Percentage of All Requests Closed Taking Longer than 365 Days (2019–2020)

Institution	Percentage of All Requests Closed Taking Longer than 365 Days
Royal Canadian Mint	40%
Correctional Service of Canada	37%
RCMP	31%
Financial Consumer Agency	23%
PSPC	16%[43]

Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

Table A2: Percentage of All Requests Closed Taking Longer than 365 Days (2020–2021)

| Institution	Percentage of All Requests Closed Taking Longer than 365 Days
Canadian Museum of History, Canadian War Museum, Nunavut Impact Review Board and Trans Mountain Corporation	50% (tie)
Canadian Development Investment Corporation	47%
Global Affairs Canada	32%
RCMP	24%
Windsor-Detroit Bridge Authority	23%[44]

Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

As the incidence of lengthier response times increases, the incidence of shorter response times is decreasing. For example, the TBS, which is currently reviewing the ATIA, exhibited the following trends in its processing times during the 2015–2021 period (see Figure A3).

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43 *Ibid.*

44 *Ibid.*

Figure A3: As Percentage of Total Requests Closed (TBS)
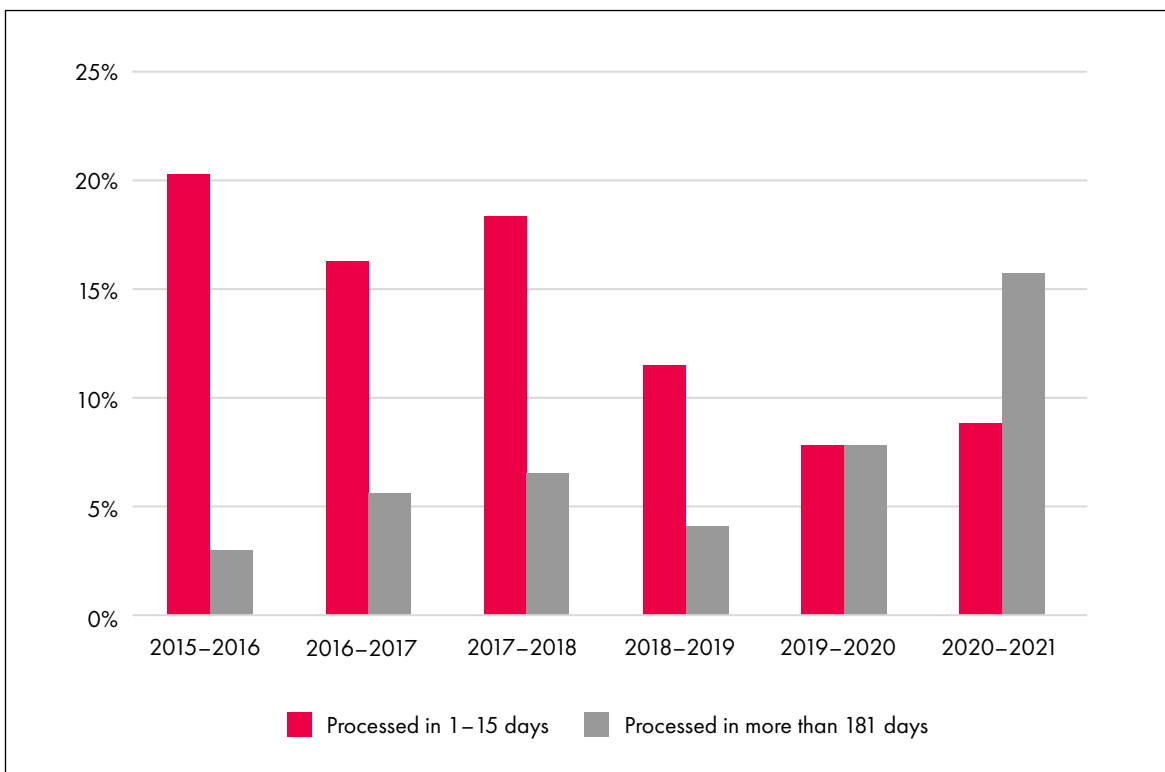
Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html; graph prepared by author.

The seminal Supreme Court of Canada case about the ATIA is also revealing. In *Merck Frosst Canada Ltd. v. Canada (Health)*, the first request for records dated from July 19, 2000, and the request took six months to process before Health Canada notified Merck of the intent to disclose records on January 2, 2001,[45] at which point Merck filed for judicial review on January 19, 2001.[46] The review was not heard until three years later. The case was appealed, and final judgment was rendered in 2012 by the Supreme Court of Canada.[47] Total time: 12 years. This timeline for the resolution of requests made under the ATIA is not one that inspires faith in the current system to achieve its stated purpose; specifically, it does not appear to demonstrate a commitment to transparency or accountability. As Justice Grammond of the Federal Court noted in the ATIA case *Doshi v. Canada* (2018): "Litigation concerning [the ATIA's] provisions may be costly and time-consuming, as illustrated by *Merck Frosst*."[48] He described *Merck Frosst* as a case that "does not show that access to information legislation has been successful in ensuring…transparency."[49]

Second, *claimed non-existence of records* is another factor contributing to the current system's failure to meet its stated purpose. During 2019–2020, Environment Canada responded "No Records Exist" to 79 percent of requests it closed during that period. Such responses have increased as responses of "All Disclosed" (i.e., records fully disclosed without redactions) have decreased in this department. Such trends are not uncommon in other departments. Figure A4 shows the breakdown of this trend at Environment Canada over the 2011–2020 period.

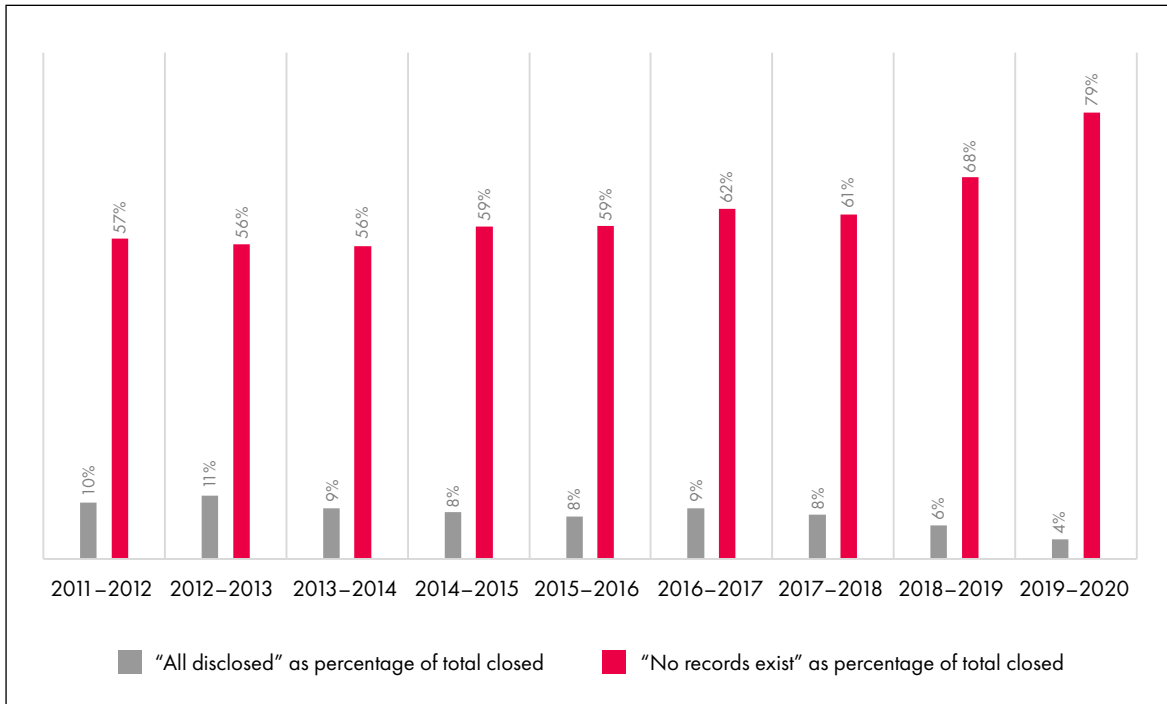45   *Merck Frosst, supra* note 13 at para 31.

46   *Ibid.*

47   *Ibid* at para 23.

48   *Peter Doshi v Attorney General of Canada* (2018), FC 710 at para 14.

49   *Ibid.*

Figure A4: Percentage of "All Disclosed" versus "No Records Exist" (Environment Canada)

Bar chart showing "All disclosed" (grey) and "No records exist" (pink/red) as percentage of total closed, by fiscal year:

Year	"All disclosed"	"No records exist"
2011–2012	10%	57%
2012–2013	11%	56%
2013–2014	9%	56%
2014–2015	8%	59%
2015–2016	8%	59%
2016–2017	9%	62%
2017–2018	8%	61%
2018–2019	6%	68%
2019–2020	4%	79%

■ "All disclosed" as percentage of total closed   ■ "No records exist" as percentage of total closed

Data source: www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html; graph prepared by author.

Finally, *invocation of exemptions* is another factor. During 2019–2020, the Canadian Security and Intelligence Service only disclosed the full record in 0.02 percent of requests it closed.[50] Another recent and notable example was the government's sweeping redactions of the purchasing obligations, intellectual property provisions and many other sections (with even the section names themselves redacted) from the procurement contracts for the Moderna and Pfizer COVID-19 vaccines.[51] The government even redacted the law governing those contracts (although one can suspect it was not Canadian law, since the contracts for AstraZeneca and Janssen Pharmaceuticals were governed by Ontario law, which was not redacted.)[52] Enshrining a lack of transparency for the rudimentary terms of contracts for widely mandated vaccines was notable, given that transparency issues went on to become a key reason for vaccine hesitancy (Machingaidze and Wiysonge 2021). Rather than use transparency of the contracts to encourage uptake of the vaccine, the government chose to spend millions on advertising on social media platforms such as Facebook (Public Health Agency of Canada 2021). Other examples of non-disclosure regularly captivate attention, as in the fall of 2021, when a historian at the University of Toronto revealed his request made pursuant to the ATIA produced a responsive record in the form of Hansard, the publicly available transcripts of parliamentary debate, which was nonetheless heavily redacted (Sayle 2021).

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50 See www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html.

51 See https://open.canada.ca/en/search/ati/reference/96548ef4717779a55cddc83cf3365dd3.

52 *Ibid.*

Acronyms and Abbreviations

ADM	automated decision making
AI	artificial intelligence
ATIA	Access to Information Act
DMV	Department of Motor Vehicles
EDD	Employment Development Department
GAC	Global Affairs Canada
ISED	Innovation, Science and Economic Development Canada
OIC	Office of the Information Commissioner
PSPC	Public Services and Procurement Canada
RCMP	Royal Canadian Mounted Police
TBS	Treasury Board Secretariat

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