

# POLICING CRIMINOLOGICAL KNOWLEDGE ON IMPRISONMENT IN PANDEMIC TIMES: CONFRONTING OPACITY AND NAVIGATING CORPORATIZATION IN PRISON RESEARCH

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*Abstract.* Thousands of prisoners and prison staff have been infected by COVID-19 across Canada. Deteriorating conditions of confinement have become commonplace, with segregation-like measures imposed in the name of preventing COVID-19 transmission. While prisoners, their loved ones, advocates, and researchers have discussed trends regarding infection, public health restrictions, and even vaccination behind bars, less explored is the deterioration of government transparency related to incarceration during this pandemic. Engaging with literatures on the policing of criminological knowledge, access to information, and state corporatization, this article examines how Canadian government authorities have limited access to records about imprisonment during the pandemic. We examine how the recent centralization of freedom of information request processing, which reshapes government services to mirror corporate entities, has altered what can be known about penitentiary, prison, and jail policies, practices, and outcomes. In so doing, we highlight the need for social science researchers to contest information blockades and create pathways to promote state transparency.

**Keywords:** Imprisonment; state transparency; policing of knowledge; COVID-19; Canada

*Résumé.* Des milliers de prisonniers et de membres du personnel pénitencier ont été infectés par la COVID-19 à travers le Canada. De plus, des mesures restrictives imposées au nom de la prévention de la transmission du COVID-19 ont aussi mené à une détérioration des conditions d'enfermement. Alors que les prisonniers, leurs proches, les militants et les chercheurs ont discuté des tendances en matière d'infection, de restrictions de santé publique et même de vaccination derrière les barreaux, la détérioration de la transparence gouvernementale liée à l'incarcération pendant cette pandémie est moins explorée.

S'appuyant sur la littérature sur la police des connaissances criminologiques, l'accès à l'information et la corporisation de l'État, cet article examine comment les autorités gouvernementales canadiennes ont limité l'accès aux dossiers sur l'emprisonnement pendant la pandémie. En particulier, nous examinons comment la récente centralisation du traitement des demandes d'accès à l'information qui a altéré les services gouvernementaux pour refléter ceux d'entités commerciales limite ce que l'on peut savoir sur les politiques, les pratiques et impacts de l'enfermement durant la pandémie. À partir de notre étude, nous soulignons la nécessité pour les chercheurs en sciences sociales de contester les blocages de l'information et de créer des voies pour promouvoir la transparence de l'État.

**Mots clés :** Emprisonnement; transparence gouvernementale; la police des connaissances; COVID-19; Canada

## INTRODUCTION

Correctional Service Canada (CSC) is not an agency known for being open with the public or the people who they confine in federal penitentiaries across the country (Piché 2011). Provincial-territorial prison authorities across Canada are not recognized for transparency either (Piché 2012). As criminologists have long argued, information control is a defining feature of penal system institutions (e.g. Brodeur 1983; Morgan 1999; Westley 1956), which limits what researchers and the public can know about imprisonment. It is important to scrutinize penitentiaries, prisons, and jails given they are places of punishment, deprivation, and violence (Balfour 2018). It is also crucial to examine how prison authorities and other state agencies manage information pertaining to the treatment of incarcerated people (Balfour and Martel 2018), especially when prisoner rights and privileges are scaled-back in a stated effort to manage risks – both perceived and real – to institutional order (Mathiesen 1990).

During the first 16 months of the COVID-19 pandemic, close to 7,000 prisoners and more than 2,150 prison staff were infected across Canada (Prison Pandemic Partnership 2021a). This period has been marked by deteriorating conditions of confinement, with torturous segregation-like measures such as the imposition of quarantines upon admission, along with medical isolation and facility-wide lockdowns being enacted in the name of preventing COVID-19 transmission when outbreaks occur (Piché et al. forthcoming). The COVID-19 response has also included the frequent suspension of programs and visits, and

other deprivations that have exacerbated the pains of imprisonment (Sykes 1958) and carceral controls implemented behind bars in Canada and elsewhere, like Scotland (Maycock 2021). While prisoners (e.g. Osman 2020), their loved ones (e.g. MOMS 2020), advocates (see Chartrand 2020), and researchers (e.g. Ricciardelli et al. 2021) have discussed trends regarding infection, public health restrictions, and even vaccination behind bars, less explored is the deterioration of government transparency related to incarceration since the March 2020 global pandemic declaration by the World Health Organization.

Engaging with literatures on the policing of criminological knowledge and state corporatization, in this article we examine how Canadian authorities have limited access to unpublished government records about imprisonment during the pandemic. We assess how the centralization and corporatization of access to information (ATI) and freedom of information (FOI) request processing – which is symptomatic of a move to reorganize government services to mirror corporate entities – has altered what can be known about prison policies, practices, and outcomes. In so doing, we highlight the need for social science researchers to contest information blockades and create potential pathways to promote state transparency.

Our motivation for using ATI/FOI requests to study the impact of COVID-19 on imprisonment is to build datasets that are not a matter of the public record, which would otherwise not be disclosed. We seek unpublished government records about COVID-19 prevention and management, along with information allowing for an assessment of the climate of penitentiaries, prisons, and jails during the pandemic, including: prisoner and staff testing and contact tracing procedures; prisoner and staff testing results, cases, recoveries and deaths; institutional entry and exit screening procedures; daily average counts, prisoner admissions and releases, and emergency diversion and decarceration measures; staffing counts; health and mental health protocols; hygiene and cleaning protocols; social distancing guidelines; the number of placements in medical quarantine and medical isolation; the frequency of lockdowns, segregation, and use of force; the number and nature of incident reports; institutional visiting and programming changes; communications distributed to prisoners, prison staff, visitors, and community partners; the number and nature of prisoner and prison staff grievances; results and recommendations from labour and health inspections; and new standing orders, directives and manuals, along with modifications to existing ones. These records should be made publicly available because what happens behind prison walls are matters of public interest, given their ramifications for public health and commun-

ity safety. However, many government departments, including prison authorities, have kept much of this information concerning sites of confinement concealed. Limiting access to information about carceral sites restricts what academics and, more importantly, the public can know about conditions of confinement (Watson 2015; Wright et al. 2015) and public health management in congregate settings that have been significant vectors for COVID-19 transmission and outbreaks (Loreto 2021).

Based on the initial phase of our fieldwork in which we filed 37 ATI/FOI with prison authorities to obtain records concerning the COVID-19 response behind bars in Canada during the first wave of the pandemic, we argue that governments are policing criminological knowledge through the ATI/FOI process in such a way that is significantly limiting information regarding the impact of the coronavirus on carceral sites. We index changes to ATI/FOI in Canada to corporatization in other sectors of government. Corporatization results in government agencies acting more like they are businesses by engaging in business-like practices with citizens (Smith and Walshe 2004) such as charging for services, cutting costs, and creating new entities to enable these changes (Brownlee et al. 2018; Steck 2003). We also reveal numerous “transparency deserts” (Koningsor 2020) in Canadian penal system agencies that exercise multiple techniques to block access to government records. In the discussion, we reflect on recent obfuscatory reforms to ATI/FOI and the implications of these findings for the literature on the policing of, and access to, criminological knowledge.

### WHAT IS (NOT) KNOWN ABOUT CANADA’S PRISON PANDEMIC

Governments have options for informing their citizenry about social, economic, and political issues. Proactive disclosure is one way governments can release records to citizens to enhance transparency and legitimacy. COVID-19 prison data ought to be proactively disclosed as these are not only a matter of the public interest, but also because much of what happens behind the walls is shielded from external scrutiny at this time when oversight bodies have less access to carceral institutions (see OCI 2020). There is also a public health dimension to sharing this information, as carceral institutions are more porous (Moran 2013) than people realize, especially as it pertains to disease transmission. However, the proactive release of information about COVID-19 related to imprisonment across Canada thus far during the pandemic can be described as uneven at best. The unevenness of available data reflects a pattern of Canadian governments having done an inadequate job of

collecting and mobilizing information about the coronavirus, its effects, and patterns of infection and health outcomes by race and socio-economic status (Choi et al. 2021). The result is what Choi and colleagues (2021) call a “data vacuum”.

One example of diminished transparency with respect to the impact of COVID-19 in the context of imprisonment specifically and government generally is the uneven disclosure of infections among incarcerated people and prison staff. To date, only Quebec<sup>1</sup> and Manitoba<sup>2</sup> provide centralized dashboards that include coronavirus cases detected amongst prisoners and staff, while Ontario<sup>3</sup> and Correctional Service Canada (CSC)<sup>4</sup> only proactively disclose the former. These data are often incomplete, however, as information on exactly where coronavirus transmission is occurring within institutions – which would provide a sense of the types of units where outbreaks are occurring the most – have rarely been provided. CSC – which is the only prison authority in Canada to provide this information at different stages of the pandemic – only divulged which parts of their penitentiaries have had prisoner infections almost a year into the pandemic following the publication of an op-ed we wrote highlighting changes in data reporting coinciding with major outbreaks that limited, rather than, expanded proactive disclosure (Piché et al. 2021). To track the spread of COVID-19 in many of Canada’s jails, prisons, and penitentiaries, we have needed to compile news reports often based on local journalist inquiries requesting details about outbreaks occasionally disclosed on public health authority websites in addition to the limited proactively disclosed data described above.

An analogous data vacuum exists with respect to the vaccination of incarcerated people and prison staff. This gap exists despite prisoners having been listed by public health authorities as a priority population for vaccination alongside residents in other congregate settings behind people living in long-term care centres in most Canadian jurisdictions, while prison staff were listed as a priority population alongside other workers deemed to be essential (Prison Pandemic Partnership 2021b). The inclusion of incarcerated people prompted some federal politicians like Conservative Party of Canada leader Erin O’Toole and

1. See <https://www.quebec.ca/sante/problemes-de-sante/a-z/coronavirus-2019/situation-coronavirus-quebec/?fbclid=IwAR1oSe5JNIGq86f7S8yppOTcsz8g2PiZyiykRoFbPRVWsQIFYW1CTctBHo0#c57309>.
2. See <https://geoportal.gov.mb.ca/datasets/manitoba-covid-19-outbreaks-table>.
3. See <https://data.ontario.ca/en/dataset/status-of-covid-19-cases-in-ontario-s-correctional-institutions/resource/1f95eda9-53b5-448e-abe0-afc0b71581ed>.
4. See <https://www.csc-scc.gc.ca/001/006/001006-1014-en.shtml>.

provincial politicians like Ontario Premier Doug Ford to deploy the principle of less eligibility, whereby prisoners are portrayed as less deserving of scarce resources (Rusche and Kirchheimer 1938), in this case COVID-19 vaccines, than other populations pushed to the margins. This politicization of vaccines may explain why only CSC<sup>5</sup> and Quebec<sup>6</sup> have proactively disclosed the number of vaccines they have administered to incarcerated people in their custody thus far, with journalist prompting resulting in the disclosure of additional data (see, for example, Ouellet and Gilchrist 2021).

Since the inception of the pandemic, epidemiologists, and doctors (see Metcalfe 2020), along with advocates for incarcerated people (e.g. Abolition Coalition 2020) warned that jails, prisons, penitentiaries, and other sites of confinement like immigration centres are congregate settings that ought to be depopulated to limit the spread of COVID-19. They issued calls to federal, provincial, and territorial governments to enact measures in concert with police and the judiciary to divert and decarcerate people from custody. Only Quebec has proactively included its daily prisoner count on their dashboard. This being the case, data on fluctuations in Canada's prison population in between bi-annual Statistics Canada (2021) reports has relied on media reporting following COVID-19 outbreaks where journalists have insisted on getting these figures (e.g. Hasham and Akrit 2021). These data have also been disclosed by authorities when journalists have confronted them about why they have not released these figures to our team (e.g. Tutton 2021a) following the publication of a report based on figures compiled from news articles indicating prison populations had increased in several jurisdictions following the depopulation that occurred during the pandemic's first wave (Prison Pandemic Partnership 2021b).

Conditions of confinement is another area where information on the impact of COVID-19 on carceral institutions is limited. When the pandemic was declared in March 2020, most Canadian prison authorities disclosed guidelines on a range of issues, including for the use of 'medical quarantines' for newly admitted prisoners, 'medical isolation' and institutional lockdowns when COVID-19 cases are suspected or detected among prisoners and prison staff, the suspension of or reductions in visitation and programs, the provision of additional cleaning and hygiene supplies, as well as the availability of personal protective equipment. Yet, prison authorities have disclosed little information concerning the implementation of these measures or their impact on

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5. See <https://www.canada.ca/en/correctional-service/campaigns/covid-19/vaccine-csc/vaccine-table.html>.

6. See *supra* note 1.

life and work behind bars, such as the number of lockdowns and segregation placements, use of force incidents, and other indicators of the temperature within carceral institutions. Compounding this lack of transparency is the retribution experienced by incarcerated people who are disciplined for disclosing such information (e.g. Osman 2020).

Given the information gaps noted above with respect to COVID-19 cases and vaccinations among incarcerated people and prison staff, prison population count changes, as well as the impact of pandemic policies, other strategies are required to generate these data. As already scarce opportunities to conduct qualitative research behind prison walls were not available to us as scholars who have been denied access to conduct fieldwork in carceral settings in the past, we requested the information above via email to ministers and deputy ministers responsible for prisons in April 2020. Having not obtained data through such informal information requests, we turned to ATI/FOI requests. Below, we situate this work and the information blockades we encountered within scholarly literatures on the policing of criminological knowledge, access to information, and state corporatization.

#### **SITUATING (PRISON) PANDEMIC INFORMATION BLOCKADES**

Our methodological, conceptual, and normative commitments include interrogating government secrecy and examining imprisonment – which we conceptualize as a form of state violence – for the purposes of advancing alternatives to human caging. We are aware championing government transparency comes with its own conceptual shortcomings and contradictions. As Birchall (2021) notes, focusing too much on government transparency can reify the legitimacy of the state and preclude other strategies for gaining information that allows one to imagine the political anew. As such, when writing about government transparency and the use of ATI/FOI requests, we do not do so believing that if the state had fewer secrets it would translate into a just and free society. We appreciate that ATI/FOI disclosures are limited, and a picture of institutional processes can only be revealed through systematic use over time. It takes time and triangulation to compile complete datasets using this approach. Aware of the barriers and the limits of this approach, we use ATI/FOI agonistically in response to the lack of open, proactive disclosed data and in response to secrecy among penal system agencies. Indeed, turning to ATI/FOI is often necessary given the policing of criminological knowledge scholars have documented.

## THE POLICING OF (CRIMINOLOGICAL) KNOWLEDGE

Sociologists have long recognized the control of access to information as a source of institutional power (Pettigrew 1972). Access to prisons in Canada for research can be difficult, particularly when the research questions are explicitly critical of the institutional objectives, policies, and practices of authorities (Balfour and Martel 2018). There are processes of policing criminological knowledge production that inhibit research in carceral spaces and what can be known about conditions inside (Watson and van der Meulen 2019; Yeager 2008). Prison agencies consider critical research as hazards to be mitigated. From decisions about what researchers will be granted access to during fieldwork, to what scholarly knowledge will be accepted as factual necessitating reforms to practices such as segregation (Martel 2004), prison authorities regulate information and ideas as much as people. Given criminalized people often endure deprivations and face the prospect of having their rights violated by penal system actors, it is critical that institutions like prisons be more open to external scrutiny in the public interest (Ashby 2020). Given the information blockades faced by many scholars, one may assume turning to ATI/FOI might provide one avenue into learning more about penal policy and practice. However, there are many barriers to this approach as well.

### *Access or barrier to information protocols?*

Where open data sets are not available, many journalists, public interest lawyers, activists, and academics turn to ATI/FOI requests. While the use of ATI/FOI is associated with uncovering government scandals (Cuillier 2019), as well as promoting government transparency (Dobson 2019), it has also been used for rigorous social science research in several disciplines to examine government conduct and policymaking (Brownlee 2015; Savage and Hyde 2014).

There are, however, many challenges to using ATI/FOI law in social science research. Poole (2019) has found variation in ATI/FOI response time and performance depending on level of government and type of agency. Gottrup and Koch (2019) refer to regressive legislative amendments and secretive administrative cultures that degrade ATI/FOI as a reversal in state transparency. Changes in ATI/FOI can stem from amendments to the law, as well as policy and administrative changes by new governments (Pack 2004). In many countries, ATI/FOI laws created to grant citizens information about their governments are not functioning as intended. Policy and administrative barriers, along with



regressive amendments, undermine the spirit of the legislation (Roberts 2005). Koningsor (2020) argues state and local levels of government in the United States are so awful at administering ATI/FOI that it creates “transparency deserts”, which are localities where a combination of poorly drafted or poorly functioning transparency laws and weak local media and civil society impedes public state oversight.

State agencies use multiple techniques to block access to government records, from issuing excessive fee estimates, to delays, and refusal (Kingston et al. 2019). Some of these techniques of obfuscation are not noted in legislation, but instead stem from administrative and policy decisions that reflect internal cultures of information control (Neuman and Calland 2007; Roberts 2005). For instance, penal system agencies use high request processing fees to block access to information (Kingston et al. 2019). Other information barriers can stem from a lack of resources and training to ensure ATI/FOI regimes operate ineffectively (Shepherd et al. 2010) or deficient oversight that fails to rein-in significant delays in record disclosure (Hazell and Worthy 2010).

These problems have resulted in a decline in ATI/FOI compliance in Canada over time. For instance, Canada’s federal access to information regime has not improved in decades, with the country continually falling behind globally in terms of right to information rankings (Tromp 2020). Multiple audits by investigative journalists and journalism schools in Canada have likewise documented the decline and poor performance of ATI/FOI offices across Canada (News Media Canada 2010, 2006; Vallance-Jones and Kitagawa 2017, 2015; Vallance-Jones 2014). Canada’s federal access to information regime has been described by current and former Information Commissioners as at a tipping point. In the past year alone, more weak-founded complaints about prior handling of federal ATI requests have been issued by the Office of the Information Commissioner (OIC) and processing of requests in many agencies has ground to a halt. The 2020-2021 Annual Report of the OIC revealed how the pandemic contributed to more delays and more complaints (Al-Mehdar 2021). While the decline in performance and compliance at the federal level is well-known and documented, less is known about these issues at the provincial-territorial level in Canada. In our findings and analysis, we chart issues with ATI/FOI request processing across the country associated with the deployment of new techniques of obfuscation stemming from state corporatization, which raise questions about government transparency and authoritarian tendencies in liberalism (Dean 2002).

*Corporatization of the state and freedom of information*

Corporatization of the state is defined as changes occurring in the public sector that result in government agencies acting more like they are businesses, invoking business-like terminology, charging for services, cutting costs, and creating new entities to enable these changes (Andrews et al. 2020). Corporatization brings into government a new managerial approach to administering workflows, workers, and citizens (Brownlee et al. 2018). The choice of organizational form has an impact on those subject to the actions of an organization or the users of the service (Bilodeau et al. 2006). Corporatization and the associated process of commodification are eroding aspects of government programs and services from health care to education (Farris and Marchetti 2017). Sometimes corporatization is implemented as part of austerity measures or after cuts to public services that initiate structural failures in government departments (Ferry et al. 2018), whether local or federal (Grossi and Reichard 2008). Corporatization is not an entirely new process and it would be inaccurate to index corporatization to neo-liberalism, although neo-liberalism has accelerated corporatization across governments in many Western countries (Læg Reid et al. 2013).

As we show below, we are experiencing a change in how ATI/FOI is administered in Canada, which we argue is reflective of corporatization. Typically, each public body would have their own ATI/FOI coordinator. The ATI/FOI coordinator receives information requests and has the responsibility of searching for the requested records in an office of primary interest or program area within a given government agency. The ATI/FOI coordinator has an awareness of the file structure of program area in question. These hallmarks of the ATI/FOI process are eroded with obfuscatory reforms being enacted. Reflective of a trend toward corporatization, more centralized ATI/FOI intake offices are emerging across Canadian jurisdictions, which treat ATI/FOI users more as a risk to the functioning of government to be managed, limiting what can be known about state entities, including carceral sites during the COVID-19 pandemic.

#### **EXAMINING THE IMPACT OF COVID-19 ON SITES OF CONFINEMENT THROUGH THE PRISON PANDEMIC PARTNERSHIP**

The purpose of this article is to examine how Canada's prison agencies are responding to COVID-19, as well as managing and controlling

information in concert with their ministerial partners, during the pandemic. To investigate these questions, this study initially entailed more than 50 requests per jurisdiction across multiple agencies in the federal government and its 13 provincial-territorial counterparts. This required 37 requests focused on ‘corrections’, along with 14 requests focused on workplace safety and health per jurisdiction pertaining to the first wave alone. The goal of filing this many requests was to capture the information we sought concerning how prison authorities and their intergovernmental partners responded to COVID-19, as well as to be systematic in ways that meet criteria for quality in social science (Walby and Luscombe 2017). We created a schedule for the requests initially covering three phases of the ongoing pandemic in Canada, roughly six months per phase. We also collected open-source materials from government websites and news sources with the aim of comparing these open-source accounts to ATI/FOI disclosures during analysis. This research design builds on our previous research using ATI/FOI requests to compare proactively disclosed or frontstage government accounts to backstage or internal government records (Piché et al. 2019).

To date, we have obtained several thousand pages of records, although for reasons we explain below the dataset is uneven when comparing the quantity and quality of records across jurisdictions. Some responded to all requests with extensive disclosures where available and rulings explaining why there were no records in others. The latter was anticipated as the ministerial record holders for the information we sought varied across jurisdictions necessitating modifications in terms of the government entities targeted in subsequent phases of data collection. Smaller jurisdictions in Atlantic Canada and the territories tended to concentrate the processing of records we sought in their justice and public safety ministries, whereas larger jurisdictions like Ontario also held records across these as well as labour and health ministries. The variance in records obtained can also be attributed to few (e.g. Prince Edward Island, New Brunswick, Nunavut, Northwest Territories and the Yukon) to no COVID-19 cases (e.g. Newfoundland and Labrador) linked to prisons being detected and reported in certain jurisdictions.

During our study, we also encountered ATI/FOI coordinators in other jurisdictions that have used multiple tactics to block access to information. A key feature of jurisdictions where information access is being blocked are newly formed corporatized and centralized ATI/FOI offices that field all incoming information requests. These centralized intake units are replacing the preceding model wherein each government agency employed multiple ATI/FOI coordinators in-house that information requesters would communicate with. While centralized

ATI/FOI intake units have the potential to streamline the workflows across ministries that some requests entail, making file processing more efficient for government, they are also a step removed from the agencies ATI/FOI users are seeking information from and often lack a tacit understanding of the record structure of the record holders in question. More efficient processing of requests does not mean better compliance with ATI/FOI law or record disclosure. As we examine below, corporatized ATI/FOI shops are throwing up barriers to the information request process in ways that limit the knowledge of those seeking to make sense of (prison) pandemic management in Canada.

*The case of british columbia: opacity through request grouping*

In British Columbia (BC), our requests were assigned to Information Access Operations of the Ministry of Citizens' Services (IAO MCS), a centralized FOI intake unit. All requests were submitted as individual requests, a point emphasized in our submission letters. The unit responded by invoking their right to consolidate requests on similar topics and they proceeded to create an omnibus request out of the 37 individual requests. The unit pointed to Order 00-19 and Order 00-20 in British Columbia as grounds to do so. David Loukidelis, then Information and Privacy Commissioner in BC, issued Order 00-19 and Order 00-20 in 2000. These orders pertain to the grouping of requests and the issuing of fees, suggesting government units can group requests together when they pertain to similar topics and can issue one single combined fee as a result. In our case, the unit issued an estimated \$3,700 fee.

The problems with administering ATI/FOI on this basis are as follows. When all requests are grouped together in this way, the ATI/FOI user loses the ability to: (a) negotiate early release of some records; (b) see which records are creating processing delays and for what reasons; and (c) see which requests are generating high fees. There are many aspects of the process that then become murky and subject to abuse by the centralized ATI/FOI coordinator who has leeway to limit information disclosure. This approach goes against the spirit of the law by constituting the ATI/FOI user as one client among many, including the government who is treated as the most important client of all.

The following steps were taken in response. The requester asked the FOI intake unit to follow the instructions in the original requests, which was denied on the grounds of Order 00-19 and Order 00-20. The requester altered the wording, removing some record types, and striking some portions of the requests. The fee was reduced by \$300. The

requester discontinued communication with the FOI intake unit on the basis that the government was not operating in good faith. The requester then had 20 research assistants restart the process, submitting up to two requests each with a reduced time scope. Some fees were issued for these requests, though the fees were smaller. The research continues, going month-by-month through the entire duration of the pandemic. This is a limited workaround as it will take months, if not years, to assemble the whole dataset for BC using this approach.

*The case of nova scotia: opacity through coordinated fee deterrence*

In Nova Scotia, our requests were assigned to Information Access and Privacy Services Service Nova Scotia and Internal Services (IPSS NSIS), another centralized FOI intake unit. While this corporatized government entity did not officially attempt to group all the requests together, in practice its approach treated our information requests, both narrow and large in scope, with heavy-handed fee estimates that reflected a greater (and exaggerated) concern for cost-recovery than record disclosure. Nova Scotia estimated \$177,312 for the 37 total requests to obtain information from its provincial prison authority. Some of the fee estimates were for more than \$10,000 per request, with one estimated at more than \$35,000. A comparison of a smaller sub-set of eight identical requests submitted to Nova Scotia and Ontario revealed that the former charged \$47,376 versus the latter charging \$1,595 for comparable information (Tutton 2021b). Given that Nova Scotia had only reported two COVID-19 cases linked to its provincial jails versus over 1,500 in Ontario at the time our initial requests were submitted, the IPSS NSIS issued FOI processing estimates appear to be grossly out of step with the requirements of legislation governing its operations. Based on the fee estimates received to date, we anticipate that those coming from Nova Scotia will be higher than those coming from CSC and the other 12 provincial-territorial authorities combined. While we understand the typical fee structure and we have paid for some disclosures in many jurisdictions for this project, the fees issued by IPSS NSIS are not reasonable or justified, although not unprecedented as some investigative journalists in Canada have received even more absurd fee estimates in the millions of dollars for institutionally and politically sensitive records (e.g. Rankin 2012).

Both the example of IAO MCS and IPSS NSIS reveal the corporatized nature of ATI/FOI occurring under these centralized information request units. Both are centralized, meaning they do not have a precise sense of the file structure of the offices of primary interest we seek re-

ords from. Thus, should the office of primary interest suggest it will take a certain amount of hours to locate and supply an approximate number of pages of records, the ATI/FOI coordinators in these corporatized units simply pass that information along, effectively denying or at least discouraging the processing of requests. What is called the duty to assist in Canadian ATI/FOI (Roziere and Walby 2020), whereby information coordinators attempt vigorously to locate and disclose records while maintaining clear and open communication with the applicant, is undermined because of this tendency. This corporatized approach does a disservice to both ATI/FOI users, but also government administrators and workers who do take state transparency seriously.

It is also important to highlight that both IAO MCS and IPSS NSIS constitute the information requester as different than a citizen who has a right to access government records, instead treating them as a client, customer, or simply an irritant. The right of the citizen to access records is sidelined in this new corporatized approach to ATI/FOI in Canada and the experience is more like dealing with a corporation whereby the individual just becomes a number. As one IAO MCS FOI coordinator put it in several emails, “We look forward to working with you and reaching a mutually beneficial outcome”. The idea of a mutually beneficial outcome is foreign to the terms of reference of ATI/FOI, as there is not supposed to be a benefit for the government. There is no reason that government entities working in a democracy should have an expectation that external scrutiny should be of benefit to them, especially with respect to activities that potentially involve wrongdoing or human rights violations. ATI/FOI was created as a mechanism to scrutinize and serve as a check on government conduct. This policy shift toward addressing ‘mutually beneficial outcomes’ is suggestive that the centralized, corporatized ATI/FOI intake units operate according to a cost-benefit calculus which is, again, not part of the intention or purpose of ATI/FOI in Canada. This mutation signals corporatization of government work and administrative processes that prevent, rather than facilitate, access to state information about the (prison) pandemic. While such policing of criminological knowledge is not new (Martel 2004), the further entrenchment of corporatization in government (Walters 2003) is translating into more barriers to accessing state information.

#### **WHAT ATI/FOI PROCESSING OUGHT TO LOOK LIKE**

While we do not want to romanticize previous procedures as it regards ATI/FOI, as researchers have noted such regimes across Canada have

been broken for decades (Roberts 1999), we point to New Brunswick and Newfoundland and Labrador as two examples that did a better job processing our requests. However, they both proceeded to process the requests in different ways.

In Newfoundland and Labrador, each individual request was treated as such. For each request, when an FOI coordinator had questions of clarification or about scope, they phoned us and we discussed. For each request, the requester received a written explanation when no records were retrieved and a similar written explanation when records were disclosed. The FOI coordinators were in constant communication and consistently documented all steps in the process and all decisions regarding exemption. This was a textbook example of compliance, communication, and disclosure. The whole process and experience was a model example of FOI staff taking their duty to assist seriously. In Newfoundland and Labrador, the records were all disclosed or accounted for within the 30-day statutory period. Indeed, although the first batch of Newfoundland and Nova Scotia requests were submitted on the same day in early 2021, the Newfoundland records had been received with no additional fees charged before Nova Scotia issued its estimate of \$177,312 for the 37 total requests directed to prison authorities. The performance of Newfoundland and Labrador was not only a model response, but shows how deficient the performance of FOI units in Nova Scotia and British Columbia (jurisdictions with more resources and larger civil services) has been.

In New Brunswick, FOI coordinators took a different approach, which was also accommodating. The FOI unit in New Brunswick communicated to the information requester that they would respond to the requests in full, but could not make any promises about when the records would be disclosed. They communicated it would not be possible to meet the statutory deadline, but they would do their best to release records as soon as they could. Approximately 100 days after the initial request, the FOI unit sent the entirety of the requested records to us, which amounted to over 500 pages without any additional processing fees. For a journalist working on a shorter deadline, this would be problematic as there was some delay. For a social science researcher, working on longer timelines, this is still a suitable outcome.

The FOI coordinators in New Brunswick and Newfoundland and Labrador both communicated their intention and commitment to FOI and disclosure, and they delivered the records sought in full. ATI/FOI is a messy process and with some requests it does take a long time to access records. It does take real labour hours to have workers in the office of primary interest search for and retrieve the records. It does take



time and energy for the ATI/FOI coordinator to then redact and process the records according to the various sections of the legislation, and this needs to be done carefully to prevent personal information from being disclosed. The FOI coordinators in New Brunswick and Newfoundland and Labrador reveal that, even in challenging conditions of a pandemic during which many government employees are working from home, it is still feasible for this process to work reasonably if people are committed to the spirit of the law, to the duty to assist, and the duty to document and communicate. It is this communicative dimension of the ATI/FOI process at the core of a good response (also see Roziere and Walby 2020), which corporatization can prevent.

One of the FOI requests we submitted in every jurisdiction sought records on complaints written by prisoners about conditions inside prison during the pandemic. From Saskatchewan, we received 150 pages of complaints submitted by prisoners about conditions inside its provincial jails resulting from COVID-19 restrictions. Complaints included concerns about the conduct of employees related to their transmission of the virus, the inability to social distance inside, the loss of privileges and programs, the transfer of prisoners with the virus, the lack of visits, as well as lack of access to cleaning supplies and protective gear. Saskatchewan did not charge us any fees for this disclosure. The exact same request, covering the same time period, received a \$37,620 fee estimate from Nova Scotia authorities. The FOI unit in Saskatchewan took 60 days to produce these records on complaints written by prisoners while responding to our other requests at the same time. In the interim period, the FOI unit in Saskatchewan issued a time extension and was in contact regarding all other requests submitted. This is another a good example of how the ATI/FOI process should work. The records are revealing of how COVID-19 restrictions exacerbated existing tensions and problems inside carceral institutions. These records were in fact damaging to the government in Saskatchewan, but they were retrieved and disclosed nonetheless because of a commitment to the spirit of the law, to the duty to assist, and the duty to document.

By contrast, the corporatized FOI units in Nova Scotia and in BC appear to exist mainly to block rather than provide access to government records. The irony is that politicians characterize the formation of centralized and corporatized information request intake units as a modernization of ATI/FOI in Canada (Ling 2020). While the 'fix' benefits government, citizens or ATI/FOI users who depend on such mechanisms to understand state decisions and operations face considerable barriers. Corporatized approaches to information management, or even more regressive amendments to ATI/FOI as is happening in Manitoba



with Bill-49 which bans systematic use of information requests and limits the number of requests citizens can make, simply promote secrecy. Such reforms threaten to further undermine the public's right to know about government conduct, including the impact of COVID-19 in carceral settings. The recourse needed now is for governments to stop posturing as if they are aiming to fix ATI/FOI and to instead follow best practices observed in jurisdictions like New Brunswick and Newfoundland and Labrador documented above.

### IMPLICATIONS AND PATHS FORWARD

As our analysis reveals, there are significant and numerous “transparency deserts” (Koningsor 2020) where the impact of COVID-19 on imprisonment in Canada is concerned. Data regarding imprisonment in Canada is subject to management in ways that mirrors the way prison agencies control people. Certain topics remain off-limits in prison research, and research access in carceral spaces in general can be difficult if one does not have the necessary contacts, is not willing to adapt their research design based on input from prison officials – whether constructive or obstructive – to gain access, or is not perceived by authorities to be pursuing research that aligns with their interests (Stevens 2020). Where formal information requests are concerned, it is evident some ATI/FOI coordinators and offices of primary interest do not take the ATI/FOI process or the public's right to know seriously. Contributing to literature on policing of criminological knowledge production, we have shown how some ATI/FOI units in Canada blocked access to information about the COVID-19 response and impacts behind bars, limiting scrutiny that could identify and propose measures to address institutional problems and injustices.

The right to access government information is a citizenship right and any attempt to block access to information undermines any semblance of democracy, transparency, and good governance (Neuman and Calland 2007). We have documented several attempts to thwart access to information. While ATI/FOI might seem like an elitist issue to fret about when there are other more palpable injustices all around us, we would suggest these attempts to undermine information access reflect some authoritarian tendencies in liberalism (Dean 2002) that constrain what the public can know about state activities. In response to the barriers we confronted during our inquiry and the recognition that filing complaints to ombudspersons responsible for ATI/FOI are often themselves subject to lengthy delays (Nam 2012; Roberts 2000), lead

to recommendations in favour of record disclosure that are not binding (Holsen and Pasquier 2019), or lead to decisions legitimating government secrecy and setting poor precedents for future research (e.g. Order 00-19 and Order 00-20 in British Columbia), we have undertaken some perhaps unconventional research and knowledge mobilization strategies in response.

First, as previously noted, we involved a large number of research assistants in submitting ATI/FOI requests where required. This was useful training for them and an opportunity to conduct team-based research, but it should never come to this if ATI/FOI laws are working as intended. Part of this approach entailed using public interest and fee waivers to reduce fees. Methodologically, this introduces some challenges, as each research assistant then takes on negotiating access, and the amount of correspondence multiplies. In terms of benefits, this approach decreases the ability of the government agencies to block disclosures.

Second, we submitted FOI requests to Nova Scotia and British Columbia to see if we could locate insights into why these regressive decisions were made regarding our requests. This approach provides some insights into the conditions of information management in these ATI/FOI units. However, we did not use this tactic uniformly as a number of ATI/FOI coordinators made efforts to track down the records we requested in challenging conditions (e.g. working from home, taking care of family, dealing with offices of primary interest that were the source of the obfuscation, etc.). We only use this more antagonistic approach when it is clear multiple staff within some ATI/FOI units are not acting in good faith and not abiding by the spirit or the letter of ATI/FOI laws. However, proactive disclosure, open government or reasonable disclosure of records under ATI/FOI would be much preferred to such detours.

Third, we engaged in several newsmaking criminology (Barak 1988) interventions to stimulate the release of additional information by governments. For example, we shared our files with a journalist in Nova Scotia who then wrote a story on the poor performance of the FOI unit we had been dealing with, revealing the issue was not limited to our project, but many other recent attempts to generate information (Tutton 2021b). We also published op-eds on government secrecy to generate pressure to force the agencies to release more information or make policy changes (e.g. Piché et al. 2021). Given the scale of the crisis and the failure of governments to act to protect prisoners and staff in the second and third waves of the pandemic especially, this form of public engagement is important as a means of pushing for policy

change and contesting the carceral itself. Research and knowledge mobilization thus overlap (Piché 2015), resulting in the release of more information<sup>7</sup> and enhanced public awareness of these issues.

Questions about ATI/FOI are not disconnected from struggles for justice. The emergence of additional barriers to accessing state information such as corporatization reflects trends across government, which can become more authoritarian over time, despite the semblance of democracy and representation under liberalism (Dean 2002). The obfuscatory reforms enacted in Canada's ATI/FOI regimes including the creation of centralized, corporatized intake units undermine the right of access to government information. While it is possible and straightforward (compared to other laws / policies) to reform ATI/FOI law to be more progressive and open (Nieman 2008), lawmakers and politicians in Canada have been gradually degrading ATI/FOI law for decades. The decline of ATI/FOI in Canada (Clément 2015; Roberts 2000) continues with these obfuscatory reforms that have few benefits for ATI/FOI users. Constituting ATI/FOI users as clients, customers, or irritants is regressive. The need to reverse the corporatization of ATI/FOI is clear and there is risk of further centralization should government austerity and authoritarian tendencies of information control become further entrenched post-pandemic. In closing, we echo Lageson (2020: 181) when she states, "The public should demand clean data about police, court, and prison activity so that we can employ the Freedom of Information Act for its original purpose – getting an honest and open account of the functioning of government".

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7. See, for example, CSC's "Outbreak and positive case summary" that was published at <https://www.csc-scc.gc.ca/001/006/001006-1014-en.shtml#2> following an op-ed in which we criticized the increasingly limited data they published concerning COVID-19 transmission in federal penitentiaries.

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