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## The duty to assist in Canadian Freedom of Information law

*Abstract:* The duty to assist is a core principle in Freedom of Information (FOI) law in Canada and elsewhere. FOI coordinators working in each Canadian government agency are responsible for implementing this duty, though they face challenges in doing so. Examining Information Commissioner rulings, we elaborate on the dimensions of duty to assist as articulated in Canadian law and policy. We argue that while attention to the duty to assist is a necessary but insufficient condition for refurbishing FOI law in Canada, improving adherence to it would enhance “internal mechanisms of administrative justice” (Adler 2003). We conclude by discussing remedies and implications for literatures on FOI, administrative justice, and due process.

*Sommaire :* Au Canada et ailleurs, l’obligation de prêter assistance est un principe fondamental de la Loi sur l’accès à l’information (LAI). Alors que les coordonnateurs de la LAI œuvrant dans tout organisme gouvernemental canadien sont responsables de mettre en œuvre cette obligation, ils doivent surmonter des défis pour le faire. Après avoir étudié les décisions du Commissaire à l’information, nous donnons plus de détails sur les dimensions de l’obligation de prêter assistance telles que formulées dans la loi et la politique canadiennes. Nous soutenons le fait qu’alors que de s’intéresser à l’obligation de prêter assistance soit une condition nécessaire mais insuffisante pour remettre à neuf la LAI au Canada, améliorer son adhésion valoriserait les « mécanismes internes de la justice administrative » (Adler 2003). En conclusion, nous discutons des recours et des implications sur la documentation concernant la LAI, la justice administrative, et une procédure équitable.

### Introduction

Over the past several decades, an increasing number of national and sub-national governments have granted their citizens the right to access information held by public bodies. The right is variously referred to as Access to Information (ATI) (e.g. Canada: Access to Information Act 1985; South Africa: Promotion of Access to Information 2000), Freedom of Information (FOI) (e.g. Ireland: Freedom of Information Act 2014; United Kingdom: Freedom of Information Act 2000), and Right to Information (RTI) (e.g. India: Right to Information Act 2005; Tasmania: Right to Information Act 2009), among others (e.g. Thailand: Official Information Act 1997). The procedure and degree of openness differs between regimes, but each act provides individuals

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with a process for requesting internal unpublished information on government decision-making and policy development.<sup>1</sup> Given the wide array of information held by public bodies and asymmetric control they have of it, requesters rely on the government to comply with its access legislation to give effect to the right (Bouhadana 2016; McDonagh 2015, 2010).

In some countries, such as Canada, governments have established a duty for public bodies to assist requesters in their pursuit of information (e.g. U.K.: Freedom of Information Act 2000, c. 36, s. 16; U.S.: The Freedom of Information Act, 5 U.S.C., § 552(a)(6)(A)(i)(II); Australia: Freedom of Information Act 1982, ss. 15(3)-(4), 24AB(3)-(4)), although there is variation in the description of this duty. This article examines the notion of duty to assist in Canadian FOI law and practice. The duty to assist is outlined in FOI legislation and policy documents across Canada. FOI coordinators working in each government agency are responsible for implementing this duty to assist. The responsibility to implement the duty to assist falls on FOI coordinators who must follow the letter of the law, as well as manage the expectations of the FOI request-maker, the information processing practices of government workers, and agency occupational culture. This responsibility may also mean enduring the pressure of investigations from FOI Commissioners. Mann (1986) referred to FOI coordinators as the meat in the sandwich, being chewed on from all sides. Being an FOI coordinator is not an easy profession, and the duty to assist ensures that the stakes remain high for every records request.

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In Canadian public administration, the idea of duty to assist in FOI law has gained traction. Information Commissioners have commented on the duty to assist in reports and orders, finding that in practice this principle has not been followed fully, impeding the functioning of FOI law. Several reports have been issued on the duty to assist, including one by former Information and Privacy Commissioner for British Columbia Elizabeth Denham (2016), the Office of the Information and Privacy Commissioner for Nova Scotia's duty to assist guide for public bodies (2019), and similar guide by the Office of the Information and Privacy Commissioner for Saskatchewan (2018), among others that we examine below.

The idea of duty to assist is a unique component of FOI law and policy, which is crucial to analyze because it reveals the extent to which an access regime is open, or whether other principles such as data protection, privacy,

or secrecy are given more precedence as principles in governance (Laurie and Gertz 2006). The duty to assist is also central to what Adler (2003) calls “internal mechanisms of administrative justice” which should reflect principles of fairness, transparency, and logic meant to be at the core of public administration in liberal democracies.

We begin by reviewing literature on FOI law. Examining Information Commissioner rulings, we elaborate on the core dimensions of duty to assist as articulated in Canadian law and policy. By doing so, we examine the minutiae of the duty to assist in Canadian FOI law and practice to the benefit of scholars and practitioners of public administration as well as FOI users. We argue that improving adherence to the duty to assist would enhance “internal mechanisms of administrative justice” (Adler 2003) in government. We conclude with a discussion of the implications of this analysis for literatures on FOI and administrative justice, suggesting that attention to the duty to assist is a necessary but insufficient condition for refurbishing FOI law in Canada and beyond.

### **Literature review and context**

There is an insightful international literature examining the establishment and effects of FOI at multiple levels of government (e.g. Worthy 2017; Sheaff 2017; McDonagh 2015; Birkinshaw 2010; Hazell and Worthy 2010). There is also literature on FOI law in Canada (Walby and Luscombe 2018, 2017; Luscombe and Walby 2017; Kazmierski 2016; Clément 2015; Dickson 2012; Gingras 2012). Alasdair Roberts (2006) has examined the letter of FOI law in Canada as well as how these laws work in practice. Roberts (2002a) has shown how administrative discretion can operate as an “internal law” that circumvents access law. Most FOI coordinators do at least follow the letter of the law, though Brownlee (2015) reveals attempts by FOI coordinators to scuttle his FOI requests submitted to universities, the opposite of what one would expect with the duty to assist. Gilbert (2000) has revealed that government departments have taken steps to avoid scrutiny under FOI, including changing file types and names, delaying access to records, and at times disregarding access legislation. As Rowat (1966) pointed out long ago, administrative secrecy in government is a social problem. Half a century later, administrative secrecy remains a problem in Canadian government agencies today (Kazmierski 2016). FOI law attempts to provide the remedy, and the duty to assist is a key mechanism in making sure FOI law works well. There is literature on appeals bodies (Rowat 1993) and legislative change. There is little focus on duty to assist in this literature. Some publications mention duty to assist (Weiler 2017; Clément 2015; Dickson 2012; Gertz 2009; Goldberg 2006). More research is needed to elaborate what the duty to assist is and how to implement it fully.

In Canada, the federal *Access to Information Act* (ATIA) was updated in 2006 to apply to more federal agencies and to include a duty to assist. It was updated again with the passing of Bill C-58 in 2019. Section 4(2.1) on the responsibility of government institutions indicates:

The head of a government institution shall, without regard to the identity of a person making a request ... make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

The duty to assist is addressed in the Access to Information Regulations (SOR/83-507) and an Interim Directive on the Administration of the *Access to Information Act* published by the Treasury Board Secretariat. The Treasury Board Secretariat Directive as well as the *Federal Accountability Act* apply to both the *Access to Information Act* and the *Privacy Act*, and require that all government institutions “make every reasonable effort to assist” individuals making a request for records. The Treasury Board Access to Information Manual (1993) also offers guidance. Section 5.5 subsection 4(2.1) of the manual indicates that the purpose:

...is to make explicit the responsibility of government institutions and to ensure the equal treatment of requesters. While the provision does not change the existing rights and obligations under the Act, it adds a new obligation to make every reasonable effort to assist requesters and to provide them with as much information responsive to the request as possible, as soon as possible. With this obligation comes a new ground of complaint concerning the quality and sufficiency of efforts made to assist requesters.

What this means is that a complaint could be made to the Information Commissioner of Canada about the efforts of the access coordinator and the duty to assist if a records requester is not satisfied with the assistance of the coordinator.

At the federal level, the duty to assist remains a perennial issue of concern for the Office of the Information Commissioner of Canada. In 2015, the Information Commissioner of Canada argued that the Treasury Board should “train departmental and ministerial staff members on the requirements of the duty to assist, including the obligation to respond to requests as soon as possible.” This suggests that despite orders on duty to assist, government workers and perhaps even some access coordinators do not view duty to assist as key to administrative justice and proper functioning of access laws.

At the provincial level, each province has its own FOI legislation.<sup>2</sup> The duty to assist appears in legislation but also in supporting administrative documents and decisions. For example, Section 6 of the FOIPPA Policy and Procedures Manual in British Columbia indicates that “The duty to assist obliges public bodies to meet a threshold of reasonableness in conducting

adequate searches for records. The burden of proof is on the public body to demonstrate it has conducted an adequate search. Public bodies should record the efforts made to respond to a request.” The reports on duty to assist issued by former British Columbia Information and Privacy Commissioner Elizabeth Denham (2016), the Nova Scotia Office of the Information and Privacy Commissioner in 2019, and the Saskatchewan Office of the Information and Privacy Commissioner in 2018, elaborate that the duty to assist requires FOI coordinators respond to any request openly, accurately, completely, and also promptly. Denham (2016) goes further to argue that “inappropriate delays, failure to meet legislated timelines, missing documentation, incomplete responses, and adversarial communication with applicants” (p. 3) emerge when the duty to assist is not fully understood and implemented. At the municipal level, some cities are drawing attention to the duty to assist as well.

The information ombudsperson or commissioner is often described as central to administrative justice in this domain (Buck, Kirkham, and Thompson 2016; Seneviratne 2002). While tribunals and oversight bodies provide a *post hoc* and external mechanism of administrative justice, there are also *in situ* and internal forms of administrative justice that are important. There is a need to go beyond thinking of administrative justice in terms of formal tribunals (Adler 2012). Doyle and O’Brien (2020) contend that the association between administrative justice and external mechanics of ombudspersons and tribunals is limiting and that internal, process-oriented approaches are essential. The duty to assist is one such *in situ* and internal form of administrative justice. The idea of duty to assist has implications for thinking about administrative justice and due process. If the minutiae of an FOI request procedurally fail, the requester will not be satisfied. The main way to ensure the process is sufficient is to enforce the duty to assist, which concerns communication between FOI coordinators, and FOI requesters (Denham 2016). Although there are other components that we elaborate on below, communication is central to the duty to assist. We understand the duty to assist as part of what Adler (2003) calls “internal mechanisms of administrative justice.” More law and policy could be enacted that clarifies what the duty to assist is and how to achieve it. However, the only guarantee of success and compliance is to at the same time enhance the internal mechanisms of administrative justice, the internal mechanisms of the duty to assist as it operates in access regimes. Administrative justice is an issue that is often relegated to the shadows of government (Adler 2012). Analyzing the law and policy of the duty to assist is a way of integrating administrative justice into legal and policy discussions.

## Research methods

FOI decisions on the duty to assist were collected from the websites of each respective provincial authority.<sup>3</sup> This was done by filtering decisions on each website to include only those addressing the duty to assist provision of the relevant legislation. Where this feature did not exist, decisions were collected by searching the website for decisions referring to the “duty to assist.” To ensure that the number of decisions remained manageable and reflective of current practice, only decisions rendered from 2010-2019 inclusive were collected. The result was a total of 209 decisions, representing every province except Ontario and Quebec.

Ontario lacks a legislated duty to assist, though the Ontario Information and Privacy Commissioner (IPC) (Goodis 2015) has recognized an implied duty. Seventy-eight decisions relating to the Ontario legislation’s access procedure (s. 24(1)) were collected, as the provision’s requirement for public bodies to use reasonable effort resembles that of the duty to assist elsewhere. These decisions increased the total to 287. Quebec decisions were excluded due to lack of online availability, which is one limit of this study. We also analyzed a small number of decisions that were cited repeatedly or quoted at length by other items in the sample. While administrative decision-makers are not bound by prior decisions, they often provide guidance (Régimbald and Estabrooks 2018). Adding these frequently cited decisions to the analysis was meant to recognize the persuasive value they still have.<sup>4</sup> Judicial review can also have an important effect on administration of FOI (Kazmierski 2013) but judicial review is outside the scope of our inquiry here. Another limit of the study is that we have not systematically interviewed FOI coordinators (Kimball 2012; Shepherd et al. 2010) about their views on the duty to assist.

## Analysis of the duty to assist: core components

Most Canadian provinces have created an express duty to assist under their FOI legislation. Others, such as Ontario and until recently, Saskatchewan, have relied on an implied duty. There is little difference between the duty to assist in statute and that which has been implied to exist. The benefit of codifying the duty to assist is not so much in its application but in its ability to provide clarity as to the legislature’s intent, particularly to those without formal legal training. Given that most FOI users and coordinators are unlikely to have such a background, codification is a valuable way to inform both of the standard to be expected.

Core to the duty to assist is that it requires the public body to “make every reasonable effort to assist applicants and to respond without delay to each

applicant openly, accurately and completely” (e.g. Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5, s. 7(1)(a); Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 6(1); Freedom of Information and Protection of Privacy Act, R.S.A.B. 2000, c. F-25, s. 10(1)).

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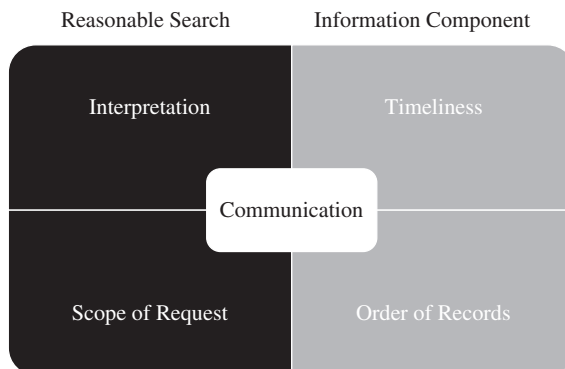
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This has been interpreted as creating two main requirements: (1) that the public body conduct a reasonable search for the requested records; and (2) an informational component requiring the public body to demonstrate how the duty to assist was fulfilled (e.g. *Order F2018-53 (Re)*, [2018] CanLII 93019 (A.B. OIPC); *Northern Village of Pinehouse (Re)*, [2019] CanLII 37983 (SK IPC)). Below we delineate these core dimensions of the duty to assist in Canadian law and policy (see Figure 1).

### Reasonable search

The first component of the duty to assist is that the public body must conduct a reasonable search. This standard demands reasonable effort in conducting a search (e.g. *British Columbia (Office of the Premier) (Re)*, 2019 BCIPC 5 (CanLII); *Prince Edward Island (Family and Human Services) (Re)*, [2017] CanLII 32455 (P.E. IPC)). British Columbia’s Office of the Information and Privacy Commissioner (OIPC) defined reasonable effort in *Order 02-18*, [2002] BCIPCD No. 18

Figure 1. Core Components of Duty to Assist





(B.C. OIPC) as “such search efforts as a fair and rational person would find acceptable in all the circumstances” (para. 7). The Saskatchewan OIPC, citing the Nova Scotia OIPC, similarly defined it as “what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances” ([2019] CanLII 37983, para. 33), which extends not only to conducting a responsive search, but also “identifying whether another public body would be better able” (*Saskatchewan (Education) (Re)*, [2019] CanLII 6140 (SK IPC), para. 17) to assist the applicant. What constitutes a reasonable effort is a fact specific determination: what is sufficient to meet the standard in one case may fall short in another. In *Order F19-04*, [2019] BCIPC 5 (CanLII) of the B.C. OIPC, it was found that the Office of the Premier failed to conduct a reasonable search for emails by not searching the deleted items folder of an email account. It was suggested that future cases may require a search of deleted emails located on a backup system to fulfil the duty to assist.

The Newfoundland OIPC described the process of a “reasonable search” as part of the duty to assist in its “Practice Bulletin” (2017), suggesting that only knowledgeable staff conduct searches including documenting where and when they searched, who searched, the type of search, the search time, and, if no records exist, an explanation why. Records management issues are not accepted by the OIPC as a reasonable explanation for a failure to locate records. The idea of a “reasonable search” as part of the duty to assist assumes the records exist and were created to begin with.

### Interpretation, scope of requests, and reasonable search

A reasonable search also requires a proper interpretation of the wording of the request. Access requests should be interpreted liberally so to not defeat the applicant’s right to access (e.g. *Wood Buffalo (Regional Municipality) (Re)*, [2019] CanLII 44152 (A.B. OIPC); *Saskatchewan (Health) (Re)*, [2019] CanLII 22845 (S.K. IPC)). Where the public body “has any doubts about its interpretation [of a request], it has a duty to assist the applicant by clarifying or reformulating the request” ([2019] CanLII 22845, para. 20; *Complaint Matter 2013-1555-AP-830*, (N.B. Office of the Integrity Commissioner)), and should not narrow the request (e.g. [2019] CanLII 44152).

This aspect of the duty was illustrated in *Ontario (Environment) (Re)*, [2011] CanLII 18252 (O.N. IPC), where the issue was the scope of a request for information on wind-powered generating equipment. The applicant sought all records relating to noise standards for the equipment, “including” those described in five subsequent bullet points (bullets two to six). The Ministry interpreted the request to mean that every document under bullets two to six must relate to the science behind the noise standards as described in bullet one. The Information and Privacy Commissioner (IPC) found that while it



was not unreasonable to interpret the word “including” in this manner, there were questions about the wording that should have led the Ministry to seek clarification. The Ministry’s interpretation narrowed the request counter to previous IPC orders stating that responsive records include “anything that is reasonably related to the request,” that public bodies should interpret requests liberally, and that inconsistencies are to be resolved in the applicant’s favour. The access legislation was clear that, even though the applicant must draft a concise request, the institution must seek clarification if the request is unclear.

Clarifying the scope of a request and determining what records are responsive is another central aspect of a reasonable search because the scope determines the depth of the public body’s search. Commissioner decisions have maintained that public bodies must take this element of the duty seriously. While public bodies may wish to limit the scope of a request for practical reasons, without the applicant’s permission they must continue to apply a liberal interpretation to the request ([2018] CanLII 76877). The public body should contact the applicant to determine the scope of the request in the case of access requests which “will result in a large fee” (*Saskatchewan (Economy) (Re)*, [2018] CanLII 76877 (SK IPC), para 40). Failing to do so could render a portion of the assessed fee unenforceable (e.g. *Ontario (Economic Development, Employment and Infrastructure) (Re)*, [2017] CanLII 51858 (O.N. IPC)). Where an applicant agrees to narrow their request, the public body should further confirm all alterations “in writing to ensure no misunderstandings going forward” (*Resort Village of Candle Lake (Re)*, [2019] CanLII 56326 (SK IPC), para. 31).

### Informational component

The second main requirement of the duty to assist is the “informational component,” the purpose of which is to explain to the applicant how the public body arrived at its decision (e.g. *Alberta Jobs, Skills, Training and Labour (Re)*, [2015] CanLII 75951 (A.B. OIPC). As the P.E.I. IPC noted in *Prince Edward Island (Department of Agriculture (Re))*, [2011] CanLII 91839 (P.E. IPC)), the public body must “provide information to an applicant to show that its duty to assist was fulfilled” (para. 18).

In *Order F2018-53 (Re)*, [2018] CanLII 95019 (A.B. OIPC), the Alberta OIPC noted that this informational component is of importance where the public body is “unable to locate responsive records and there is a likelihood that responsive records exist” (para. 7). The Saskatchewan IPC has found that where a record is refused, the public body should explain its decision, including the search that was conducted and how any exemptions were applied, to give effect to the openness element of the duty ([2019] CanLII 37983, paras 34-38). With respect to applying exemptions, the Nova Scotia OIPC has proposed that:

...the duty to assist includes two obligations. First the public body must only remove the information to which a specific exemption applies (i.e. sever) and release the remaining information.

Second, public bodies must clearly identify the specific section relied upon for withholding information, on a line-by-line basis (*Waterfront Development Corporation Limited (Re)*, [2018] NSOPIC 10 (CanLII), para. 9).

While it may be of limited importance to the applicant where the requested records are sufficiently disclosed, the informational component is significant in cases where disclosure has been restricted or refused altogether. Fulfillment of the informational component better positions the applicant in determining what the public body did, and grounds for appeal.

Informational obligations also arise should the applicant wish to appeal the adequacy of the search. In most jurisdictions, applicants must first “provide a reasonable basis” (*London Police Services Board (Re)*, [2017] CanLII 45090 (O.N. IPC), para. 127) for contending that further records exist (e.g. *Nova Scotia (Community Services) (Re)*, [2014] CanLII 71241 (N.S. FOIPOP)). Should this threshold be met it falls on the public body to show that it conducted a reasonable search, though not “absolute certainty” ([2017] CanLII 45090 (O.N. IPC), para. 125) that no further records exist (e.g. [2014] CanLII 71241). To prove the adequacy of a search, several Information Commissioners have suggested that the public body should provide evidence of:

1. who conducted the search;
2. steps taken by the public body to identify and locate records responsive to the applicant’s access request;
3. the scope of the search (areas searched);
4. the steps taken to identify and locate all possible locations of records responsive to the access request; and
5. reasons the public body believes that no more responsive records exist than the ones that have been identified (e.g. [2011] CanLII 91839, para. 19; *Edmonton (Police Commission) (Re)*, [2008] CanLII 88774 (A.B. OIPC), para. 66).

The evidence needs to be detailed enough to satisfy the Information Commissioner but does not need to comprise a complete paper trail (*Alberta Justice and Solicitor General (Re)*, [2017] CanLII 48070 (A.B. OIPC)).

### Timeliness and the informational component

The duty to assist also requires public bodies to respond to applicants without delay. Not meeting the statutorily imposed time limits for responding or disclosing information breaches the duty (e.g. *British Columbia (Environment) (Re)*, [2008] CanLII 1648 (B.C. IPC); *Case 2011-0443*, M.B. Ombudsman), as does failing to inform the applicant of potential delays when they arise (*Complaint Matter 2013-1374-AP-707*, N.B. Office of the Integrity Commissioner).

The importance of meeting legislated time limits or communicating with applicants when an extension is necessary is illustrated in *Prince Edward Island (Liquor Control Commission) (Re)*, [2015] CanLII 98415 (P.E. IPC)). Expense

claims for government officials were requested from three public bodies, and each required additional time to disclose. Two of the public bodies' time extensions were found reasonable due to the number of records requested while the third's delays, due to insufficient resources, were deemed unjustifiable. P.E.I.'s IPC made these conclusions by reviewing the communications between the applicant and public body, timelines provided by the public body, the response letters, and a 1998 Alberta OIPC Order (98-002), that stated a large number of requests and inadequate resources are unsatisfactory reasons for failing to respond within legislated time limits. While the extensions based on the large volume of requested records were found reasonable, the IPC warned that public bodies must "be able to support their use of such extensions" (para. 133), and offer applicants an estimate as to when the records will be ready.

However, a public body's obligations may extend beyond this. In *Alberta Labour Relations Board (Re)*, [2006] CanLII 80886 (A.B. OIPC) the Alberta OIPC agreed with the applicant that where a request is time sensitive in nature, a public body's failure to consider this may contravene the duty to assist. The applicant had sought records from the Alberta Labour Relations Board surrounding the government's contentious enactment of Bill 27: the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003. The Labour Relations Board initially refused disclosure but agreed to release the information a year later, after the applicant had appealed. Although the applicant received the information they had requested, it was provided 14 months after they made the request, which undermined its value.

The duty to assist may also apply where no legislated time limit is imposed. In *Cases 2011-0004 and 2011-0005* (M.B. Ombudsman), the applicant filed a complaint with the Manitoba Ombudsman after waiting three months for Manitoba Conservation to respond to a fee waiver request. The Ombudsman advised Manitoba Conservation to respond to the applicant by the end of the month with an explanation. Two months later, Manitoba Conservation contacted the applicant seeking additional information in support of the fee waiver request. The Ombudsman noted that while there was no legislated time limit to respond to a fee waiver request, Manitoba Conservation had failed to "make reasonable efforts to reply" (p. 5), and breached its duty to assist the applicant, who had not received a decision after five months.

Public bodies may also breach the duty to assist if they discriminate in their treatment of different applicants. In *British Columbia (Environment) (Re)*, [2008] CanLII 1648 (B.C. IPC), a group of environmental activists alleged that requests they made to the Ministry of Environment and Ministry of Forests and Range, were subjected to "routine delays...excessive censoring or records, excessive, and unreasonable fees and frequent and unjustified denials of fee waivers" ([2008] CanLII 1648, "Summary"). The B.C. OIPC stated that "any one of these allegations, if proven, would be a violation" ([2008] CanLII 1648, "Summary") of the duty to assist, as public bodies cannot intentionally

or systematically delay responses or charge excessive fees based on the type of request, or applicant or group of applicants.

### Order of records and the informational component

Public bodies are not required to provide documents in chronological order ([2019] CanLII 22846). In the case of email attachments, they must offer clear information to the applicant as to where to find the attachments. If any email attachments are removed because they are duplicates, the applicant must also be informed (*Saskatchewan (Health) (Re)*, [2019] CanLII 22841 (SK IPC)).

The issue of email attachments was similarly recognized in Nova Scotia where the Commissioner remarked that applicants may be upset if duplicates are included because it will increase the processing fee, but they may also be suspicious if attachments are excluded (Review Report 18-02 (N.S. IPC)). Where duplicates exist, the public body was said to have three options:

1. Provide all duplicates, with any exemptions consistently applied
2. Remove duplicates and include an explanation for the removal
3. Contact the applicant and ask them how they would like duplicate attachments treated (*Department of Community Services (Re)*, [2018] NSOIPC 2 (CanLII), para. 77).

The applicant may negotiate the order of records with the public body, though it has been found reasonable for the public body to charge a fee to do so (*Alberta Energy (Re)*, [2016] CanLII 82088 (A.B. OIPC)). The order of the records should be a point of discussion and conversation between applicant and FOI coordinator.

### Trigger and scope of the duty to assist

The point at which the duty to assist is triggered has led to diverging views by the Information Commissions. While most provinces assume the duty triggers once a request is received (e.g. *Capital Health (Re)*, [2008] CanLII 88780 (A.B. OIPC); *Complaint Matter 2013-1608-AP-859* (N.B. Office of the Integrity Commissioner)), in Saskatchewan it has been suggested that the duty to assist applies “before and after receipt of any access to information request” (*Public Complaints Commission*, Review Report 276-2017 (S.K. OIPC), para. 10):

When an individual first contacts a public body, reasonable efforts to assist could include explaining the access to information processes to the applicant. This would include letting the applicant know if any further information would be required to process the request... (Review Report 276-2017 (S.K. OIPC), para. 10).

The P.E.I. IPC found that no breach of the duty to assist occurs when a public body refuses to provide answers to questions made by an applicant prior to

filing a formal access request (*Public Schools Branch (Re)*, [2018] CanLII 3930 (P.E. IPC)). Yet as concluded by the Newfoundland OIPC in *College of the North Atlantic (Re)*, ([2009] CanLII 80645 (N.L. IPC)), once a request has been made an applicant's questions may require an answer. The applicant asked several questions of the public body after receiving records that were not fully responsive to their request. Instead of communicating with the applicant that the records did not exist, the college released irrelevant records, giving the appearance that the college was concealing records. The college refused to answer the applicant's questions, claiming that these constituted new access requests. While accepting that an applicant's questions may require a new request, the questions were related to "the obvious discrepancies between what the applicant asked for and what he received" (para. 90), requiring the public body to offer an explanation as part of the duty to assist.

The Saskatchewan OIPC has determined that where a request has multiple parts, the public body may be required to explain "how each record [is] responsive to the request" ([2019] CanLII 22846, para. 77) if questioned by the applicant. In Alberta, the OIPC has found that there is no duty for the public body to answer an applicant's questions, including those about the process, beyond whether they are in possession of responsive records (*Edmonton (City) (Re)*, [2008] CanLII 88735 (A.B. OIPC)). Even if no responsive records exist, the public body must still fulfil its duty to assist (*Calgary Regional Health Authority (Re)*, [2001] CanLII 38142 (A.B. OIPC)). Rulings in other provinces have similarly found that specific questions need not be answered, but that they may form the basis of an access request and therefore trigger the duty.

In *Toronto Police Services Board (Re)*, [2008] CanLII 24753 (O.N. IPC), the Ontario IPC concluded after a review of previous orders, that regardless of the information sought, where an applicant frames a request as a question or series of questions, the public body must determine whether they possess responsive records. If the public body finds the questions to be unclear, they are obligated to contact the requester to clarify as for any other request.

The duty to assist also intersects with the idea of discretion and refusal in administering FOI process. Access legislation in most provinces allows public bodies to disregard requests that are "frivolous or vexatious" (e.g. The Freedom of Information and Protection of Privacy Act, S.M. 1997, c. 50, s. 13(1); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 10(1)(b)). However, the Manitoba Ombudsman has found that the duty to assist will continue to apply with respect to an applicant's future requests, stating in *Case 2011-0520* that "while an applicant may have made previous [frivolous or vexatious] requests...this does not mean that every future request by the applicant can automatically be disregarded" (*Case 2011-520* (M.B. Ombudsman), p. 8). In this sense, the duty to assist must be perpetual and free of bias.

### Remedy for breaches of the duty to assist

Where a public body does not fulfill its duty to assist, the timing and availability of a remedy will depend on the nature of the breach. As a general principle the applicant must be vigilant in raising a breach of the duty to assist (e.g. *South Coast British Columbia Transportation Authority (Translink) (Re)*, [2017] BCIPC 2 (CanLII), though the type of breach is a relevant consideration.

Because the duty to assist is concerned with ensuring that a reasonable search is conducted, it should be unsurprising that breaches often involve a failure to conduct a reasonable search, or otherwise a failure to prove that a reasonable search was performed. The most common remedy is for a new search to be ordered. As the applicant will have little awareness whether a reasonable search has been conducted until after they receive a response, the review process is typically the appropriate venue to address violations of this sort. However, a public body may itself remedy a breach if it is able to return to compliance either by conducting a new search or providing an explanation of the search results after initially failing to do so ([2018] CanLII 89512).

By contrast, breaches based on delay will be noticeable to the applicant independent of any disclosure. If the public body does not meet the statutorily imposed time limits the applicant can raise the issue immediately. In practice an applicant may tolerate a certain degree of delay. This does not necessarily bar them from seeking a remedy if the delay continues, but if a decision on disclosure is made it probably will. Once an applicant is no longer impacted by a delay, no appropriate remedy is likely to remain available. When seeking a remedy for delay, the applicant must file a complaint or seek review while the issue remains active.

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*Fulfillment of the duty to assist alone will not always be sufficient to grant full effect to the right to access.*

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Among the other steps necessary to fully reform FOI law in Canada (Roberts 2002b), duty to assist must be seen as a means of making proposed changes to access law a reality. Although not always articulated in these terms, the focus must be on constant verbal and written communication. The onus should not fall completely on FOI coordinators either. Part of brokering access to FOI disclosures must be communicating with FOI coordinators to achieve access (Walby and Luscombe 2018, 2017; Luscombe, Walby, and Lippert 2017; Luscombe and Walby 2017).

Fulfillment of the duty to assist alone will not always be sufficient to grant full effect to the right to access. Circumstances beyond the control of the



requester or that of the FOI coordinator may still frustrate the right, such as where records were never created. Such situations present a challenge for FOI coordinators, who must try to determine how extensive their search for the record should be and what evidence will potentially be necessary to demonstrate to the Commissioner that the search was adequate. If the coordinator fulfilled their duty to assist, then the matter is closed and the requester will not receive access. This is true even if the requester seeks review of the coordinator's conduct and convinces the Commissioner to order a new search. There is no true remedy available where a record does not exist, even if the record reasonably should.

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*Despite continued refinements to what duty to assist encompasses, there are limits to what can be accomplished through law alone.*

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Despite continued refinements to what duty to assist encompasses, there are limits to what can be accomplished through law alone. FOI coordinators must continually make reasonable decisions about what the duty requires of them. Even where FOI coordinators fulfil their duty, FOI requesters may still find themselves without information and left with little explanation as to why. Measures beyond the duty to assist are necessary to address these barriers to access for which the duty is insufficient. Access regimes may benefit from implementing a "duty to document," thereby codifying a policy requiring that key decision-making processes be recorded (Office of the Information and Privacy Commissioner for British Columbia 2016). Currently, B.C. is the only Canadian province to have done this and only select government agencies are subject to the provision (Information Management Regulation, B.C. Reg. 109/2016, s. 1), yet it marks one way the duty to assist may be supported indirectly.

### **Reworking Canada's access regime**

There are many barriers to organizational and governmental transparency (Pasquier and Villeneuve 2007), and the functioning of FOI is just one dimension of the relationship between the state and its citizens. However, if FOI law is to be a marker of government transparency, the duty to assist must be at the core of the work of FOI coordinators. If access law is to have any association with accountability, the duty to assist must be upheld. There are many abstract notions of accountability in liberal democracies (Mulgan 2000), but duty to assist is a practical point at which to make these ideas really matter. This is a real challenge for FOI coordinators. The orders of Information Commissioners provide guidance, though in our experience as



access request users we have found that FOI coordinators have not always followed them. For many reasons, there is still non-compliance with FOI law in Canada (Kazmierski 2016).

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*[I]f FOI law is to be a marker of government transparency, the duty to assist must be at the core of the work of FOI coordinators. If access law is to have any association with accountability, the duty to assist must be upheld.*

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As Darch and Underwood (2005: 85) note, access to government records is a right but it is a frail one. The fact that such orders continue to be made suggests that administrative secrecy remains a problem in the operation of government agencies or that FOI coordinators are not trained sufficiently in duty to assist (or that their offices lack resources to conduct the searches and manage information). This is important to highlight in the context of the recent automation and digitization of the access to information process as a result of Bill C-58, which we view as a policy move that will decrease not increase communication.

One way to rework the Canadian access regime would be to better define the meaning of duty to assist in the letter of law and policy. The recent enactment of Bill C-58 failed in this regard, as it focuses less on the duty to assist and more on technological modernization of access to government records. However, as important as the letter of the law is, creating an access culture or internal mechanism of administrative justice (Adler 2003) that normalizes the duty to assist and normalizes fulsome information access to government records in Canada is crucial. A process-oriented approach to public accountability (Mulgan 1997) overlaps with a focus on administrative justice, and we have argued that it is necessary to focus on the intricacies of the duty to assist as a way of enhancing administrative justice in Canada. The degree to which the duty to assist is followed is a principal indicator of the wellbeing of administrative law and its role in promoting government transparency and accountability.

At the provincial level in Canada, the report by Denham (2016) was comprehensive in its analysis of the minutiae of FOI requests and the points at which duty to assist must come into play. Denham argued that FOI coordinators should better document not only the parameters of the search conducted but also which offices were not searched and why. All FOI coordinators and government workers need training in FOI law and the duty to assist to ensure better compliance with FOI law. Open, constant communication is needed for each FOI request if the duty to assist is to be fulfilled. Communication is also the central pillar in what Adler (2003) calls internal

mechanisms of administrative justice. It may create more work for FOI coordinators and government employees, but taking the duty to assist seriously requires heightened attention to the informational component and enhanced training in the core dimensions of duty to assist. Future research should continue to explore how the duty to assist in Canadian access practice and public administration compares to the duty to assist in access practice and public administration in other jurisdictions (Figure 1).

We should note that creating better adherence to the duty to assist in Canadian access law itself would not drastically erode secrecy, nepotism, or hierarchy in government. The problems with Canada's access regime and associated issues of secrecy run deeper than procedural barriers. There is a need to think through the limits of current approaches to liberal governance and to contemplate other strategies for obtaining government information (Beyer 2014), which requires a tempered outlook on the prospects of FOI (Berliner et al. 2019; Pozen 2017; Luscombe and Walby 2017). There is also a need for mobilizations by access advocates and for continued advocacy by organizations such as the BC Freedom of Information and Privacy Association.

## Notes

- 1 In this article we use FOI to refer to all access regimes, as irrespective of their official terminology they are fundamentally the same.
- 2 Most provinces have a single FOI statute, though some have multiple (e.g. Saskatchewan has separate statutes to govern FOI at the provincial and municipal levels).
- 3 Most provinces have an Information and Privacy Commissioner (Integrity Commissioner in New Brunswick), though Manitoba has an Ombudsman.
- 4 Our dataset is available by emailing the corresponding author.

## References

- Adle, M. 2012. "The rise and fall of administrative justice: A cautionary tale." *Socio-Legal Review* 8 (2): 28–54.
- Adler, M. 2003. "A socio-legal approach to administrative justice." *Law & Policy* 25 (4): 323–352.
- Berliner, D., A. Ingrams, and S. Piotrowski. 2019. "The future of FOIA in an Open Government world: Implications of the Open Government for Freedom of Information policy and implementation." *Villanova Law Review* 63 (5): 867–894.
- Beyer, J. 2014. "The emergence of a Freedom of Information movement: Anonymous, WikiLeaks, the Pirate Party, and Iceland." *Journal of Computer-Mediated Communication* 19 (2): 141–154.
- Birkinshaw, P. 2010. *Freedom of Information: the Law, the Practice and the Ideal*. 4th Edition. Cambridge: Cambridge University Press.
- Bouhadana, I. 2016. "The right of access to public information: An analysis of international conventions." *Revue Internationale des Gouvernements Ouverts* 2: 1–10.
- Brownlee, J. 2015. "Contract faculty in Canada: Using Access to Information requests to uncover hidden academics in Canadian universities." *Higher Education* 70 (5): 787–805.
- Buck, T., R. Kirkham, and B. Thompson. 2016. *The Ombudsman Enterprise and Administrative Justice*. London: Routledge.

- Clément, D. 2015. "'Freedom' of Information in Canada: Implications for historical research." *Labour/Le Travail* 75: 101–131.
- Darch, C., and P. Underwood. 2005. "Freedom of Information legislation, state compliance and the discourse of knowledge: The South African experience." *International Information & Library Review* 37 (2): 77–86.
- Denham, E. 2016. City of Vancouver, Duty to Assist. Audit and Compliance Report F16-01. Office of the Information and Privacy Commissioner for British Columbia. June 23, 2016 BCIPC 32.
- Dickson, G. 2012. "Access regimes: Provincial Freedom of Information law across Canada." In *Brokering Access: Power, Politics, and Freedom of Information Process in Canada*, edited by M. Larsen and K. Walby. Vancouver: UBC Press, pp. 68–96.
- Doyle, M. and N. O'Brien. 2020. *Reimagining Administrative Justice: Human Rights in Small Places*. Switzerland: Springer Nature.
- Freedom of Information Act. 2014. Number 30 of 2014 (Ireland).
- . 2000 c. 36 (UK).
- . 1982 No. 3, 1982 (Australia).
- Gertz, R. 2009. "Mr. Collie goes to London: The House of Lords decision in Common Services Agency vs. The Scottish Information Commissioner." *Studies in Ethics, Law, and Technology* 3 (1).
- Gilbert, J. 2000. "Access denied: the *Access to Information Act* and its effect on public records creators." *Archivaria* 49: 84–123.
- Gingras, A. 2012. "Access to Information: An asset for democracy or ammunition for political conflict, or both?" *Canadian Public Administration* 55 (2): 221–246.
- Goldberg, D. 2006. "Access to Information laws in Scotland and England: Close Freedom of Information (FOI) encounters of the third kind." *Comparative Media Law Journal* 8 (1): 33–72.
- Goodis, D. 2015. (May 15.) *How to Use Access to Information and Privacy Laws* [PowerPoint slides]. Retrieved January 1, 2020, from Information and Privacy Commissioner of Ontario website.
- Hazell, R., and B. Worthly. 2010. "Assessing the performance of Freedom of Information." *Government Information Quarterly* 27 (4): 352–59.
- Kazmierski, V. 2016. "Accessing with dinosaurs: Protecting access to government information in the cretaceous period of Canadian democracy." *Constitutional Forum* 25 (3): 57–66.
- . 2013. "Lights, judges, access: How active judicial review of discretionary decisions protects access to government information." *Alberta Law Review* 51 (1): 49–75.
- Kimball, M. 2012. "Shining the light from the inside: Access professionals' perceptions of government transparency." *Communication Law and Policy* 17 (3): 299–328.
- Laurie, G., and R. Gertz. 2006. "When worlds collide: What are the obligations of the NHS at the interface between data protection and Freedom of Information regimes?" *Edinburgh Law Review* 10 (1): 151–155.
- Luscombe, A., K. Walby, and R. K. Lippert. 2017. "Brokering access beyond the border and in the wild: Comparing freedom of information law and policy in Canada and the United States." *Law & Policy* 39 (3): 259–279.
- Luscombe, A., and K. Walby. 2017. "Theorizing freedom of information: the live archive, obfuscation, and actor-network theory." *Government Information Quarterly* 34 (3): 379–387.
- Mann, B. 1986. "The federal information coordinator as meat in the sandwich." *Canadian Public Administration* 29 (4): 579–582.
- McDonagh, M. 2015. *Freedom of Information Law in Ireland* (3rd ed.). Dublin: Thomson Round Hall.
- . 2010. "The impact of Freedom of Information on Irish local government." In *Freedom of Information: Local Government and Accountability*, edited by R. Chapman and M. Hunt. London: Ashgate, pp. 73–91.

- Mulgan, R. 2000. "'Accountability': An ever-expanding concept?" *Public Administration* 78 (3): 555–573.
- . 1997. "The processes of public accountability." *Australian Journal of Public Administration* 56 (1): 25–36.
- Office of the Information and Privacy Commissioner for British Columbia. 2016. (January 1.) *Backgrounder on A Duty to Document*. Retrieved March 24, 2020, from [https://www.oipc.bc.ca/media/16822/2016-01-25-backgrounder\\_duty-to-document\\_en.pdf](https://www.oipc.bc.ca/media/16822/2016-01-25-backgrounder_duty-to-document_en.pdf)
- Official Information Act. 1997. B.E. 2540 (Thailand).
- Office of the Information and Privacy Commissioner for Nova Scotia. 2019. Duty to Assist #1: Communication with Applicants Guidelines for Public Bodies and Municipalities. (January 25.) available online at: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf>
- Office of the Saskatchewan Information and Privacy Commissioner. 2018. Understanding the Duty to Assist: a Guide for Public Bodies, Office of the Saskatchewan Information and Privacy Commissioner, available online at: <https://oipc.sk.ca/assets/understanding-the-duty-to-assist.pdf>.
- Pasquier, M., and J. Villeneuve. 2007. "Organizational barriers to transparency: A typology and analysis of organizational behaviour tending to prevent or restrict Access to Information." *International Review of Administrative Sciences* 73 (1): 147–162.
- Pozen, D. 2017. "Freedom of Information beyond the Freedom of Information Act." *University of Pennsylvania Law Review* 165: 1097–1158.
- Promotion of Access to Information. 2000. Act 2 of 2000 (South Africa).
- Régimbald, G., and M. Estabrooks. 2018. "Restriction on exercise of discretion." In *Halsbury's Laws of Canada* (Vols. *Administrative Law*). Toronto: LexisNexis Canada, pp. HAD-66.
- Right to Information Act. 2009 (Tasmania).
- Roberts, A. 2006. *Blacked Out: Government Secrecy in the Information Age*. Cambridge: Cambridge University Press.
- . 2002a. "Administrative discretion and the Access to Information Act: An 'Internal Law' on Open Government?" *Canadian Public Administration* 45 (2): 175–94.
- . 2002b. "New strategies for enforcement of the Access to Information Act." *Queen's Law Journal* 27: 647–682.
- Rowat, D. 1993. "Freedom of Information: The appeal bodies under the access laws in Canada, Australia, and New Zealand." *Australian Journal of Public Administration* 52: 215–221.
- . 1966. "The problem of administrative secrecy." *International Review of Administrative Sciences* 32: 99–106.
- Seneviratne, M. 2002. *Ombudsmen: Public Services and Administrative Justice*. Cambridge: Cambridge University Press.
- Sheaff, M. 2017. "Constructing Accounts of Organisational Failure: Policy, Power and Concealment." *Critical Social Policy* 37 (4): 520–539.
- Shepherd, E., A. Stevenson, and A. Flinn. 2010. "Information governance, records management, and Freedom of Information: A study of local government authorities in England." *Government Information Quarterly* 27 (4): 337–345.
- The Right to Information Act. 2005. No. 22 of 2005 (India).
- Treasury Board Manual: Access to Information Volume. 1993. Ottawa: the Information and Privacy Policy Division of the Treasury Board of Canada Secretaria.
- Walby, K., and A. Luscombe. 2018. "Ethics review and freedom of information requests in qualitative research." *Research Ethics* 14 (4): 1–15.
- . 2017. "Criteria for quality in qualitative research and use of freedom of information requests in social research." *Qualitative Research* 17 (5): 537–553.

- Weiler, M. 2017. "Legislating usability: Freedom of Information laws that help users identify what they want." *Journal of International Media & Entertainment Law* 7 (1): 101–127.
- Worthy, B. 2017. *The Politics of Freedom of Information: How and Why Governments Pass Laws that Threaten their Power*. Manchester: Manchester University Press.

### **Legislation cited**

- Access to Information Act, R.S.C . 1985.
- Freedom of Information and Protection of Privacy Act, R.S.A.B. 2000.
- Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996.
- Freedom of Information and Protection of Privacy Act, R.S.O. 1990.
- Freedom of Information and Protection of Privacy Act, S.N.S. 1993.
- The Freedom of Information and Protection of Privacy Act, S.M. 1997.