THE RIGHT TO GOVERNMENT INFORMATION IN NEW BRUNSWICK AND ITS USE BY THE SCHOLARLY COMMUNITY

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Abstract

Access to information legislation enshrines in law a government's commitment to transparency and the public's right to know what their governments are doing. New Brunswick's right to information legislation has been used successfully by journalists and the public to uncover issues such as gaps in ambulance service and inadequate water quality guidelines. The legislation also has great potential as a tool for academic research. Using government sources, interviews, and survey results, this study explores the state of access to government information in New Brunswick, the province's right to information legislation, and its use by the scholarly community.

Résumé

La loi sur l'accès à l'information enchâsse dans la loi l'engagement d'un gouvernement à l'égard de la transparence et du droit du public de savoir ce que font leurs gouvernements. Les journalistes et le grand public ont utilisé avec succès la *Loi sur le droit à l'information et la protection de la vie privée* du Nouveau-Brunswick pour découvrir des problèmes comme des lacunes dans les services ambulanciers et des lignes directrices inadéquates sur la qualité de l'eau. En outre, la loi offre de belles possibilités en tant qu'outil de recherche universitaire. À l'aide de sources gouvernementales, d'entretiens et de résultats de sondages, la présente étude explore l'état de l'accès aux informations gouvernementales au Nouveau-Brunswick, la *Loi sur le droit à l'information et la protection de la vie privée* de la province et son utilisation par la communauté universitaire.

Introduction

Provincial governments deal with issues that affect peoples' lives directly in many areas such as health, education, energy, and the environment. In the course of their operation, on behalf of citizens, and funded by taxpayers, they collect, generate, and hold vast amounts of information and data. What is proactively disclosed, however, represents only "the tip of the iceberg." Right to information legislation is intended to ensure that the public also has access to unpublished government information. The right was described as part of a "new trend toward openness in government" in "most advanced democracies" in 1982 by Canadian political science professor Donald C. Rowat (59). Today, the public's right to access information held by public bodies is considered a quasi-Constitutional right in Canada protected by the *Charter of Rights* (Tromp, 24), and a fundamental human right under international law (Mendel, 3).

The New Brunswick government was among the first in the world to pass a right to information law in 1978. Years later, New Brunswick was the first among the provinces and territories to stop charging all associated fees, removing one of the largest barriers to its use. The right to information

system in New Brunswick has been used successfully by journalists and members of the public to bring important issues to light, but it also has enormous potential for academic research beyond political studies or the study of government. It should be of value for research on policy issues in the social, economic, environmental, and other areas under provincial jurisdiction, and for research that could contribute to government decision making and policy development.

Canada's federal *Access to Information Act* and how it is administered has been severely criticized over the years by journalists and frequent users of the act, by information commissioners, and others including scholars, most notably Alasdair Roberts (1998, 2002, 2006). They have all described numerous shortcomings of the act and ways in which government officials have been subverting the act to limit access to information. More recently, scholars have begun highlighting the value of filing access requests for social and historical research (Clément; Hannant; Walby and Larsen), and documenting their experiences and successes using the act. (See, for example, the 2011 volume of the *Canadian Journal of Law and Society*, and the edited volumes by Larsen and Walby, and Brownlee and Walby.) Much less attention has been paid to provincial access regimes and how they are functioning. New Brunswick's case is especially interesting to examine given its historical leadership with right to information legislation, and, paradoxically, the lowest reported usage compared to other Canadian provinces and territories even years after fees were removed (New Brunswick Government Services [NB GS], *Review*, 6).

This article examines New Brunswick's right to information legislation in light of international standards and practices, supplemented with insights on the internal procedures used in its application from interviews with government employees. Academic researchers were also surveyed on their experiences accessing government information. Findings indicate that many academics in the region use government information in their teaching or research, and some have also incorporated filing access requests into their teaching and research practices. Also revealed is a disturbing trend toward a reduction in access to government information over recent years, both through issues with the right to information system, and through a reduction in the amount of government information that is proactively disclosed.

Right to Information Legislation

The right to information (RTI), also called access to information (ATI) and freedom of information (FOI), is legislation that recognizes the public's legal right to access unpublished government records (commonly defined as information in any format), subject to limited and specific exceptions. Government bodies are required to disclose the information within a set deadline, usually thirty days. Non-compliance can be appealed to an independent oversight body. This article uses "right to information," since it is in the title of New Brunswick's act, and is considered the ideal term by the human rights organization Article19, who use it in their proposed model statute (Article 19, *Model*). The terms "access regimes" or "access systems" are used for the legislation and the mechanisms in place for putting it into practice (Dickson, 68).

Promising Beginnings

The New Brunswick *Right to Information Act*, S.N.B. 1978 c.R-10.3, was the second access law enacted in Canada. Nova Scotia's *Freedom of Information Act* was passed in 1977, the federal *Access to Information Act* in 1983, and all other Canadian provinces and territories had an access act

by 2002 (Dickson, 68). Only seven countries in the world had a similar act in 1978. By 2020, the Global RTI Rating site included 129 countries in every region of the world with similar laws (Access Info and CLD).

Academics were prominent among those advocating for a federal access to information law in the 1960s and 1970s (Kazmierski, 613). There was widespread criticism of government secrecy at the time and support for an access act, likely influenced by developments in the U.S. (McCamus, "FOI in Canada," 52). The American *Freedom of Information Act* had passed in 1966 and was considerably strengthened in 1974 after the Watergate scandal (Roberts, *Blacked Out*, 55). When federal legislation had still not been passed in Canada in 1982, the Canadian Library Association called on its five thousand members to write their MPs and urge immediate passage of the bill (Gray 1982). In all, it took over a decade of debate and public pressure, multiple private members' bills, committee hearings, a task force, and a much-criticized Green Paper, before the federal government finally passed the *Access to Information Act* in 1983 (McCamus, "FOI in Canada," 52).

The introduction of access legislation in New Brunswick was very different. It was initiated by the government and took only one year from White Paper to enactment. In June 1977, the Hatfield government published the White Paper *Freedom of Information: Outline of Government Policy Pertaining to a Legislated Right of Access by the Public to Government Documents*. It stated clearly that the public has a right to information "since the need to know what a government is doing is as basic to the democratic process as are the freedom to vote and the secret ballot" (1). Public hearings were held, submissions were invited and received that fall (including from librarians, professors, and St. Thomas University students), a bill was drafted for the following spring session, tabled by the premier, and the act was passed by the end of June 1978. Beverley G. Smith, the Director of Law Reform in the NB Department of Justice, and co-author of the act, noted that Premier Hatfield had stated "publicly and privately, on more than one occasion, his wholehearted support of the general principle of freedom of information" and that the legislation "was generated by a sincere motive on the part of the government of the day to bring in something that was going to be of value" (213–14).

Although not without flaws, the act was considered "a vast improvement over the Nova Scotia Act" introduced the year before (Gaudet, "Secrecy," 40), and a "significant achievement" (McCamus, *FOI Canadian Perspectives*, 227). Roland Gaudet, national coordinator for the group ACCESS—A Canadian Committee for The Right to Public Information, described the New Brunswick act as "a considerable breakthrough in light of the tradition of discretionary secrecy passed down from Westminster." He noted that the overall provision ensuring that "every person is entitled to request and receive information relating to the public business of the Province" was unique in the Commonwealth, reversing the entrenched attitude that "everything is secret unless made public by permission" (40). New Brunswick's act was also the first in the Commonwealth to allow judicial review when access to information requests were denied (Gaudet, "Reversing," 13).

Despite the groundbreaking nature of the act, three major areas of concern were identified even before it came into force. The "most serious problems," according to a government source cited by Gaudet in 1979, were the lack of requirements to provide an index or list of government publications, or to publish certain basic kinds of information, such as policy directives, manuals, guidelines, etc. The other "weakness" had to do with exemptions that were "unnecessarily broad" ("Secrecy," 40). The exemptions were also considered "the most problematic features" of the act by John McCamus, dean of York University's Osgoode Hall law school (*FOI: Canadian Perspectives*, 221).

The *Right to Information Act* came into force on 1 January 1980. It was reviewed in 1990, 1998, and 2007. In 2009, the *Right to Information Act* and the *Protection of Privacy Act* were combined and replaced with the *Right to Information and Protection of Privacy Act (RTIPPA). RTIPPA* was reviewed in 2015 and some significant amendments were made in 2017, including a mandated review every four years. However, despite some positive changes, over forty years of amendments to the act have failed to address the major problems identified. It still includes no obligation to publish either a listing of government information holdings or other basic types of information, and the exemptions have only increased in number and scope.

Usage of the Act

From the beginning, usage of the act was low. Fewer than two hundred requests had been received under the act in its first six years (Ferris, "Freedom," 344). Even years after all related fees for requesting government information had been removed in 2011, usage was reported to be the lowest per capita compared to all other provinces and territories in Canada (NB GS, *Review*, 6). Gaps and variations in how access statistics are reported make it difficult to confirm if this remains the case. For example, under *RTIPPA*, requests can be made for "general" government information and for personal information held by the government. In some cases, but not all, these are reported separately. It should also be noted that some five hundred public bodies are now subject to the act, including municipal governments, educational institutions, health authorities, and other local bodies (NB GS, *Review*, 5), but the statistics published by the New Brunswick government cover only provincial government departments and selected agencies.

Because filing RTI requests is described as a method to request information "that is not available by other means" (NB *Request*), low usage of the act could be an indication that in New Brunswick, more of the information citizens want to see is made available on government websites or through informal requests than elsewhere. Or it could indicate a problem. Statistics have not been kept on how often information is provided without resorting to the act (NB, *Discussion*, 30; RTI Coordinator interviews). Further research is required to determine what citizens think of the act, or what societal, political, or historical factors may be involved to explain low usage of the act in New Brunswick. However, lack of awareness among the public is very likely an important factor.

There does not seem to have been much of an effort made to publicize the act. An official government announcement was printed in New Brunswick newspapers on the two days immediately after it came into effect 1 January 1980. In Fredericton's *Daily Gleaner*, for example, a notice published the following day, outlined in black, appeared in the bottom corner of page 35, beneath an advertisement for hemorrhoid cream. The first review of the act ten years later noted that despite intentions at the time the act was passed, no brochures had been published to inform the public of the legislation (NB, "Discussion Paper," 113). Very little evidence could be found of government's promoting the RTI in the following decades either. One notable exception was a 1999 news release issued at the request of the Association of Professional Librarians of New Brunswick: "Premier's message / Information rights Week (99/03/18)," in which Premier Thériault affirmed the importance of the right to information.

The Ombud's Office, the independent oversight body for the RTI in New Brunswick, issued press releases to promote the act during International Right to Know Week (e.g., in 2006 and 2009). More efforts to increase public awareness were made during the seven years (2010-2017) New

Brunswick had a full-time, dedicated information and privacy commissioner. The ombud's website now has some helpful guides for the public and for government bodies clarifying specific issues, such as the government's "duty to assist." The ombud's (and former information commissioner's) complaint investigation reports are also online. These can be very useful for understanding how the legislation was interpreted in each case. The government department responsible for *RTIPPA*, currently Finance and Treasury Board, has on its website some basic information on the act and how to file a request, the request form, and the *Directory of Public Bodies*, which has contact information for each public body that falls under the act.

Do Academic Researchers Use the Act?

Seasoned academic users of access legislation refer to it as "a rich and untapped source for historical research" (Clément, 101), a "key tool for social inquiry" (Kazmierski, 621), and "a remarkable means of producing data about government agencies and their activities" (Walby and Larsen, 32). Yet filing access requests is underused by the Canadian scholarly community, according to historians (Hannant, 137) and social scientists (Walby and Luscombe, 539), and is not widely taught as a research method (Larsen, 2). To help promote public interest research using access laws, the Centre for Access to Information and Justice (CAIJ) was opened in December 2019 at the University of Winnipeg.

It is difficult to know how often members of the scholarly community use New Brunswick's RTI act. The federal government, British Columbia, and Alberta include "academic researcher" as a requester group in their reported access statistics, but the New Brunswick government does not. The online form for filing a request (accessed in 2020) included a field to enter the "name of company or organization (where applicable)" (NB *Request*). Appropriately, there was no requirement for requesters to identify themselves as part of a category of users, or to state the purpose of their request. However, statistics for user groups are generated partly from this form. If a university were entered, it would be counted as an "organization" (RTI Coordinator interview, 2019).

The statistics published in RTI annual reports for 2008/09, and the ten years following, show that the top user group requesting information was the "public" for eight years out of ten (NB, NB GS, and NB Treasury Board [TB]). The public, the media, and MLAs were the top three user groups in each year from 2013/14 to 2017/18. (User categories published since 2009-10 are the following: consultants, interest groups, law firms, media, MLAs, organizations, other government/federal, and public).

Searching academic databases provides some evidence of books, chapters, and articles in which information obtained through the New Brunswick access act are cited. Recent examples include the following:

- "The Raid on Elsipogtog," in *Policing Indigenous Movements: Dissent and the Security State*, by Jeffrey Crosby and Andrew Monaghan (Winnipeg: Fernwood, 2018).
- A chapter on how projects in New Brunswick were selected for federal grants in *Secrets in High Places* by Jay Innes (Toronto: Breakout Educational Network, 2003).
- *Dying for Development: The Legacy of Lead in Belledune*, by Inka Milewski (Fredericton: Conservation Council of New Brunswick, 2006).

- "The Front and Back Stages of Carceral Expansion Marketing in Canada," by Justin Piché, Shanisse Kleuskens and Kevin Walby, *Contemporary Justice Review*, 2017, 20:1, 26-50.

A search of the online archives of two academic journals that focus on New Brunswick and the region, *Journal of New Brunswick Studies* and *Acadiensis*, from 1 January 1980, when the act came into force, to 31 December 2020, found no articles that directly referenced information obtained through a New Brunswick RTI request. However, it may be that authors used other ways to cite these, such as "internal" or "unpublished government document."

The most widely used citation manuals, MLA, APA, and Chicago, are silent on how to cite information obtained through an access request. The recommendation from a popular U.S. government citation manual is to identify the documents as precisely as possible, with the statement "Obtained under the Freedom of Information Act from," then adding the agency that provided the information, as well as the nature and date of the request and the date of receipt (Cheney, 63). Larsen also notes the importance of providing enough information for readers to be able to access the same records and recommends adding contextualizing notes if needed (44). The file number assigned to the request, if any, should also be included.

It is common practice for journalists to include a statement in their articles to indicate when information was obtained through a right to information request, and this has no doubt helped raise the profile of the act immensely. Identifying information received through an access request is also important because once released, the information should be made available to others without the need for a formal request. This aspect of "making public" government information that would otherwise remain hidden adds to the value of research projects that use access legislation.

Academic User Survey

To find out more about whether academic researchers in New Brunswick and the Atlantic region are using government information in their teaching or research, and about their experience with requesting information through access legislation (and New Brunswick's *RTIPPA* in particular), a colleague and I created a short online survey questionnaire. The survey invitation was posted on Atlantic region scholarly and librarian association email distribution lists and was emailed to selected departmental secretaries and administrators at the major Atlantic province universities who were requested to forward the invitation to their faculty. Follow-up emails were sent to approximately 260 individual faculty and librarians. The survey was open for two months, from 25 September to 26 November 2017.

In all, 103 respondents completed the survey (seventy-four faculty, twenty-two librarians, and seven "other"). Ninety-six respondents reported having used Canadian government information (federal, provincial/territorial, or municipal) in their teaching or research. Over half of these (57%) did so three or more times per year, and 78 % at least once every year. We grouped together seven types of government information and asked respondents to check off any they had ever used in their research or teaching. Research, technical reports, statistics, and data was checked by seventy-six respondents; policy papers and discussion and consultation reports by sixty-eight; Census data or publications: sixty-six; laws, regulations: forty-nine; organizational annual reports: forty-two; Parliamentary, Legislative, or Council documents (e.g., debates, committee reports or minutes) by thirty-six; and thirty-three checked speeches and news releases. Twelve respondents added additional categories such as environmental assessments,

public accounts, budget and other financial publications, safety standards and guidelines, task force, inquiry, and inquest reports.

Respondents were mostly positive about access to government information in general, but less so when referring to New Brunswick. On a four-point scale, 67% (30 of 45) said they were "satisfied" or "somewhat satisfied" with their access to New Brunswick government documents, whereas 83% (69 of 83) said so with access to information from the federal, other provincial, or municipal governments.

The survey allowed respondents to provide comments throughout; the final question was "Do you have any comments to add about this topic?" The issue most frequently mentioned (by thirteen) was the difficulty of finding information on government websites. Four specifically referred to New Brunswick government sites, and four others noted that older information is especially difficult to find. The second most frequently mentioned issue (by eleven) was that information they felt should be public was not available at all. A specific example is transcripts of legislative debates ("Hansard"), which are posted online by every province and territory except New Brunswick. Two long-time users of New Brunswick government information also noted that less information is being made available than in the past. One wrote that the information the province holds relating to their discipline "used to be viewed as a public resource, with access to it a public good. In the last 10-15 years, it has been harder and harder to access that basic data, resulting in multiple RTIPPA requests." Even after filing requests, they noted "results were poor." Another researcher with decades of experience working with New Brunswick government records noted "the quantity and quality of the hard copies has declined radically (along with the filing indices)," while at the same time "most departments have no systematic record management system for electronic records." These comments reveal serious problems with how the New Brunswick government is managing and providing access to information.

Of the 103 survey respondents, twenty-seven had filed a request using a Canadian access act, although only fifteen did so specifically for teaching or research purposes. (The survey did not include an option to specify other reasons for filing a request, such as activism, community service, etc.) Some respondents did provide comments on how they use the act. One said that filing requests is a research method they teach, and another that it is "an essential component" of their research methodology.

Fourteen respondents had filed an access request using New Brunswick's *RTIPPA*, and twenty-three had used other Canadian access acts (federal, other provincial/territorial, or municipal). Ten had filed requests with both the New Brunswick government and others. Most respondents filed a right to information request less than once a year, but there were four "frequent filers" who filed three or more access requests per year. Documents obtained through access requests included emails, memoranda, briefing notes, decks, MOUs, handbooks, training manuals, inspection, and investigation reports—and a stack of completely redacted blank sheets.

Some respondents who had filed multiple requests noted the experience varied widely depending on the government body involved. To the question on the overall experience filing access requests, however, positive responses clearly outnumbered the negative, although, again, to a lesser degree in the case of New Brunswick. Using *RTIPPA*, almost twice as many respondents said they were successful (they received all or some of the information requested) than were not (information was denied or received too late). The ratio of positive to negative responses using the access acts of the other governments was over 3:1. However, if the partial responses are separated out, the number of fully

successful New Brunswick access requests was only three out of fourteen (21%), compared to six of twenty-three (26%) for the other acts.

Concerning the use of RTI acts, respondents commented that "it would be great to have a simple list" of the information available, that the process was unclear, and that appeals were often necessary. Despite descriptions of the process as "laborious," "frustrating," "lengthy," and with "many barriers," sixty-three of the sixty-four respondents who answered this question said they would recommend the use of access legislation to their colleagues.

Some survey respondents did not use access legislation but nevertheless expressed a desire for assistance. The basic information posted on the Finance and Treasury Board website mentioned earlier is a good start, but much more could be added to help requesters (and government employees) understand the act and how it should be applied. In several other provinces and territories, the information provided online includes a detailed RTI manual and a list or description of the kinds of information routinely disclosed without resorting to the act. These are two simple steps the New Brunswick government could take to assist applicants and government employees; doing so would bring them closer to meeting international access standards.

The New Brunswick Act

There are several sources that describe right to information standards, principles, and best practices that can be used to evaluate access legislation. Examples are *Freedom of Information: A Comparative Legal Survey*, by human rights lawyer Toby Mendel, and *The Public's Right to Know: Principles on Right to Information Legislation*, by Article 19. The most authoritative and detailed source is *Global RTI Rating* developed by Access Info and the Centre for Law and Democracy, with advice from leading global RTI experts. It compares the legal framework of access acts around the world using sixty-one indicators drawn from international standards developed by the UN and regional bodies, national best practices, and general principles of law. The Halifax-based Centre for Law and Democracy last applied this rating methodology to the acts in Canada's provinces and territories in 2012. New Brunswick's act was ranked last, tied with Alberta's and the federal act (3). In a 2020 analysis of the Canadian federal access act, which included comparisons with other national and provincial/territorial acts, Stanley Tromp noted improvements were made to New Brunswick's *RTIPPA* in 2017, but that it was still ranked low among the provinces (318). Newfoundland and Labrador's act, on the other hand, was so significantly improved following an extensive independent review in 2014 that it was rated the best in Canada (Centre, *Canadian*).

Some common features of most RTI laws, including New Brunswick's, are a statement indicating the act does not replace existing procedures for accessing government information; that all information, in any format, held by or under the control of public bodies, must be made available to the public with only limited and specific exceptions; that the government has a duty to assist requesters, and that denials can be appealed to an independent body. However, New Brunswick's *RTIPPA* falls short in several key areas, including how public bodies are covered by the act, its numerous and overly broad exceptions and exclusions, and the limited powers of its oversight body.

Public bodies covered by *RTIPPA* include government departments, agencies, boards, commissions, Crown corporations, health and educational institutions, local police, and local government bodies. However, these do not all automatically fall under the act. New bodies must be

individually added, which means some can end up being left out. Not all Crown corporations are included, either. Depending on the appointment process of its members or governing members, some Crown corporations can be excluded from the act. For example, in 2020, Cannabis NB—a subsidiary of the Crown corporation ANBL and registered under the *Business Corporations Act* in 2018—was covered under *RTIPPA*, but the Crown corporation that received millions of dollars in provincial funding to develop small modular nuclear reactor technology, the New Brunswick Energy Solutions Corporation, registered in 2017, was not.

The act does not clearly state that private bodies performing public functions or receiving public funding are covered by the act. The definition of bodies covered in the original 1978 act did include "any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund" (*Right to Information Act*, 1(d)). This broader definition, more in line with modern standards and the original purpose of the act, was removed in 2009.

There are also several public bodies and types of records specifically exempted or excluded from the act. The act had "nine fairly specific" exceptions when enacted in 1978, but subsequent amendments had increased the number to thirteen by 1986 (Ferris, "New Brunswick," 13). By 2020, there were twenty-one mandatory and discretionary exceptions, with dozens of specific clauses expanding on these (*RTIPPA*, ss. 17-33). An additional section of the act, added in 2009, was expanded by 2020 to list eleven types of records entirely excluded from the act, such as constituency records, court records, and records "pertaining to legal affairs that relate to the performance of the duties and functions of the Attorney General" (*RTIPPA*, s. 4). This last addition was described by the ombud at the time it was proposed in 2008 as a "most glaring and disturbing example" of unaccountability, "unprecedented," and "very damaging to the principles of Freedom of Information in Canada" (Office of the Ombudsman, *Submissions*, Part 1).

According to international standards, no public bodies should be completely excluded from the act, and any non-disclosure must be justified on a case-by-case basis (Article 19, Principle 4). In New Brunswick's act, one of the ten "mandatory exceptions" is "Executive Council confidences" (s. 17(1)), which can be disclosed only after fifteen years have passed. Even then, unlike all other provincial and territorial acts in Canada, disclosure requires Executive Council approval. International standards indicate that background information, factual material, explanations, and analyses used by the Executive Council (Cabinet) can and should be disclosed immediately, and any information denied legitimately must be disclosed as soon as the reason ceases to apply or the time period expires, except in "extraordinary" circumstances (Article 19, Principle 4). In 2007, even the task force reviewing the act, chaired by Donald Savoie, a staunch defender of Cabinet confidentiality ("Why Keep"), recommended that this exception be more clearly defined so that background material, factual information and data, and analyses of issues provided to ministers be accessible after the relevant Cabinet decision is announced (NB RTIPP 30). The advice was not heeded. In 2019, when a request was denied for the information used to determine risks and potential issues posed by fee-for-service long-term care contracts, the ombud noted that New Brunswick has one of the most stringent protections for Cabinet confidences under access to information legislation in the country and he repeated the call for amendments in his complaint investigation report (*Report of Findings* 19/20-AP-071).

There are also numerous discretionary exceptions in *RTIPPA* that allow public bodies the option to withhold information depending on the circumstances. The two most frequently used, as reported in

RTI annual reports from 2006/07 to 2016/17, are "privacy of a third party" and "advice to a public body." Investigation reports by the ombud and former information and privacy commissioner indicate government bodies have often been interpreting these too restrictively, not following the principle of maximum disclosure implied by the act.

By any standard, *RTIPPA*'s numerous mandatory and discretionary exceptions (ss. 17-33) and exclusions (s.4), are overly long and overly broad. International standards (e.g., Article 19 *Principles* and *Global RTI Rating*) allow some specific exceptions based on protecting national security, personal privacy, legal investigations, etc. However, in each case, there should be a harms test applied so that information can be withheld only when disclosure actually poses a risk of harm. In addition, there should be a mandatory public interest override for when disclosure is in the public interest, and there should be reasonable time limits on how long exceptions can apply.

When public bodies refuse to disclose information, the law should provide the right of appeal to an independent body with full powers to investigate and to order disclosure where appropriate. Under *RTIPPA*, the ombud is denied access to certain records when investigating complaints (s. 70) and can only make recommendations. On these and several other points, New Brunswick's *RTIPPA* does not meet modern standards.

Implementation of the Act

The *Global RTI Rating* is a good tool for evaluating access laws, but it does not measure the full "access regime" or systems in place that determine how the laws are administered or implemented. Implementation issues are a major concern with the federal act. As noted, excessive delays, redactions, and denials that undermine proper functioning of the *Access to Information Act* are well documented. Instances of political interference and bureaucratic resistance, such as delaying responses to sensitive requests (Roberts, *Blacked Out*), destroying records (Clément, 105), and not creating records at all (Hannant, 132), have also been reported. Research on how provincial access regimes function in practice has focused mainly on British Columbia and Ontario, where similar issues were found (BC 9-13; Brownlee and Walby, x–xii; Vallance-Jones, "Access," 297-300; Vallance-Jones, "FOI," 160-1).

Some insight into how New Brunswick's access act works in practice is provided by the National Freedom of Information Audits sponsored by News Media Canada. Ten audits were conducted between 2005 and 2017, testing the response of all levels of government to access requests. In 2017, as in most years, the federal response was the worst, and the municipalities generally performed the best. Comparing the ten provinces on their response rate within the 30-day deadline, and on the full disclosure rate, New Brunswick was among the worst for several years, but improved somewhat to end up in the middle of the pack by 2017 (News Media Canada).

Gary Dickson's overview of provincial and territorial access regimes in 2012 highlighted features of strong and weaker access regimes. He concluded that a strong access regime must have not only modern, comprehensive legislation, but also strong political and administrative leadership and properly resourced coordinators and oversight agencies (91). Applying some of the key points of his analysis to the case in New Brunswick is informative: Despite some good features, New Brunswick's access regime is clearly one of the weaker ones. For example, Dickson noted that the two most significant barriers to users of provincial RTI systems are typically fees and delays (85). New Brunswick has been a leader in removing the fee barrier, but has a poor track record when it comes to delays.

Fees

All fees for RTI requests, including the application fee, search and preparation fees, copying fees, computer processing fees, and mailing fees for general government information requests were repealed in 2011 by an order in council. This was a significant, trailblazing step for improving access. Fees are obviously a deterrent for many users, and it can be argued they are basically unfair, since government information has already been paid for by taxpayers. Some fees, such as the fee to search for records, are especially unfair. As one RTI coordinator interviewed put it: "The public shouldn't have to pay for a department's poor records management practices." Fees are also costly and time-consuming to administer. *RTIPPA* still includes a section on fees, to be set by the accompanying regulation, so they can be reinstated quite easily at any time. The 2015 review report noted that many public servants argued for reinstating fees (NB GS 7).

Delays

Delayed responses are a significant problem in New Brunswick. The government's 2015 review report noted that over the 2011-13 period, "slightly more than half of RTI requests were responded to within the 30-day period" and that "this falls well below other provinces, which respond within 30 days more than 80 percent of the time" (NB GS 9). Government statistics in RTI annual reports since then show that New Brunswick's response rate within the prescribed deadline of thirty days never reached 60 percent from 2013-14 to 2016-17 (NB GS, SNB and TB), and dropped to a five-year low of 44 percent in 2017-18 (NB TB).

Providing timely, accurate, and comparable information to the public on how access requests are handled shows a government's commitment and level of compliance with the act and allows researchers to study the issue. The New Brunswick government has not always published this information on a regular basis. Four years of RTI annual reports were published at once in 2014, and, in December 2020, the most recent annual report published by the Treasury Board was over three years old. The ATI unit was able to provide some more recent statistics by email, but these were not entirely complete or up to date. In this, as in responding to access requests, information delayed is information denied.

Thirty calendar days (or twenty business days) is the norm for the deadline to respond among provincial/territorial acts. This is considered a "reasonable" maximum timeline for responding to requests by *Global RTI Rating*, which notes that the best acts also state that authorities must respond "as soon as possible." In 2017, New Brunswick extended the deadline for responding to requests from thirty calendar days to thirty business days. This change was obviously not intended to fix the problem of excessive delays. On the contrary, it granted public bodies permission to delay even longer. Another amendment allowed public bodies to grant themselves a thirty-business-day extension for a variety of reasons, without requiring approval from the ombud. It is telling that the two Treasury Board departmental annual reports since then (2017-18 and 2018-19), show that responding to RTI requests within thirty days is not even a target. They use the sixty-day, maximum allowable time as their benchmark performance measure (14, 8).

Given that the volume of requests has been low in New Brunswick compared to other provinces and territories, response times should have been faster. For insight into the internal processes for dealing with access requests, we spoke to some of the government employees involved.

RTI Coordinators and Internal Procedures

In New Brunswick, as is common in the other provinces and territories, the head of each public body (the minister, in the case of a department) is responsible for the administration of the act in their organization, but they can delegate this responsibility. In most cases the minister will designate a staff member to serve as the RTI coordinator. RTI coordinators are responsible for processing requests and serve as the main point of contact between applicants and the public body (the government). Dickson found that in jurisdictions with strong access regimes, coordinators tend to be senior, dedicated access professionals who frequently provide advice to senior management. In weaker access regimes, the coordinator's role is narrower and reactive, usually filled by a very junior employee, and the actual decisions to provide or deny information are made by senior or middle managers who have no RTI training or experience (76-77).

To find out more about how requests are handled by RTI coordinators in the New Brunswick government, and their thoughts on the process, we contacted fifteen RTI coordinators selected from the *Directory of Public Bodies*; six agreed to be interviewed. The six semi-structured telephone interviews lasted forty minutes to an hour each and were conducted in May and June 2019. We were pleased with the level of openness this showed: that so many agreed to an interview, and that our questions did not have to be pre-approved or vetted, unlike the experience described by Jiwani and Krawchenko when they tried to interview employees of a federal department during the Harper regime (62).

All RTI coordinators described similar steps taken in processing requests: When a request is received, they acknowledge receipt, and, if needed, ask for clarification from the applicant. Then they send the request to the appropriate staff member or subject expert to collect the information. When the records are received, if not electronic, they are scanned, then reviewed and redacted if needed according to the act, and then sent for approval and sign-off.

Not all mentioned they take the additional step of removing the requester's identity before forwarding the request. A guidance document on the ombud's website dated November 2019 reminds public bodies that the requester's identity is to be kept confidential. It should be removed from the request before it is forwarded, a third party is notified, or any other public body is consulted, in order to "demonstrate that the request has been handled in an open and accurate manner and without bias or interference for political or other motives." The guidance document goes on to say, "We are aware that some bodies have adopted this into their process for responding to access requests and encourage those that have not to do so" (*Anonymity of Applicants* 1).

We asked if all requests are treated the same, without regard to the category of requester, the purpose of the request, or political sensitivity of the subject matter. All coordinators said they follow the same process, although they do have some flexibility to fast-track requests (the example given was of an urgent request from an MLA), or to flag potentially sensitive ones.

Officials involved in the approval process varied slightly, but in most cases included as many as four or five senior people: the minister, deputy minister, assistant deputy minister, director of communications, the head of the policy area involved with the response, and, in some cases, a privacy officer. Where the subject matter of the request spans more than one department, the equivalent group in the other departments could also be included. Two people were in most cases required to sign off on the release, from among the minister, deputy minister, and assistant deputy minister.

According to the extensive 2014 Newfoundland and Labrador access legislation review report (47), coordinators should have the delegated authority from the head of the public body and be the only ones who communicate with the requester. Coordinators should be regarded as the access and privacy experts in their public bodies and receive the necessary training and appropriate salary (9). The many approvals and sign-offs required attest that this is not the case in New Brunswick, even years after New Brunswick's 2015 review report noted that "New Brunswick is the only province where many heads of public bodies continue to sign off on RTI requests." The report recommended heads of public bodies review their delegated authorities (NB GS 11).

The practice of involving communications staff is also inappropriate. As pointed out by the authors of the 2014 Newfoundland and Labrador review report, a system "where requests are scrutinized by staff, the deputy minister, and often the minister, facilitates the interpretation of [the act] in a partisan political way rather than in a fair, principled way" (46). Some believe it is not unreasonable for ministers and communications staff to be informed of information being disclosed, as long as it is apart from the approval process (Vallance-Jones, "Access," 299).

It may not be the case that politically sensitive requests in New Brunswick are subject to extra delays. There is no doubt, however, that where so many people are required to sign off on information before it is released, delays will result. In some cases, the approvals are gathered by sharing the information electronically, but one coordinator noted that printed information is passed manually from one official to the other, so when one of them is unavailable, the whole chain of approvals is held up. The approval process was one of the major reasons for delays noted by RTI coordinators.

Few New Brunswick government departments and agencies regularly receive so many requests that a full-time RTI coordinator is required. Requests for personal information are generally fewer than for government information and are often handled by the department's privacy officer. Most of the employees in the RTI coordinator role have other, unrelated duties as well. A high turnover rate for RTI coordinators was evident by comparing iterations of New Brunswick's *Directory of Public Bodies.* The majority of department-based RTI coordinators had changed between November 2018 and February 2019, and again by October 2020. Clearly, the majority were not senior, dedicated access professionals.

The RTI coordinators interviewed had a variety of backgrounds and levels of experience. We asked about the training they had received and the guidance documents they used. Some had received training from the Finance and Treasury Board, ATI unit, but most used guidance materials created in their own department. No one mentioned a government-wide manual such as those publicly accessible online in Alberta, BC, Ontario, Newfoundland and Labrador, Nova Scotia, and the Yukon. Some noted that the changes the ATI unit was undergoing at the time would have interfered with the amount of training provided.

RTI training is important not only for coordinators but for all government employees. The employees who search for the information requested also need to know about the act, the duty to assist, what a proper search entails, the importance of meeting the prescribed deadlines, etc. It seems there is very little such information provided to government employees beyond the guidance documents recently added to the ombud's website. International standards such as Article 19's Principle 3 suggest access laws should include a requirement that public bodies provide comprehensive RTI training for their employees. In New Brunswick, there have been calls for this since the first review: the 1990 discussion

paper, 2007 task force report, and the 2015 review report all called for a government-wide, ongoing training program to be developed.

A related issue is records management training and systems. Good records management practices are required for an access system to function well. A 2001 audit by the auditor general confirmed this area had been underfunded for decades (178-82). Training sessions on records and information management are offered to all provincial and municipal government employees, but are only voluntary, and do not cover RTI principles or procedures. The fact that public bodies have been using a variety of different information systems has also hampered efficient access to information. This was noted in the 2018 *Digital New Brunswick: Strategy Document*: "Departments historically have operated independently of one another resulting in processes and systems that are not aligned nor compatible to share information. Many processes within GNB are manual and paper-driven" (NB TB 16). We also heard from RTI coordinators that some departments had not been using the online RTI tracking system for very long and had been redacting manually until quite recently. One of our survey respondents commented on this too, noting there was quite a bit of variation between public bodies in how requests were processed.

Modern information technologies offer the potential for improved efficiency in records management processes, but they have also complicated the work, increasing the volume and variety of records. The use of personal communication devices has also added to the concerns about a trend of increasing "no records found" or similar responses, and an emerging culture of oral decision making in government. These concerns led Canada's federal and provincial/territorial information commissioners to release joint statements, in 2013 and again in 2016, calling on all governments to create a legislated duty for all public entities to document their deliberations, actions, and decisions (Canada OIC). New Brunswick RTI annual reports include statistics on the outcome of information requests, such as the number that were granted, denied, transferred, etc. The outcome category "records do not exist" appeared without explanation for the first time in the 2011-12 report when two of the total 431 (personal and general) information requests had this outcome (NB GS). The number of "records do not exist" responses reported increased every year after that to reach a high of 292 (23% of responses) by 2016-17 (NB TB), the most recent statistics available in 2020.

RTI coordinators interviewed said they did not know the reason for the large increase in "records do not exist" responses, but offered possible explanations: records may not be found if the right words are not used; if a search is conducted only in English or French; if the information is in a database; if the request was sent to multiple departments and not transferred; or if the record was destroyed (either according to the records management policy or not). One said: "There is a huge records management issue; people not following the policies for saving important documents." These responses are concerning. They suggest that incomplete searches and non-compliance with procedures required by the act and by the governments' records management policy could account for many of the cases. Given the lack of detail available for requesters on information holdings, it also seems likely that some requests are being made for information that genuinely does not exist. Further research is required to understand this trend.

When asked about how they felt about their RTI work, coordinators interviewed used terms such as "challenging," "interesting," and "proud." All were positive about the principle of the public's right to government information. Further research could include interviews of the government employees who search for the information requested, and others involved in the process, including ministers and other

senior staff. It would not be surprising if the coordinators' positive attitude toward the right to information is less common among other public servants, given the lack of government-wide RTI training and the repeated calls for more.

Another influence against openness may be the oath of secrecy all government employees are still required to sign as a condition of employment. It is identical to the wording in the 1970 federal *Public Service Employment Act*, R.S.C. 1970, c.P-32, schedule III: "I will not, without due authority…disclose or make known any matter that comes to my knowledge by reason of such employment" (qtd. in Rankin 30). Exactly the same wording is in New Brunswick's *Civil Service Act* Section 22 (accessed January 2021) and in the *Staffing Policy Manual AD-4100*, last updated in 2020 (NB Finance and TB 158). This is obviously a hold-over from pre-RTI times. Even in the 1970s, though, some considered this oath inappropriate and excessive (Franson; Rankin, 31).

The final report of the 2007 NB RTIPP review task force chaired by Donald Savoie repeatedly notes that historical Westminster-type governments are based on secrecy (e.g., 3, 6, 24, 30), and that some in government may still believe that RTI legislation is incompatible with good government (23). This idea, however, has been challenged by scholars past and present who have argued that adjustments can and must be made to adapt this form of government to modern democracies (Grube; McCamus, "FOI in Canada"; Rankin; Rowat; Roy).

Government Leadership and Support for the Right to Information

As Dickson noted, RTI regimes require strong political and administrative leadership to be effective (91). Many of the issues already discussed, such as regressive amendments to the act, a dearth of supportive public statements by premiers, persistent issues remaining unaddressed, and the abolishment in 2017 of the dedicated Office of the Information and Privacy Commissioner, all point to a lack of government leadership and support for RTI legislation in New Brunswick.

Another indicator is underfunding of the independent oversight agency. Dickson noted that access regimes tend to be weaker where there is only a part-time commissioner (77). New Brunswick and Manitoba are the only two of the provinces and territories where the ombud also serves as information and privacy commissioner. In New Brunswick, this was the case before the information commissioner's 2010-2017 term, and again since 2019, after a year in which the responsibility was added to the integrity commissioner's mandates. Despite the multiple mandates and heavy workload, the level of funding for the Office of the Ombud has been consistently low in New Brunswick. The 2007 RTIPP review task force report described it as "a serious, if not a flagrant, lack of resources over the years" (34).

For a current picture that takes into consideration the combined mandates, per capita funding for the New Brunswick and Manitoba Offices of the Ombud was compared with the other eight provincial Offices of the Ombud and Information Commissioner combined, using each province's 2020-21 *Budget Estimates* and Statistics Canada's 2020 population estimates (19, Table 1.1-1). Funding was highest in Saskatchewan at $5.51 per capita, well over double New Brunswick's funding of $1.90, the lowest in Canada. Funding amounts were as follows: Saskatchewan $5.51, Newfoundland & Labrador $4.61, Ontario $3.33, BC $3.17, Quebec $3.13, Manitoba $2.93, Nova Scotia $2.88, Alberta $2.53, PEI $2.30, New Brunswick $1.90.

One of the ombud's major responsibilities as information commissioner is to investigate complaints of how public bodies have handled RTI requests and to advise government on the law. The office's annual reports include statistics on the number and type of complaints received each year. *RTIPPA* access-related complaints reached an all-time high of 136 in 2017-18, the latest year for which statistics were available in December 2020 (Office of the Integrity Commissioner, 14). In all, 19 percent of access requests resulted in complaints that year, compared to most previous years in which it was closer to 10 percent.

Complaints about information denials could indicate unrealistic demands by users unfamiliar with the limitations of the act, or public bodies' not complying with the act. According to the information and privacy commissioner, interviewed by the CBC in 2017 at the end of her seven years in office, there were only a few cases where the government did not release information after she worked with them to address complaints (Bertrand). This means government bodies were initially withholding information that requesters were entitled under the law to receive. The commissioner's 2012-13 annual report indicates that from September 2010 to the end of March 2013, 92 percent of access complaints resulted in additional information being released (Office ATI 5-6). In 2013-14, it was 93 percent of the cases (Office ATI 5). The statistics provided in the commissioner's and ombud's annual reports since then are not current or complete enough to show if this high rate of inappropriate denials continued. However, the most recent (2017-18) annual report notes that the majority of access complaints continued to be about denials of information requested, in full or in part, and that areas of the law most frequently misinterpreted by public bodies involved privacy and contracts between government and third parties (Office of the Integrity Commissioner, 15-16).

Consistent misapplication of the law reinforces the need for more training and guidance for government employees, but this still does not appear to be a priority for the government. After a brief experiment with creating a centralized unit to respond to RTI requests, announced in 2018 and abandoned a year later, the Finance and Treasury Board unit with the mandate to provide support for all public bodies regarding *RTIPPA* had only one employee listed in it at the end of 2020.

The amount of time that can be involved with the RTI process, with no guarantee of success, can obviously discourage some people from filing requests. There is no doubt as well that the access system is costly and time-consuming for the government to administer. An obvious solution is for government bodies to routinely and proactively disclose more information on their websites. This is one of the "key elements of progressive access regimes" (Tromp, 257), and a key component in many related international laws, declarations, and treaties (Darbishire, 5).

Proactive Disclosure

RTIPPA's section 3(1) states that the act "is in addition to and does not replace existing procedures for access to records or information normally available to the public." It does not, however, establish a general obligation to publish and disseminate information of public interest, nor does it specify key categories of information that must be published. The only mandatory disclosure statement in *RTIPPA* is a very limited 2017 addition requiring disclosure (although not necessarily to the public at large) where there is "risk of significant harm" to health or safety or to the environment (s. 33.1).

The duty to publish specific information does exist in many New Brunswick acts. The *Clean Air Act*, section 12(1), for example, requires enforcement-related information to be published in a public

register, including "all administrative penalties paid," "all convictions of persons," and "a description of the penalties and offences," which, according to section 12(4) of the act, "shall be available for viewing by the public" in the minister's office and regional offices, and "may be made available to the public on the Internet." The Department of Environment and Local Government had this information (including the companies and individuals involved) on their website for many years, but when viewed in December 2020, it was no longer being maintained.

Despite the requirement in many laws for the government to publish and make available information specific to the main purpose of those laws, it is still widely considered important for access acts to include a section on proactive disclosure to help ensure government bodies publish and actively disseminate key types of information (Article 19, Principle 2). Access acts must also take precedence over other acts (Access *Global RTI Rating*, Indicator 28; Article 19, Principle 8). This is not the case in New Brunswick, where other acts, such as the *Clean Air Act* (s. 12(5)) allow ministers to override *RTIPPA.* According to Darbishire, the key types of information that should be proactively disclosed are based on four historical drivers for proactive disclosure: the need for citizens to know the law, to know how to access government services, to hold governments accountable, and to be able to participate in decision making (9). She compared national access legislation and international provisions to come up with a list of common features that suggest a minimum standard for classes of information that should be proactively disclosed (21-22). Among the most basic is a list or index describing the types of information each government body holds, including in databases. As noted earlier, this has been a notable omission in New Brunswick's access act from the beginning. The difficulty of knowing what government information exists and where it can be accessed has always been a barrier to users and remains the case, as the many comments from our survey respondents attest. Since a description of records held must be created and maintained under New Brunswick's *Archives Act*, it is not clear why this description could not be adapted for public use and maintained online.

Also a basic requirement for proactive disclosure is operational information in sufficient detail to allow others to monitor the workings of a government body. There have been major reductions in the amount of this kind of information proactively disclosed by the New Brunswick government in recent years. For example, the government's *Annual Report Policy* (AD-1605) describes annual reports as the "major accountability document by departments and agencies for the Legislative Assembly and the general public" (qtd. in Auditor General, 2005 14); it outlines the information they should contain. In 2005, the auditor general reported poor compliance with this policy after multiple audits over the years (16). Since 2013-14, with the introduction of the government's new management system focused on performance reporting aligned with strategic themes of government, the amount of useful information provided has been reduced even further, to the point where many departmental annual reports no longer serve their purpose, for either the public or MLAs.

In particular, MLAs in the Standing Committee on Public Accounts have the mandate to review the spending and operations of all government departments and agencies, based largely on annual reports. In 2017 the committee reported they had "noted a trend in the annual reports of many government departments" of "a reduction in the volume of detailed information that was previously included," and recommended that departments comply with the policy (5). An example of this trend can be seen by comparing Department of Environment and Local Government annual reports over time. One of the department's mandates is to ensure compliance with several environmental acts and regulations. Enforcement-related activities used to be described in the department's annual reports. The eighty-nine-page, 1999-20 Department of Environment annual report, for example, described environmental

offences committed; listed the company or individuals involved; the charges, penalties, and fines; and the final outcome (78-80). Ten years later, the sixty-two-page 2009-10 annual report gives only the total number of charges, warnings, orders, penalties, and fines (31-32). By 2018-19, the annual report is reduced to twenty-nine pages and says only, "Approximately 90 enforcement-related actions were handled" (NB DELG, 15).

Publishing environmental enforcement information, including details such as the location and parties involved, is clearly in the public interest, to show where and when pollution, for example, has occurred; to show that environmental protection laws are being enforced; and to deter polluters. The federal government and several provinces (e.g., BC, Alberta, Ontario, and Nova Scotia) maintain this information online. An informal request for the information sent to the New Brunswick department by email in 2020 resulted in a few additional numbers but not the information requested. The response included the statement that the department often receives *RTIPPA* requests on this topic and included a link to the online form to file a formal request (NB DELG).

In some jurisdictions, but not New Brunswick, information once released through an access request can be found online (e.g., the province of Newfoundland and Labrador and the city of Vancouver), and some federal agencies post some previously released information (e.g., CRA and CBC). The U.S. 2016 *FOIA Improvement Act* requires any FOIA-processed records requested at least three times to be posted online (DeLuca, 2), and many U.S. agencies maintain online "FOI libraries" of these records, such as the FBI's FOIA library, "The Vault." Summaries of all Canadian federal access to information requests can be browsed or searched through the federal open government site. The information previously released can then be obtained without the need to file a formal request. Some provincial/territorial governments (e.g., BC, Nova Scotia, Yukon) do the same, as do some municipalities. Researchers can use these sites to learn about the kind of information government bodies have, and to help focus follow-up requests. Ideally, public bodies should be paying attention to what information is often requested and prioritizing it for proactive disclosure on their websites.

While proactive disclosure is not a replacement for the RTI system, it is clear that much more information held by the government of New Brunswick could and should be proactively disclosed than is currently the case. Doing so would reduce the workload and expense involved with responding to as many individual RTI requests, and it would make it easier for academic researchers, elected officials, and others—including public servants themselves—to access and use government information.

Open Government

Proactive disclosure of government information is a cornerstone of "open government," which can be defined broadly as transparent, accountable, and participatory (OGP). In 2010, noting that advances in information technologies had made open government much more achievable, Canada's federal and all provincial and territorial access to information and privacy commissioners signed a joint statement urging governments to embrace "the paradigm shift from reactive to proactive disclosure, and ultimately to open government" (Canada OPC). In 2012, the Canadian government joined the international Open Government Partnership, which means committing to uphold the principles of open and transparent government and endorsing the *Open Government Declaration*. The declaration includes the commitment to promote "increased access to information and disclosure about governmental activities at every level of government" (OGP).

The federal government and several provinces now have open government policies. New Brunswick came close in 2016 when Premier Gallant announced New Brunswick's *Open Data Policy*. The policy stated that it "creates a framework for the public release of government-held data with the goal of moving government toward an 'open by default' environment" (NB 1). The press release announcing the policy on 28 April 2016 mentioned both data and information, but the policy was clearly data-focused. Four years later, Open Data New Brunswick, a portal created in 2018 by a U.S. firm, included only a small fraction of the intended data sets, and the policy was no longer on the government website.

Although also data-focused, the 2018 *Digital New Brunswick Strategy Document*, announced in April 2018, came closer to open government principles, as it recognized one of the "critical needs areas" as "increased access and use of information within GNB and the public" (NB TB 3). To address this need, the strategy included commitments to establish mandatory information management training for all employees (16) and to modernize classification, search, and archival tools (17). It remains to be seen if these goals will be achieved. A new government with different priorities was elected a few months later. In any case, there can be no real open government without a properly functioning right to information system. The right to information is a crucial component. If "open government" means officials disclose only what they want to disclose while access legislation remains overly restrictive, then it is not much different from the "discretionary secrecy" Gaudet described in 1979, before New Brunswick's access legislation had come into effect.

Conclusion

Despite the early promise of New Brunswick's groundbreaking right to information legislation, successive governments have undermined its purpose and value. Amendments made over the years have failed to address some of its most serious weaknesses and have instead introduced restrictions that have limited access further. The act now compares poorly with other provincial and territorial acts in Canada and is far from meeting international standards. It resembles in many ways the federal *Access to Information Act*, widely recognized as outmoded, out of step with international trends, and subject o systemic delays (Larsen and Walby, 3). However, further research is required to determine if some of the ways in which the federal act has been subverted—such as those documented by Roberts, Clément, Hannant, and others—are also happening in New Brunswick. A positive amendment made to New Brunswick's act in 2017 was the requirement for a review of the act every four years. This provides regular opportunities for change. Given the political will, significant improvements could easily be made to modernize New Brunswick's access regime. Newfoundland and Labrador's example in 2015 shows it can be done.

Several issues related to how the act is administered in New Brunswick were found to be similar to those in other weak access regimes, but in many cases worse. The number of requests responded to within the prescribed time frame in New Brunswick, for example, was much lower than in other provinces, but instead of addressing the reasons for delays, recent amendments have just increased the allowable time frame and made extensions easier to obtain. The practice of requiring approval from multiple senior officials before information is released was flagged as a problem unique to New Brunswick in the last review, but the practice has continued unchanged. According to the ombud and former information and privacy commissioner, government bodies have frequently been misinterpreting the act. And yet, next to no resources have been provided for RTI training for government staff, and the

ombud still has no power to enforce compliance with the law. Funding for the Office of the Ombud was shown to be the lowest of all the provincial oversight agencies. These findings indicate a blatant lack of government support for the public's right to information in New Brunswick.

The Internet has provided governments with an easier and cheaper way to make more information and data available to the public than ever before. In New Brunswick, however, not only are there still important gaps in the information the public can access online, such as a description of government information holdings and legislative debates, researchers and others have noticed that the amount of information being made available by the New Brunswick government has been reduced in recent years. Examples are annual reports, which no longer contain the operational information required for legislative oversight, and environmental enforcement information, one of several cases where information that was previously accessible on a government website is no longer available at all, or now requires filing an access request to obtain. The New Brunswick government was at the forefront of the trend toward openness in government when it passed the *Right to Information Act* in 1978, but it has since fallen very far behind.

While many New Brunswick public servants work hard to make the right to information possible, support for transparency among senior government officials has wavered in the past and may be at an all-time low. New Brunswickers cannot afford to be complacent. Public access to government information is a right and a requirement for a properly functioning democratic society. It is important for citizens and academic researchers to advocate for more proactive disclosure and for improvements to the right to information regime. One way to uphold the right to information, as any other right, is to exercise it. Many faculty and librarians in the Atlantic region are using government information in their teaching and research. Some are also filing access requests, and a few have incorporated the use of right to information requests into their teaching and research practices. Given the often-cited criticisms of Canadian access acts, a surprising finding of the survey was that the majority of respondents who had filed requests were at least partially successful and would recommend the use of right to information requests to colleagues.

The right to information system is an important tool for accessing government information and data that are normally hidden from public view, but there should be very little that is hidden in a modern democratic society, and much to be gained from greater transparency. The vast majority of information and data collected or created by the New Brunswick government in the course of its operations should be made more readily available to citizens so that it can be used to inform public debate and help shape better collective decision making and public policy development in the province.

To comment on this article, please write to editorjnbs@stu.ca. Veuillez transmettre vos commentaires sur cet article à editorjnbs@stu.ca.

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