HOUSE OF COMMONS
CANADA

THE *ACCESS TO INFORMATION ACT:* FIRST STEPS TOWARDS RENEWAL

Report of the Standing Committee on Access to Information, Privacy and Ethics

Paul Szabo, MP
Chair

JUNE 2009

40th PARLIAMENT, 2nd SESSION

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has the honour to present its

ELEVENTH REPORT

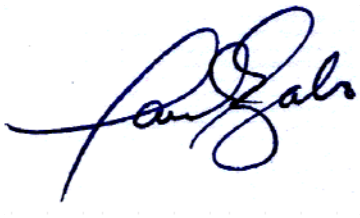
Pursuant to its mandate under Standing Order 108(2), the Committee has studied the subject of *Access to Information Act* Reform and has agreed to report the following:

CHAIR'S FOREWORD

As Chair of the Standing Committee on Access to Information, Privacy and Ethics, I want to thank the permanent members of the Committee and the other Members of Parliament who participated in the hearings for their support and efforts in discharging our collective responsibilities.

As well, no Parliamentary Committee can function properly without the experience, expertise and support of House of Commons and Library of Parliament personnel. Our clerk, research analysts, translators and other technical and support personnel were invaluable in helping us to organize our hearings. I am extremely grateful for their efforts related to this important study.

Respectfully submitted,



Paul Szabo, MP
Chair

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Background

In the wake of the publication of his special report on systemic issues affecting the access to information regime,[1] the Information Commissioner, Robert Marleau, presented the Committee with 12 recommendations aimed at modernizing the *Access to Information Act* (ATIA). In the Commissioner's opinion,

> The *Access to Information Act* must be strengthened to meet today's imperatives. While it is recognized that the Act is sound in terms of its concept and balance, work is urgently needed to modernize it from a legislative perspective and to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.[2]

He made it clear, however, that the 12 recommendations are only the starting point for a more comprehensive reform of the ATIA:

> I want to stress that the list of recommendations represents an important first step in meeting the challenge of modernizing the Act. The list is by no means exhaustive. The recommendations only tackle the most pressing matters.[3]

The ATIA has been the subject of a number of reform proposals since its passage in 1983. Nor is this the first ATIA reform proposal to be the subject of a study by the Committee: barely a week before the 38th Parliament was dissolved, the Committee tabled a report to the House of Commons recommending that the Minister of Justice consider introducing a bill based on the provisions in the *Open Government Act*, proposed by the then Information Commissioner, John Reid.

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1 Special report: *Report Cards 2007-2008 and Systemic Issues Affecting Access to Information in Canada*, February 2009, http://www.infocom.gc.ca/specialreports/2007-2008_special_report-e.asp.

2 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

3 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

Evidence

The Commissioner appeared before the Committee twice in the course of its study, once at the beginning and a second time at the very end. The Committee also heard from a number of witnesses with views on the changes proposed by the Commissioner, including a variety of people who work in the area of access to information: Stanley Tromp, Murray Rankin, Michel Drapeau, Marc-Aurèle Racicot, Duff Conacher, Vincent Gogolek from the Freedom of Information and Privacy Association of British Columbia (FIPA) and Ken Rubin. The Information and Privacy Commissioner of British Columbia, David Loukidelis, appeared before the Committee, as did the legal counsel for the New Brunswick Office of the Ombudsman, Christian Whalen. The Committee concluded its hearings with the appearance of the Minister of Justice, the Honourable Rob Nicholson, followed by representatives of the Canadian Bar Association (CBA), David Fraser, Priscilla Platt and Gaylene Schellenberg.

Observations and Recommendations

The Committee heard a variety of evidence about each of the Information Commissioner's 12 recommendations, and would like to put its observations and conclusions before the government.

Recommendation No. 1: That Parliament review the *Access to Information Act* every five years.

The Commissioner justified this recommendation as follows:

> First, I recommend that the Act be amended to require a review by Parliament every five years. This schedule will provide an opportunity for parliamentarians to identify systemic issues, consider best practices in other jurisdictions and recommend changes to legislative or administrative structures.[4]

He pointed out that the Committee is free to review the Act at any time,[5] but that a statutory mandated review would ensure that this exercise is conducted at least once every five years.[6] A large majority of the witnesses heard by the Committee supported this recommendation, including Christian Whalen of the New Brunswick Office of the Ombudsman:

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4 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

5 Ibid. (1545).

6 Ibid. (1640).

> The experience in New Brunswick and federally in Canada amply demonstrates the need for that type of system. [...] I think invariably what you see in practice in Canada and around the world is that governments-in-waiting are always interested in law reform in this area, and it's something that dissipates, unfortunately, often very quickly after they come into power. I think a regularly mandated parliamentary review is a necessary check against that tendency.[7]

The Canadian Bar Association agreed that the ATIA should be reviewed regularly to ensure that it follows the evolution of federal institutions and new technologies:

> As the ATIA is the most important vehicle for citizen access to government records, Parliament has an ongoing responsibility to ensure the legislation is serving the country as efficiently as possible. In our view, this requires regular review of the law. If the review finds the ATIA is keeping pace with changes in government and society, no changes will be required. It is appropriate to consider the question at least every five years.[8]

Witnesses Michel Drapeau and Marc-Aurèle Racicot did not support the recommendation, on the grounds that the Committee is already mandated to review the Act under section 75 of the Act.[9]

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 2: That all persons have a right to request access to records pursuant to the *Access to Information Act.*

Currently the Act provides that only Canadian citizens and permanent residents of Canada can make an access to information request. The *Access to Information Act Extension Order, No. 1*[10] expands this right of access to any individual or corporation in Canada. The Commissioner would prefer the Act to provide for a universal right of access:

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7 Standing Committee on Access to Information, Privacy and Ethics, Christian Whalen, April 22, 2009 (1625)

8 Brief from the Canadian Bar Association, *Access to Information Act Reform*, pp. 2-3.

9 Section 75(1) of the ATIA: "The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose."

10 Access to Information Extension Order, No. 1, SOR/89-207, section 2.

> In an environment of increasing globalization, people require access to information regardless of their physical presence. It's becoming difficult to sustain the concept of limited access. It prevents our regime from moving to the Internet age, which ultimately affects timeliness. It also increases costs by adding intermediaries. Therefore, I recommend that the right of access be provided to all.[11]

In the view of a number of the witnesses, the requirement for residency or even presence in the country is an equally easily evaded one, since a non-resident can simply make the request via a third party or an information broker who does happen to be in Canada:

> [W]hen you have a citizenship or residency restriction, they're relatively easily circumvented. You can always find somebody who qualifies who will make the request for you. And I'm not sure how you would police or enforce compliance with that restriction.[12]

Some witnesses pointed out that other Commonwealth countries, including Australia, New Zealand, Ireland and the United Kingdom, have no residency requirement and that it would be desirable for Canada's legislation to be in tune with theirs.[13] The United States and Mexico have no residency requirement either.[14]

What would be the impact of such a change in the law? According to the Commissioner, the countries that do not have a residency criterion have not experienced a significant jump in the volume of demand: "The major difference is that individuals are permitted to make requests directly rather than through agents."[15]

Witnesses Drapeau and Racicot were not opposed to amending the Act in this way, but expressed doubts about the timeliness of making the change as matters stand:

> The system is so swamped now as not to work. Why would we want to be an embarrassment on the world scene by saying, "Come on board. Put in your request. And by the way, you, Canadian, go to the back of the queue, because we're now swamped"? The institution can't respond.[16]

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11 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

12 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1710)

13 Standing Committee on Access to Information, Privacy and Ethics, Murray Rankin, March 11, 2009 (1610).

14 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1610).

15 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

16 Standing Committee on Access to Information, Privacy and Ethics, Michel Drapeau, March 30, 2009 (1625).

Universal access is not, in their opinion, one of the most pressing problems in search of a solution.[17]

> **Committee Response: The Committee supports this recommendation but strongly encourages the Minister to consider what cost-recovery options could be used to defray the costs of opening the process to foreign users and for all commercial users who resell the information for profit.**

Recommendation No. 3: That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters.

This recommendation is taken from a 1987 report by the Standing House of Commons Committee on Justice and the Solicitor General entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. In this report, the Justice Committee recommended a hybrid model that would retain the Commissioner's ombudsman role with respect to denial of access while giving him quasi-judicial powers to facilitate prompt settlement of administrative matters. Administrative matters are those involving deadlines, extensions, fees and fee waivers; they constitute about 50% of the work of the Office of the Commissioner.[18]

In his testimony, the Commissioner said that the change would make it possible to correct a shortcoming in the ATIA that allows only complaints on a refusal of access to information to go before the Federal Court, while administrative complaints do not benefit from the same right of recourse:

> On the one hand, there is a bit of a flaw in the legislation under section 30. You can go to court for refusals if you're not satisfied, but there is no recourse for an administrative review, other than a complaint to me. And if you're not satisfied with my results, if I say this extension is perfectly reasonable, you have no recourse. At the same time, if I say to the department that it's not reasonable and I recommend X, and they don't do it, I have no recourse. So the recommendation would fix part of that and bring, I think, more structure and discipline to the use of extensions and on other administrative issues.[19]

The Commissioner is thus suggesting making up for lack of recourse to the Federal Court, in the case of complaints of an administrative nature, by giving him order-making power. A large majority of the witnesses heard by the Committee supported this

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17 Standing Committee on Access to Information, Privacy and Ethics, Marc-Aurèle Racicot, March 30, 2009 (1625).

18 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

19 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1600).

recommendation. David Loukidelis, British Columbia's Information and Privacy Commissioner, supported the Commissioner's recommendation on the basis of his office's experience:

> Speaking only to the situation and experience in British Columbia, we have found, over the 16 years of our office's experience, that order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office.[20]

Duff Conacher of Democracy Watch echoed Mr Loukidelis by pointing out the effectiveness of such a system:

> The experience in Ontario, BC and Quebec has shown that this is a major change that changes the way the system works, because essentially, information institutions know that very quickly they can face a binding order to release documents, so they are less resistant to releasing them in the first place.[21]

A number of Canadian provinces have an access to Information Commissioner who has full order-making powers for both matters of an administrative nature and for refusals to disclose. Several witnesses told the Committee that they would like the Information Commissioner of Canada to have such full order-making powers.

Vincent Gogolek of B.C.'s FIPA testified that his organization was "disappointed" with the decision of former Commissioner John Reid not to include full order-making powers for the federal Commissioner in his proposed *Open Government Act* and noted that the addition of this element to the bill would be "the way forward" in his view.[22] He further testified that he would add it to Commissioner Marleau's recommendations as well:

> FIPA believes it is essential that the commissioner have full order-making power, not just the power to make orders regarding administrative matters. Order-making power is essential to ensure the proper functioning of the ATI Act. The information commissioners in four provinces have this power, and those systems work far better than the current federal regime.
>
> Commissioner Reid expressed the view that order-making power would change the nature of his office. He was right, and FIPA believes this would be a positive change. By seeking the power to make orders on administrative matters, Commissioner Marleau has apparently accepted this change in the nature of his office. FIPA recommends against taking a half measure when full order-making power is clearly what's needed.[23]

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20 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11 (1545).

21 Standing Committee on Access to Information, Privacy and Ethics, Duff Conacher, March 30 (1545).

22 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1540).

23 Ibid., (1545).

Ken Rubin also proposed full order-making powers as part of his own draft bill that he presented to the Committee.[24] Both he and Mr. Gogolek testified that all of the provincial Commissioners who have order-making powers continue to use mediation and ombudsperson-type tools as well, so they did not view it as substituting how complaints are dealt with, but rather as adding additional teeth to the existing regime.[25] Mr. Gogolek added that this would reduce the workload burden on the Courts by allowing people to get an affordable remedy directly from the Commissioner.[26]

Christian Whalen, of the New Brunswick Office of the Ombudsman, which uses a similar model to the current federal Commissioner, noted that their Office had actually recommended moving to a model with full order-making powers, due to some of the issues they had encountered with the ombudsperson model. He stated that in his view this would be a "natural and desirable next step" at the federal level as well.[27]

Murray Rankin testified that he believes full powers are necessary for an effective access statute:

> To me, a statute that does not have full order-making power is a bird with one wing, and a crippled bird at that. […] To me, this is an absolutely integral part of the statute. Most meaningful statutes, if not all meaningful statutes I'm aware of, have the ability for someone to order the government, after due deliberation, to release the record. In the United States that's the courts, and in most provinces, five of them at least, it is the commissioner who has final decision-making authority—always, I hasten to add, subject to ordinary laws of judicial review of jurisdictional error or other errors that the commissioner might make along the way.[28]

Stanley Tromp also recommended full order-making powers, and noted that 16 other countries have given such powers to their access to Information Commissioners, including Mexico, India, New Zealand, Scotland and the United Kingdom.[29]

However, Michel Drapeau did not agree with this recommendation and noted that the ombudsperson model was chosen under the original legislation and subsequently exported to a number of countries. He also testified:

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24 Standing Committee on Access to Information, Privacy and Ethics, Ken Rubin, April 1, 2009 (1555).

25 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek and Ken Rubin (1605 to 1610 and 1615).

26 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek (1620, 1635 and 1705).

27 Standing Committee on Access to Information, Privacy and Ethics, Christian Whalen, April 22, 2009 (1625).

28 Standing Committee on Access to Information, Privacy and Ethics, Murray Rankin, March 11, 2009 (1625).

29 Standing Committee on Access to Information, Privacy and Ethics, Stanley Tromp, March 11, 2009 (1555 and 1630).

> The point I want to make is that order-making power is not a panacea. It's not the end of the road. It doesn't mean that you'll have compliance. You are now opening a new door where the institution or the requester will say, “Let me go to court now, because I'm not happy with this.” So you go full circle. What have we done now? What have we accomplished?
>
> In the meanwhile, you have dramatically and drastically transformed the role of the ombudsman into a judicial officer. He's going to be in his office; he's going to be acting at administrative tribunals. He will no longer have persuasive power. He will no longer have the very vast powers that he now has. Probably in the process you're going to be asking requesters to engage the services of lawyers, because there will be an administrative law process that we now have to go through.[30]

The Minister of Justice voiced some concerns about this recommendation too. In his opinion, it could result in the Federal Court’s resources being increasingly tied up by institutions wanting to dispute the Commissioner’s decisions on administrative matters.[31]

The CBA approved the recommendation but raised the question of possible recourse from a decision by the Commissioner:

> There are implications to providing order-making powers to the Commissioner. If those powers are granted, recourse to the courts, either by appeal or judicial review, should also be addressed. Under the ATIA, the Federal Court holds *de novo* hearings in respect of the Commissioner’s recommendations, but that would be inappropriate for a binding order.[32]

According to the CBA it would be necessary to clarify what recourse could apply following a binding order by the Commissioner.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 4: That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints.

Currently, the *Access to Information Act* requires the Information Commissioner to investigate all complaints received. Recommendation No. 4 would give him a discretionary power that would allow him not to investigate certain complaints:

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30 Standing Committee on Access to Information, Privacy and Ethics, Michel Drapeau, March 30, 2009 (1615).

31 Standing Committee on Access to Information, Privacy and Ethics, Hon. Rob Nicholson, May 4, 2009 (1535).

32 Brief from the Canadian Bar Association, *Access to Information Act Reform*, p. 3.

> Such a provision would enable the Commissioner to exercise a measure of control over the complaint process and the utilization of resources by ensuring they are focused on significant individual requests and public issues.[33]

The Commissioner provided the following example to justify his recommendation:

> For instance, I may have four previously closed extensions to complaints. If I get another one that is almost identical, I have to open a file, I have to investigate, I have to assign a resource. So it would give me the discretion to apply, to some degree, the results that I've already established—the investigative results—to some of those coming in the door. So I could say, no, I won't investigate this because we dealt with it in another timeframe, in another annual report, in another context.[34]

The discretionary power could also be used in the event of frivolous or vexatious complaints. The Commissioner said that very few complaints fall into this category.[35] He also said that any decision not to investigate a complaint could be subject to the judicial review process.[36]

This recommendation was supported by a number of witnesses. Most provincial access to information legislation contains such a discretionary power.[37] Some witnesses expressed the wish that the discretionary power be limited:

> Recommendation 4 is that the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints. FIPA is of the view that such a power would only be acceptable in situations equivalent to dismissal of a frivolous and vexatious lawsuit, and similar criteria should be used in these very rare circumstances.[38]

The Canadian Bar Association supported the recommendation and suggested that a provision like section 13(2) of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) should be added to the ATIA to allow the Commissioner not to conduct an investigation in any of the following circumstances:

a) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada other than the ATIA, or the laws of a province;

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33 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation 4, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

34 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1550).

35 Ibid.

36 *Strengthening the* Access to Information Act *to Meet Today's Imperatives*, March 2009, Recommendation No. 4, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

37 Ibid.

38 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1545).

b) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was filed is such that a report would not serve a useful purpose; or

c) the complaint is trivial, frivolous or vexatious or is made in bad faith.[39]

Witnesses Drapeau and Racicot criticized the recommendations on the grounds that "[t]o deny an individual the right to submit a complaint and the right to have his complaint investigated would be incompatible with the current quasi-constitutionality (and universality) of the right of access."[40]

The Minister of Justice also expressed some disquiet about Recommendation No. 4, on the grounds that it appeared to him incompatible with Recommendation No. 11, designed to enable complainants to appeal directly to the Federal Court in the event of a refusal of access:

> My concern about the Information Commissioner's recommendations Nos. 4 and 11 can be boiled down to one of ease of access to justice. Under the current ombudsman model, an access requester can complain to the Commissioner about a refusal of access. The Commissioner is obliged to investigate, and upon the completion of the investigation, the Commissioner will make a finding and a non-binding recommendation. If the requester is unhappy with the result, he or she can then go to the Federal Court.
>
> I believe the crucial point is this. Under the current Act, if the requester decides to go to Federal Court, he will then have the benefit of all the work that went into the Commissioner's investigation and its results.
>
> Under the Commissioner's proposed reform, if the Commissioner exercises his discretion and declines to investigate a requester's complaint, then the requester would be obligated to go directly to the Federal Court to complain. In this case, the requester then would not have the benefit of the Commissioner's investigation; that is, the requester will have to start from scratch, attempting to investigate the refusal of access without any of the significant investigative powers the commissioner possesses. In short, I encourage you to consider these access-to-justice issues when you examine these two recommendations.

In response to the Minister's concerns, the Commissioner said:

> I read the Minister's evidence, and I must say with respect to the Minister—and I don't mean any disrespect—that I don't know how he associates the two recommendations, Nos. 4 and 11. I see them as being quite different.[41]

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39 Brief from the Canadian Bar Association, *Access to Information Act Reform*, p. 4.

40 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation No. 4.

41 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, May 13, 2009 (1600).

Committee Response: The Committee supports this recommendation and wishes to underline the need to establish a clear and defined framework for the exercise of this power, including consideration of limiting the Commissioner's discretion to cases that involve frivolous and vexatious complaints or when precedents responsive to the complaint have already been established by a previous investigation. The Committee further recommends that the Commissioner should be required to provide a written response to the complainant with the reasons that the discretion has been invoked.

Recommendation No. 5: That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner.

The aim of this recommendation is to give the Commissioner a proactive mandate to educate the general public. According to the Commissioner, studies of the *Access to Information Act* have shown that Canadians do not know about, or do not understand, the rights that this quasi-constitutional statute gives them.[42]

Justice La Forest, in his study of the Offices of the Information and Privacy Commissioners, acknowledged the importance of this function when he wrote:

> [J]ust as there is a need to inculcate access and privacy norms in government, it is also necessary to educate the public about their access and privacy rights and inform them of the threats posed to these rights by various technological, social, and legislative developments.[43]

The Commissioner said that many of his provincial and international counterparts are empowered to undertake research and public education.[44]

The Canadian Bar Association supported the addition of such a mandate to the Office of the Information Commissioner:

> While many individuals and organizations have diverse interests in access to information issues, as the only public body completely dedicated to providing access to government information, the Commissioner is the obvious choice to have primary responsibility for education on access to information issues at the federal level.[45]

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42 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation No. 5, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

43 Ibid.

44 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

45 Brief from the Canadian Bar Association, *Access to Information Act Reform*, p. 5.

Witnesses Drapeau and Racicot, however, did not support the recommendation because in their view the problem actually lies with the bureaucracy:

> The real problem is lack of knowledge about the Act, and misguided perceptions of the right of access, [on the part of] the public administration, not the public or the users.[46]

They argued that awareness and education measures should be addressed to public servants and officials, and made possible through a collaboration between the Office of the Information Commissioner and Treasury Board. Among other things, they suggested that the Prime Minister and/or the Clerk of the Privy Council should issue a declaration to the Public Service that "Disclosure is the rule and access is the norm."[47]

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 6: That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives.

This recommendation would enable the Commissioner to voice his views on the possible repercussions of legislative proposals:

> In addition, I recommend that the role of the Information Commissioner in providing advice regarding proposed legislative initiatives be expressly recognized so that federal institutions are obligated to consult with my office in developing legislative proposals to ensure proper account is taken of the impact on freedom of information.[48]

Such a provision is already on the books in British Columbia and Alberta.

Witnesses Drapeau and Racicot opposed the recommendation. In their opinion, the Commissioner's mandate is to investigate complaints and to submit conclusions and recommendations, and he should be very circumspect about advocating changes to a statute defines his mandate.[49]

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

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46 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation No. 5.

47 Ibid.

48 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

49 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation No. 6.

Recommendation No. 7: That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts.

This recommendation would amend the Act so that the administrative records of the Senate, the House of Commons, the Library of Parliament and the courts under federal jurisdiction would be covered by the ATIA, subject to provisions protecting parliamentary and judicial privilege.[50] According to the Commissioner, "Canadians expect all publicly funded bodies to be accountable under access to information legislation."[51]

The recommendation was proposed for the first time in the 1987 report of the Standing Committee on Justice and the Solicitor General, entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. In it, the Justice Committee recommended that the Act apply to the Senate and the House of Commons (with the exception of the offices of Senators and Members of Parliament), and to the Library of Parliament.[52] The Commissioner also cited precedents in Alberta, Newfoundland and Labrador, the United Kingdom, Australia and Ireland in support of the recommendation.[53]

Witnesses Drapeau and Racicot did not agree with the recommendation. They said that it might be desirable, but that it was also highly unlikely ever to be implemented. Instead they suggested identifying the government agencies that should be subject to the ATIA, such as the Courts Administration Service, Genome Canada, Canada Infoway Health Inc., and the Green Municipal Enabling Fund.[54]

With respect to court records, the Minister of Justice encouraged the Committee "to have thorough consultations with the courts on this issue, given the critical importance of judicial independence."[55]

The Canadian Bar Association argued that the proposal needed further examination. In the CBA's opinion, the recommendation as now worded "could have a negative impact on parliamentary and court processes."[56] It proposed instead the adoption of a government policy of proactive disclosure of information about financial expenditures by the Senate, the House of Commons, the Library of Parliament and the judicial branch in

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50 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation No. 7, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

51 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

52 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation No. 7, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

53 Ibid.

54 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation No. 7.

55 Standing Committee on Access to Information, Privacy and Ethics, Hon. Rob Nicholson, May 4, 2009 (1540).

56 Brief from the Canadian Bar Association, p. 5.

the course of their administrative functions.[57] The CBA based its recommendation on the success of the policy adopted by Treasury Board on proactive disclosure of travel and hospitality expenses:

> A comparable Proactive Disclosure policy was issued in 2006 by Treasury Board to require government-wide publication of travel and hospitality expenses. This extends to [the] Courts Administration Service and the Supreme Court of Canada. The advantage of this approach is that access requests are unnecessary since ongoing publication provides full public disclosure.[58]
>
> **Committee Response: The Committee supports this recommendation subject to provisions protecting parliamentary and judicial privilege, and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 8: That the *Access to Information Act* apply to Cabinet confidences.

At present, Cabinet confidences are entirely excluded from the scope of the ATIA. This means that once it has been decided that a document is a Cabinet confidence, neither the Information Commissioner nor the Federal Court may examine it to determine whether it in fact falls into this category. The recommendation thus seeks to replace the absolute exclusion by a discretionary exemption.

The Commissioner said he realizes how important it is to protect Cabinet's decision-making process, but he would nevertheless like Canada to benefit from the experience of other jurisdictions, both internationally and in its own provinces and territories, that have adopted this type of provision:

> I have had conversations with the provincial and territorial commissioners, and this does not seem to cause them any difficulty at all. The fact that a third party would at least have looked at the document would give requesters more confidence. If I tell you that you cannot get a document in accordance with an exemption set out in the legislation, at least you have the satisfaction of knowing that someone independent of the government made this decision.[59]
>
> […]

57 Ibid., p. 6.

58 Ibid., p. 6.

59 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1625).

> I think comments made in Cabinet would remain exempted, and for good reason. In the Westminster model you mentioned, Cabinet solidarity is important. Having a common position on particular policies does remain fundamental to the system. This is not a problem in New Zealand, where there is very proactive disclosure of Cabinet decisions, sometimes within two to three months. Here, it takes 20 or 30 years.[60]

A number of witnesses heard by the Committee supported the recommendation. British Columbia Information and Privacy Commissioner David Loukidelis said, [Mr] Marleau's recommendation around Cabinet confidences is key."[61] Vincent Gogolek of FIPA concurred:

> In most Canadian provinces Cabinet documents are not excluded from review by the Commissioner. This recognizes the fact that a Cabinet confidence's exception, like all exceptions from disclosure, can be misapplied or abused. FIPA strongly recommends that Cabinet records be made an exception to disclosure, subject to review by the Commissioner.[62]

The Canadian Bar Association agreed with the replacement of the current exclusion of Cabinet records by an exemption, but suggested that it be a mandatory rather than a discretionary exemption:

> Instead of a discretionary exemption, we believe it would be preferable to provide a mandatory exemption under the ATIA for specified types of Cabinet records. Making the exemption mandatory would reflect its importance and assist in ensuring that Cabinet confidences remain confidential. Cabinet discussions must be frank and open in a Parliamentary democracy, to uphold the principle of collective responsibility for government decisions. A discretionary exemption for Cabinet records could undermine this principle, particularly where disclosure may be made by successive governments.[63]

The CBA further said that the Cabinet records subject to exemption should be narrowly framed, using as a guide the types of records in the existing list of excluded Cabinet records in subsection 69(3) of the ATIA and in the case law to date.[64]

Witnesses Drapeau and Racicot did not support the Commissioner's Recommendation No. 8. They conceded that it might be desirable, but said that they thought it had little chance of being adopted because of the long tradition of keeping such records confidential:

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60 Ibid. (1630).

61 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1620).

62 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1545).

63 Brief from the Canadian Bar Association, p. 6.

64 Ibid..

> The concept of Cabinet confidences is a time-tested concept and tradition of parliamentary government. It provides a safehouse for Cabinet members to exchange frankly and to provide to the Prime Minister their unvarnished advice for better government.[65]

They suggested instead reducing the 20-year exclusionary period for Cabinet confidences to 10 years.[66]

> **Committee Response: The Committee notes that there were disagreements among witnesses about this recommendation and suggests that the Minister consider this recommendation in light of the arguments raised by the witnesses and the experience of other jurisidictions.**

Recommendation No. 9: That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond 60 days.

The ATIA requires that the response to a request for access to information must be made within 30 days. This can be extended in certain circumstances, defined in section 9 of the Act. The ATIA also provides that institutions must inform the Commissioner of any extension of the 30-day period. The Act does not however put a time limit on such extensions. The Commissioner also pointed out that not all institutions comply with the requirement to inform him of an extension. Recommendation No. 9 is designed to rectify this situation. In practice, the Commissioner's new power would apply as follows:

> [In my special report, we] found that [extensions average 120 days and, in some departments, much longer than that. We've cut it in half and modelled it on some of our provincial legislation, so that the commissioner should be the one to approve any extensions beyond 60 days. Those are the 30 days within which they are normally supposed to respond under the statute, and then they can claim a perfectly legal extension, but to a maximum of 60 days, so that within 90 days there should be an expectation that service will be provided to the requester.[67]

David Loukidelis, who already has this power under the British Columbia statute, agreed with the value of the idea:

> Yes, I think one of the key tools my office has in its ability to police, if you will, the question of delayed responses to access to information requests is our ability to oversee extensions.

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65 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation No. 8.

66 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, comments on Recommendation 8.

67 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1545).

[…]

> That second look we take on the further extension allows us to say yes or no and therefore gives an incentive to public bodies not to take excessive time extensions.[68]

The Canadian Bar Association said that it supported the recommendation:

> In this regard, the ATIA is out of step with most provincial and territorial freedom of information legislation, which generally limits a public body's ability to unilaterally extend a time limit to 30 days (30 business days in British Columbia). The CBA Section agrees with the Commissioner's recommendation.[69]

The CBA suggested that the criteria for extending a time limit should be further expanded by granting the Commissioner residual discretion to approve an application for an extension on "fair and reasonable" grounds.[70]

FIPA supported the recommendation, but said that it feared the provision would have the effect of replacing the 30-day deadline in the Act by an automatic 60-day deadline:

> Recommendation No. 9 is that the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond 60 days. FIPA is concerned that while this proposal may reduce government's ability to take extremely long periods to reply to a request, it will have the unintended consequence of instituting an automatic 60-day delay for all requests.[71]

Witnesses Drapeau and Racicot did not support the recommendation. In their opinion, such a power would simply add to the Information Commissioner's workload. They pointed out that the Act already provides for a notice to the Commissioner for any extension beyond 30 days.[72]

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

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68 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1640).

69 Brief from the Canadian Bar Association, pp. 7-8.

70 Brief from the Canadian Bar Association, p. 8.

71 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1545).

72 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, Recommendation No. 9.

Recommendation No. 10: That the *Access to Information Act* specify timeframes for completing administrative investigations.

As it stands, the ATIA does not impose any specific timeframe for the Information Commissioner when carrying out an investigation into complaints of an administrative nature. The Commissioner would like the Act to define a timeframe, because he has observed that federal institutions often have trouble responding rapidly when investigations are being carried out: "As a result [...] complainants can become frustrated by the failure to resolve their complaints in a timely manner."[73] Using provincial laws as his model, the Commissioner suggests that a 90-day timeframe be established.[74]

A similar recommendation appeared in the "Open Government Act" proposal of former Commissioner John Reid, who suggested a 120-day timeframe.[75]

FIPA and the Canadian Bar Association supported the recommendation while witnesses Drapeau and Racicot did not. In their opinion, the recommendation is "futile" and the issue of deadlines can be resolved by the Service Standards adopted pursuant to section 34; it is therefore unnecessary to amend the Act.[76]

Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.

Recommendation No. 11: That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals.

This recommendation would amend the ATIA to permit a complainant (in the case of refusal of access only) to proceed directly to the Federal Court, without going through the complaint process established in the Act. In the Commissioner's opinion,

> For some requesters the two-stage review set out in the Act is contrary to the principle of timely access to requested records. Depending upon such factors as the complexity of the issues raised and the number of exemptions claimed, it is not always possible for the Commissioner to complete his investigation of complaints concerning access refusals within an expedited timeframe.[77]

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73 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation No. 10, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

74 Ibid.

75 Office of the Information Commissioner of Canada, *Proposed Changes to the Access to Information Act*, 2005, http://www.infocom.gc.ca/specialreports/2005reform-e.asp.

76 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, Recommendation No. 10.

77 *Strengthening the Access to Information Act to Meet Today's Imperatives*, March 2009, Recommendation No. 11, http://www.infocom.gc.ca/publications/modernization_2009-e.asp.

Recommendation No. 11 would thus make it possible, according to the Commissioner, to speed up the process in cases where obtaining a document in a timely manner is necessary.

Christian Whalen of the New Brunswick Office of the Ombudsman said apropos of this recommendation:

> At first glance, I would say that this recommendation is realistic and appropriate, in that this is the practice we follow in New Brunswick. Citizens can inform the ombudsman of a request to review a decision made by administrative authorities regarding an access matter or they can go directly to the Superior Court.[78]

Witnesses Drapeau and Racicot, on the other hand, suggested that the recommendation was being made to solve the problem of backlogs in the Office of the Commissioner:

> Such a recommendation coming from the Commissioner / Ombudsman is puzzling, and may be tragic to the whole access to information regime. Instead of addressing the backlog, the Commissioner would download some of his investigations upon the Court.[79]

The Canadian Bar Association did not support Recommendation 11 either. It did not consider direct access to judicial recourse a good idea, and would prefer that the Commissioner be given enough resources to solve the problem of the complaints backlog:

> We take this position because of the complexity of proceedings before the Federal Court, and because the majority of requesters do not have the resources to take advantage of the option. In our view, the Commissioner should be given the tools to undertake the ATIA mandate effectively.[80]

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 12: That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester.

Currently, the provision on extensions of the deadline for responding to a request for access to information does not apply in cases where having to respond to multiple simultaneous requests from the same person would interfere with the workings of a

78 Standing Committee on Access to Information, Privacy and Ethics, Christian Whalen, April 22, 2009 (1630).

79 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, Recommendation No. 11.

80 Brief from the Canadian Bar Association, p. 10.

government institution. When there is no possibility of extending the response time, considerable resources may have to be assigned to multiple simultaneous requests from the same requester.

The Commissioner therefore recommends:

> [T]hat government institutions have the option of claiming time extensions when responding to multiple and simultaneous requests from the same requester that would unreasonably interfere with their operations.[81]

FIPA supported the recommendation, but wanted it made clear that any extension would be subject to review by the Commissioner and not to the fiat of a government body.[82]

Witnesses Drapeau and Racicot did not support the recommendation. In their view, it "challenges the accepted constitutional notion that all are equal before the law."[83]

Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.

Other Possible Areas of Reform

Proactive Web-Based Disclosure of Government Documents

Almost all of the witnesses who came before the Committee suggested that the federal government make use of current web-based technologies to introduce a new proactive model for the disclosure of government documents. This is a model which has been introduced in various forms in the United Kingdom[84] and Mexico[85] and it entails taking all written work of the government, applying the appropriate exemptions to redact certain information in advance, and making it available on the web with a searchable index.

The idea is that this model would eliminate the need for a large ATIP infrastructure devoted to receiving and processing requests, especially requests that are repeats of information which has already been disclosed to an earlier requester. It would also cut down on the interaction needed to ensure that a request is made in exactly the right way before it can be fulfilled. While there might still be requests made for certain documents,

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81 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1540).

82 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1550).

83 Brief tabled by Michel Drapeau and Marc-Aurèle Racicot, Recommendation 12.

84 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis March 11, 2009 (1550).

85 Standing Committee on Access to Information, Privacy and Ethics, Christian Whelan, April 22, 2009 (1655).

the vast majority would be self-searchable by the general public on-line in a form to which the exemptions have already been applied. The intent behind the proposal is to facilitate ease of access, free up resources, and reduce the costs of the system.

David Loukidelis, the current Information and Privacy Commissioner of British Columbia, described it this way:

> I have long taken the position that a comprehensive program, mandatory in nature, of routine proactive disclosure of records, without access requests, should be made obligatory by law. Such an approach of proactive disclosure has two advantages. First, routine disclosure more meaningfully implements the law's goals of openness and accountability. Second, routine disclosure could reduce the costs of freedom of information by avoiding the more expensive business of responding to specific and often repeated access requests for the same information.
>
> […]
>
> …I urge the committee to recommend a U.K.-style scheme of routine proactive disclosure without access request as part of a forward-looking and cutting-edge Access to Information Act reform.[86]

He also suggested that this reform could contribute to a cultural change within government as well:

> Mandatory disclosure would make a major contribution to a culture promoting transparency. [87]

Michel Drapeau noted that a proactive disclosure system would not require an amendment to the Act:

> There's nothing that prevents the administration—I make a difference between government and administration—from posting anything that they have in a proactive way.[88]

Christian Whalen of the New Brunswick Office of the Ombudsman testified that there would be two components to implementing such a system:

> So there is the issue of making the access to information process amenable to Internet usage, and then there is the proactive disclosure aspect of the issue of trying to anticipate what are the common access to information requests and making sure that

86 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1545 to 1550).

87 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1545).

88 Standing Committee on Access to Information, Privacy and Ethics, Michel Drapeau, March 30, 2009 (1635).

> type of information is publicly posted in advance of people having to come in and ask for the information. I think both those things are important and Information Commissioners across Canada, the federal commissioner included, are very much oriented towards encouraging those types of practices.[89]

Priscilla Platt of the Canadian Bar Association noted that such an approach is already in place with the Treasury Board's routine disclosure of travel and meal expenses for public servants, and that it has been very successful:

> I think we could be using technology much better. I mention this proactive disclosure example from 2006 with Treasury Board. It's been enormously successful. Everyone's always interested. We all know what prompted the interest in how much people spent for their lunches and so forth: it was taxpayers' dollars.
>
> We could use that system in some of the ways we're recommending here to make the system more open, without requiring people to go through even an access request at all.[90]

Duff Conacher of Democracy Watch gave the view that the costs of implementing this system would ultimately pay for themselves:

> There is a cost to this system, but if there is proactive routine disclosure of documents, the costs will decrease enormously because requests and complaints will also decrease.[91]

The witnesses also indicated that proactive routine disclosure is a growing modern trend which many more countries are expected to implement in the near future. Marc-Aurèle Racicot noted:

> If I could add to that, the next generation of access legislation will be proactive disclosure. We're not looking at a request initiated by a citizen; rather, the government or administration would be disclosing the information proactively. There would be no fees; you'd just need a good computer or a good library.[92]

More than one witness commented that the original intent of the *Access to Information Act* was to provide a type of 'back-up system' through which the public could obtain documents if no other means was open to them, but that it was not intended to be the sole avenue through which the public could examine government documents. The Information Commissioner stated:

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89 Standing Committee on Access to Information, Privacy and Ethics, Christian Whalen, April 22, 2009 (1655).

90 Standing Committee on Access to Information, Privacy and Ethics, Priscilla Platt, May 6, 2009 (1605).

91 Standing Committee on Access to Information, Privacy and Ethics, Duff Conacher, March 30, 2009 (1550).

92 Standing Committee on Access to Information, Privacy and Ethics, Marc-Aurèle Racicot, March 30, 2009 (1655).

> The statute was never designed to be user pay. Indeed, it was designed to be "on top of". The normal way to get information is simply to ask for it for free, since the taxpayer has already paid for the document that he or she may be looking for. And section 2 of the act, which was adopted in 1983, clearly says that the act is intended to complement and not replace existing procedures for access to government information. It is not intended to limit in any way the type of information that is normally available to the general public.[93]

Marc-Aurèle Racicot also noted how the proactive model would fit with the original intent of the *Act*:

> You have to look at the right of access. It's not the privilege of access. You have a right to access information.
>
> If you see a large volume of requests aimed at one department, it means there's a need to be more informed about that department. So why not make it public instead of waiting and accusing the requester of making too many requests? There's a will from the citizen to be informed about that department, so make it public.[94]

Obligation to Document Government Decisions

Several witnesses raised the possibility of adding to the law a duty to document government decisions in writing. The current regime governing the creation of government records is the *Library and Archives of Canada Act.* The current Librarian and Archivist of Canada was invited to testify before the Committee, but declined.

Ken Rubin's proposal, in the form of a draft bill which he presented before the Committee, contained a recommendation for a "duty to document" to be contained in the access to information legislation, which would include a requirement for detailed documentation of key actions and decisions, and an obligation to keep records up to date and readily retrievable, with penalties for non-compliance.[95] He explained his rationale for the recommendation:

> Certainly the national librarian has to be involved. […] We have a serious problem, not only for history but for access users. We don't keep proper records, so you don't necessarily get an accurate picture of what's going on. That's why the duty to document decisions and actions in detail is so very important.[96]

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93 Standing Committee on Access to Information, Privacy and Ethics, the Information Commissioner, March 9, 2009 (1615).

94 Standing Committee on Access to Information, Privacy and Ethics, Marc-Aurèle Racicot, March 30, 2009 (1720).

95 Standing Committee on Access to Information, Privacy and Ethics, Ken Rubin, April 1 2009 (1555).

96 Standing Committee on Access to Information, Privacy and Ethics, Ken Rubin, April 1, 2009 (1705).

Vincent Gogolek noticed that this type of duty had been included in the draft bill of former Commissioner Reid as well, and opined that the federal Information Commissioner "needs it in his own act."[97]

David Loukidelis, the current Information and Privacy Commissioner of British Columbia, stated that he has recommended that a duty to document be introduced in British Columbia. He stated:

> I have recommended in the past that there be a legislative duty to document here in British Columbia—not, I would argue, an onerous one by any means, but some duty on the part of public servants to record actions and decisions and reasons therefor. One can control this by prescribing certain criteria that would surround the extent of it. Again, if you were making a policy decision or taking a decision to embark on a program or cancel it, it seems to me there should be some duty to document. This is not just a question of creating records for the purposes of openness and accountability. One could argue, and I do argue, that it is a question of good governance and good government operation, and it fits into this larger context that I believe archivists and librarians and others are deeply concerned about in relation to the information management and information holdings of governments across the country, and to the state of information management legislation and practice here in Canada.[98]

The Information Commissioner himself stated that in his view the creation of records belonged under the *Library and Archives of Canada Act*, where it is currently situated:

> My recollection on the duty to keep records is that the position of the former commissioner is mine as well. It does not belong in this statute. It belongs, I think, in the *National Archives of Canada Act*. The duty to keep records and the concept of access to those records are two principles. It should be the responsibility of the archivist to articulate what is necessary and should be kept for preservation over the long term and what should be kept in a temporary timeframe, so that the history of policy development is in a framework that the archives, at the end of the day, will require.[99]

Restoration of CAIRS

One witness, David Fraser of the CBA, made the suggestion of restoring the Coordination of Access to Information Requests System (CAIRS). CAIRS was a federal government database which contained an ongoing trackable history of access-to-information requests made to all government departments, which the government stopped using in May 2008.[100]

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97 Standing Committee on Access to Information, Privacy and Ethics, Vincent Gogolek, April 1, 2009 (1705).

98 Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1700).

99 Standing Committee on Access to Information, Privacy and Ethics, Robert Marleau, March 9, 2009 (1700).

100 Standing Committee on Access to Information, Privacy and Ethics, David Fraser, May 6, 2009 (1535).

The CBA proposed to the Committee that CAIRS be reactivated in a form that would make all of the information on it publicly accessible, rather than the previous practice of Treasury Board releasing monthly updates from the database to interested researchers.[101]

The CBA stated:

> The CBA's national privacy and access law section has considered the fact that it was discontinued, and has also carefully considered the fact that during the time it was in place, the system itself was subject to *Access to Information Act* requests. It was used by journalists and others with a strong interest in *Access to Information Act* issues in order to keep track of those issues and essentially be able to tell how the act itself was working and what sorts of requests were going through. It was an important insight into what was happening inside government.
>
> […]
>
> This would be consistent with the Canadian Bar Association's view that the *Access to Information Act*, which has been characterized as quasi-constitutional by many courts and in a number of court cases, is a critical tool in making sure that our form of Canadian responsible government maintains the characteristic of being transparent and open to everybody. It increases accountability, and the restoration and expansion of this CAIRS system would go a long way towards doing that. [102]

101 Two researchers in particular, Professor Alaisdair Roberts and journalist David McKee, took the monthly updates provided by the Treasury Board and put them on-line for the public to use at http://www.onlinedemocracy.ca/CAIRS/CAIA-OD.htm as a voluntary project.

102 Standing Committee on Access to Information, Privacy and Ethics, David Fraser, May 6, 2009 (1535).

LIST OF RECOMMENDATIONS

Recommendation No. 1: That Parliament review the *Access to Information Act* every five years.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 2: That all persons have a right to request access to records pursuant to the *Access to Information Act.*

> **Committee Response: The Committee supports this recommendation but strongly encourages the Minister to consider what cost-recovery options could be used to defray the costs of opening the process to foreign users and for all commercial users who resell the information for profit.**

Recommendation No. 3: That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 4: That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints.

> **Committee Response: The Committee supports this recommendation and wishes to underline the need to establish a clear and defined framework for the exercise of this power, including consideration of limiting the Commissioner's discretion to cases that involve frivolous and vexatious complaints or when precedents responsive to the complaint have already been established by a previous investigation. The Committee further recommends that the Commissioner should be required to provide a written response to the complainant with the reasons that the discretion has been invoked.**

Recommendation No. 5: That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 6: That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 7: That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts.

> **Committee Response: The Committee supports this recommendation subject to provisions protecting parliamentary and judicial privilege, and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 8: That the *Access to Information Act* apply to Cabinet confidences.

> **Committee Response: The Committee notes that there were disagreements among witnesses about this recommendation and suggests that the Minister consider this recommendation in light of the arguments raised by the witnesses and the experience of other jurisidictions.**

Recommendation No. 9: That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond 60 days.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 10: That the *Access to Information Act* specify timeframes for completing administrative investigations.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 11: That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

Recommendation No. 12: That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester.

> **Committee Response: The Committee supports this recommendation and suggests that the Minister consider amending the Act accordingly.**

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings (Meetings Nos 7, 8, 9, 12, 13, 15, 18, 19, 23, 26, 27, 28) is tabled.

Respectfully submitted,

Paul Szabo, MP

Chair

Supplementary Report from Bill Siksay MP (Burnaby-Douglas) for the New Democratic Party

New Democrats support all 12 recommendations from the Information Commissioner of Canada and urge the government bring forward legislation that updates the Access to Information Act without further delay.

New Democrats concur with the Standing Committee position on the Commissioner's recommendations 1, 3, 4, 5, 6, 7, 9, and 10.

We make the following recommendations with regards to recommendations 2, 8, 11 and 12:

Recommendation 2: That all persons have a right to request access to records pursuant to the Access to Information Act.

New Democrats support the Commissioner's recommendation and urge the Minister to amend the act accordingly. We believe that universal access to information in Canada would be in keeping with the development of access to information legislation in other countries and with the principles of open and transparent government. Universal access could make the process more direct by reducing the need to contract with an intermediary to undertake an access request or file an access complaint. We do not support the qualification put forward by the committee that this expansion of access should be tied to cost recovery measures, which we believe could interfere with access to information as a quasi-constitutional right. Furthermore, we are concerned that a mechanism to charge non-Canadians, non-permanent residents, and profit-making businesses cost recovery fees would be overly bureaucratic, cumbersome, easily circumvented, and expensive to operate.

Recommendation 8: That the Access to Information Act apply to Cabinet confidences.

New Democrats support this recommendation from the Commissioner. The current situation where all Cabinet confidences are excluded from the Access to Information Act is not acceptable and does not support openness and transparency in government. The Information Commissioner and the Federal Court should have the ability to review the designation of a document as a cabinet confidence and more careful definitions of cabinet confidences should be established. Many jurisdictions have moved in this direction without impairing the Cabinet decision-making process. New Democrats also believe that the Open Government Act proposed by former Information Commissioner Reid and tabled in the current Parliament as Bill C326 - An Act to amend the Access to Information Act (open government) by NDP MP Pat Martin also offers excellent

guidance and specific proposals as to how access to information to cabinet confidences might be appropriately accomplished.

Recommendation 11: That the Access to Information Act allow requesters the option of direct recourse to the Federal Court for access refusals.

New Democrats support the Commissioner's recommendation, as did the committee. However, New Democrats acknowledge that seeking recourse to Federal Court is not possible for a significant number of Canadians and that it can be complex and expensive. While we believe that this direct access to the Federal Court should be available, *at the same time*, we call on the government to ensure that the Information Commissioner has adequate and effective tools to appropriately undertake and complete time sensitive investigations. The ability of the Information Commissioner to fulfill his mandate and undertake timely investigations must be a priority to ensure fairness and equality.

Recommendation 12: That the Access to Information Act allow time extensions for multiple and simultaneous requests from a single requester.

New Democrats support the Commissioner's recommendation but believe that any such time extension should be subject to review by the Commissioner.

Other issues:
New Democrats emphasize that a commitment to increased proactive disclosure on the part of the government would be a significant and cost-effective step toward improving access to information and providing transparency and openness in government.

Reform of the Access to Information Act should recognize access to information as a quasi-constitutional right. The government should consider former Information Commissioner Reid's Open Government Act when developing its legislative proposals. Full order making powers for the Information Commissioner and the duty to document should be further considered by both the Commissioner and the government. Urgent consideration should also be given to re-establishing the Coordination of Access to Information Requests System (CAIRS).

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Office of the Information Commissioner of Canada	2009/03/09	8
Suzanne Legault, Assistant Commissioner, Policy, Communications and Operations		
Robert Marleau, Information Commissioner		
Andrea J. Neill, Assistant Commissioner, Complaints Resolution and Compliance		
As an individual	2009/03/11	9
Murray Rankin, Lawyer		
Canadian Association of Journalists		
Stanley Tromp, Coordinator, Freedom of Information Caucus		
Information and Privacy Commission of British Columbia		
David Loukidelis, Commissioner		
As individuals	2009/03/30	12
Michel Drapeau, Professor,University of Ottawa		
Marc-Aurèle Racicot, Lawyer		
Democracy Watch		
Duff Conacher, Coordinator		
As an individual	2009/04/01	13
Ken Rubin		
BC Freedom of Information and Privacy Association		
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New Brunswick Office of the Ombudsman	2009/04/22	15
Christian Whalen, Legal Counsel		
Department of Justice	2009/05/04	18
Carolyn Kobernick, Assistant Deputy Minister, Public Law Sector		
Denis Kratchanov, Director and General Counsel, Information Law and Privacy Section		
Hon. Rob Nicholson, Minister of Justice and Attorney General of Canada		
Joan Remsu, General Counsel and Director, Public Law Policy Section		

Canadian Bar Association	2009/05/06	19
David Fraser, Vice-Chair, National Privacy and Access Law Section		
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Suzanne Legault, Assistant Commissioner, Policy, Communications and Operations		
Robert Marleau, Information Commissioner		
Andrea J. Neill, Assistant Commissioner, Complaints Resolution and Compliance		

APPENDIX B
LIST OF BRIEFS

Organizations and Individuals

Canadian Association of Journalists

Canadian Bar Association

Drapeau, Michel

Racicot, Marc-Aurèle

Rubin, Ken

APPENDIX C
STRENGTHENING THE *ACCESS TO INFORMATION ACT* TO MEET TODAY'S IMPERATIVES

Information Commissioner of Canada

Commissaire à l'information du Canada

Strengthening the *Access to Information Act* To Meet Today's Imperatives

Appearance before the Standing Committee on Access to Information, Privacy and Ethics

March 4, 2009

"Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners–and then, hopefully, look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present."

Stanley Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, September 2008.

Message from the Information Commissioner

The *Access to Information Act* must be strengthened to meet today's imperatives. While it is recognized that the Act is sound in terms of its concept and balance, work is uregently needed to modernize it from a legislative perspective and to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.

The document contains a list of specific recommendations that represent an important first step in meeting the challenge of modernizing the Act. The list is by no means comprehensive. The recommendations address only the most pressing matters. They may be categorized under the general themes of Parliamentary review, providing a right of access to all, strengthening the compliance model, public education, research and advice, coverage and timeliness.

The *Access to Information Act* was a birthday gift to the country when it was proclaimed on Canada Day in 1983. Now, more than twenty-five years later, Parliamentarians have a unique opportunity to implement measures to modernize the access to information regime and bring it steadfastly into the 21st century. The work of the Standing Committee on Access to Information, Privacy and Ethics reflects Parliament's understanding of the importance of the Act and its commitment to improve it.

What has transpired since 1983? All provinces and territories have joined early adopters Nova Scotia (1977) and New Brunswick (1978) by implementing increasingly progressive freedom of information laws. On the international front, upwards of 70 countries have adopted right to information laws and another 20 to 30 countries are considering them according to a recent study by the United Nations Educational, Scientific and Cultural Organization.

While it is recognized that the *Access to Information Act* remains sound in terms of its concept and balance, work is needed to modernize it from legislative and administrative

perspectives and to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.

The way in which the government conducts business has changed dramatically. Departments and agencies continue to devise innovative ways of delivering their programs and services electronically. New technologies have transformed the means by which information is created, managed and communicated. The volume of information continues to increase exponentially.

Important to ensuring access to all is the implementation of technologically advanced systems to support access functions and the dissemination of information. Electronic request processing and links with institutions' communications and publishing modules should be basic requirements of the infrastructure. Such modernization would facilitate the implementation of a necessary program of proactive disclosure to disseminate information in a cost-effective and timely fashion.

The *Access to Information Act* has rarely been reviewed. The only statutory review was conducted by the Standing Committee on Justice and Solicitor General. In 1987, it issued a report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. In the report, the Committee asserted that the Act was of "similar significance" to the *Canadian Charter of Rights and Freedoms*. Later the courts would affirm that the rights embedded in access and privacy legislation were fundamental, democratic rights and would recognize the Act's "quasi-constitutional" status.

In his tenth-year anniversary report, Information Commissioner John Grace presented his case for reform. He recognized that "while the Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information – an approach which is too slow and cumbersome for an information society." Today, most of his forty-three recommendations remain valid candidates for inclusion in a renewed *Access to Information Act*.

In 2002, the Access to Information Review Task Force issued its report entitled, *Access to Information: Making it Work for Canadians*. The comprehensive report made 139 recommendations for legislative, administrative and cultural reform. Nothing came of this report.

Many Private Members' bills have been introduced. They have ranged in scope from amendments to particular provisions of the Act to legislation comprised of sweeping reform measures.

Regardless of the various reform movements, changes to date have been modest. Section 67.1 was added in 1999 to make it an offence to willfully obstruct the right of access. In 2006, the *Federal Accountability Act* (FedAA) made several amendments to the *Access to Information Act*. Changes included codifying the "duty to assist" requesters and expanding the coverage of the Act, notably to remaining Crown corporations and their subsidiaries. Regrettably, the FedAA also created additional exemptions and exclusions applicable to the new institutions.

In 2005, a draft bill, entitled the *Open Government Act*, was tabled before the Standing Committee on Access to Information, Privacy and Ethics. Developed by Information Commissioner John Reid at the request of the Standing Committee, the proposed Act

included substantial changes to the law. A primary objective was to address concerns about a “culture of secrecy” within political and bureaucratic environments. The proposed Act was endorsed by Commissioner Gomery in his Phase 2 report, *Restoring Accountability*. I generally support the draft bill. However, I believe the recommendations outlined in this document should be implemented without further delay.

Recommendations

Recommendation Number 1: That Parliament review the *Access to Information Act* every five years

Recommendation Number 2: That all persons have a right to request access to records pursuant to the *Access to Information Act*

Recommendation Number 3: That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters

Recommendation Number 4: That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints

Recommendation Number 5: That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner

Recommendation Number 6: That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives

Recommendation Number 7: That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts

Recommendation Number 8: That the *Access to Information Act* apply to Cabinet confidences

Recommendation Number 9: That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond sixty days

Recommendation Number 10: That the *Access to Information Act* specify timeframes for completing administrative investigations

Recommendation Number 11: That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals

Recommendation Number 12: That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester

Recommendation Number 1

That Parliament review the *Access to Information Act* every five years

Although the *Access to Information Act* requires that the administration of the legislation "shall be reviewed on a permanent basis" by a Parliamentary Committee, the only statutory review undertaken was by the Standing Committee on Justice and Solicitor General in 1986. The Committee issued a comprehensive report entitled, *Open and Shut: Enhancing the Right to Know and the Right to Privacy,* in 1987 and the government responded to it in *Access and Privacy: The Steps Ahead*. There have been reform initiatives since that time but there is currently no provision for scheduled reviews to ensure that the legislation continues to reflect the needs of Canadians in a constantly changing environment.

Establishing regular reviews would yield opportunities to examine and improve practices and harmonize federal legislation with national and international standards. Ultimately, the reviews would foster an enhanced awareness and appreciation of access to information rights within political and bureaucratic spheres and, most importantly, by the public. The *Open Government Act* proposed a review of the administration of the *Access to Information Act* every five years.

Therefore, it is recommended that the Act be amended to require a review by Parliament every five years. This schedule would provide an opportunity for Parliamentarians to identify systemic issues, determine best practices in other jurisdictions and recommend changes to legislative or administrative structures.

Benchmarking

The requirement to review access and privacy legislation on a regular basis has been entrenched in more recent regimes. The federal *Personal Information Protection and Electronic Documents Act* requires that it be reviewed by Parliament every five years. Most provincial and territorial statutes contain similar provisions.

In the United States, the *Open Government Act of 2007* re-enforced the importance of legislative reviews. It states that

> *Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the* Freedom of Information Act*), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.*

Recommendation Number 2

That all persons have a right to request access to records pursuant to the *Access to Information Act*

The *Access to Information Act* provides the right to request and receive information held by federal institutions only to Canadian citizens, permanent residents, and individuals and incorporated entities present in Canada. The legislation does not grant universal access. Foreign companies and individuals can obtain indirect access to the same information by engaging Canadian agents or information brokers.

In a recent submission to the Office of the Information Commissioner on how to strengthen the *Access to Information Act*, the Commonwealth Human Rights Initiative stated that the right of access in Canada "falls short" of compliance with a human rights convention. It noted that

> *Canada, as a member of the United Nations, has acceded to* the International Covenant on Civil and Political Rights (ICCPR) *in 1976. Article 19 expressly provides for every human being the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The Organization of American States and the Commonwealth – both of which Canada is a member – have also endorsed minimum standards on the right to information that must be enjoyed by all people. These minimum standards should form the basis for Canada's information access regime.*

Recommendations from previous reviews of the legislation have advocated an amendment providing "any person" with the right of access to records. The *Open Government Act* included a provision that "subject to this Act, but notwithstanding any other Act of Parliament, any person has a right to and shall, on request, be given access to any record under the control of a government institution."

In an environment of increasing globalization, people will require access to information regardless of their physical presence. From the practical perspective of networked communications and determining eligibility, it is becoming difficult to sustain the concept of limited access. Therefore, it is recommended that the right of access be provided to all.

Benchmarking

The restriction on access is inconsistent with other Canadian and international standards. All provinces and most countries, including Australia, Ireland, Mexico, the United Kingdom and the United States, provide access to all persons regardless of citizenship or geographical location. These jurisdictions report that foreign requests have not resulted in a significant increase in the volume of requests. The major difference is that individuals are permitted to make requests directly rather than through agents.

Recommendation Number 3

That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters

The debate surrounding the authorities allocated to Information Commissioners has generally involved the examination of two models–the ombudsman model and the quasi-judicial model. The ombudsman model is based on investigation and moral suasion while the quasi-judicial model provides for order-making powers.

The Commissioner, like other bodies that engage in fact-finding and recommendation making activities, currently has jurisdiction to issue orders in the course of carrying out investigations. This includes confidentiality orders to ensure the privacy of investigations.

It is recommended that a third model be adopted. Put forward by the Standing Committee on Justice and Solicitor General, it retains the advantages of the advisory and informal role played by the Commissioner while facilitating an expeditious resolution of administrative matters. In its report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, the Committee recommended that the "central mandate of the Information Commissioner and Privacy Commissioner to make recommendations on disclosure be confirmed, but that the power allowing the Information Commissioner to make binding orders for subsidiary issues (relating specifically to delays, fees, fee waivers and extensions of time) be provided in amendments to *the Access to Information Act*."

Benchmarking

The Special Advisor to the Minister of Justice, Justice La Forest, reviewed the issue in his report entitled, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*. He acknowledged the success of the Commissioners in Alberta, British Columbia, Quebec, Ontario and Prince Edward Island in settling complaints in a manner satisfactory to all parties by employing a combination of their powers to render final decisions to settle disputes, subject to judicial review, and their practices of resolving cases through conciliation, mediation and other informal means.

Justice La Forest quoted the arguments of the Access to Information Review Task Force in favour of order-making powers:

> *Many users would argue that a Commissioner with order-making powers would provide a more effective avenue of redress for complainants. Under the current system, a complainant who is not satisfied with a recommendation by*

> *the Commissioner or the government's response must apply for review by the Federal Court. This is both time-consuming and expensive.*
>
> *Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less ad hoc than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied. As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.*

However, he balanced the argument with cautions that

> *There is a danger that a quasi-judicial, order-making model could become too formalized, resulting in a process that is nearly as expensive and time-consuming as court proceedings. It is also arguable that the absence of an order-making power allows the conventional ombudsman to adopt a stronger posture in relation to government than a quasi-judicial decision-maker. There is also some virtue in having contentious access and privacy issues settled by the courts, where proceedings are generally open to the public. The ability of both the commissioners and the complainants to resort to the courts may well be seen to be a sufficient sanction for non-compliance, particularly in relation to some of the more sensitive issues arising at the federal level.*

Recommendation Number 4

That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints

The *Access to Information Act* requires that the Information Commissioner investigate all complaints received and report findings of the investigations. These complaints may be in relation to a broad range of matters relating to requesting or obtaining access under the Act. The Act contains no provision that would grant the Commissioner any measure of discretion to investigate a complaint.

It is recommended that the *Access to Information Act* be amended to allow the Information Commissioner discretion on whether to investigate complaints. Such a provision would enable the Commissioner to exercise a measure of control over the complaint process and the utilization of resources by ensuring they are focused on significant individual requests and public issues. Any decision not to investigate a complaint could be subject to the usual judicial review process.

Benchmarking

Most of the provinces' and territories' freedom of information statutes grant Commissioners an ability to decide not to review some complaints received. Both Alberta's and Prince Edward Island's *Freedom of Information and Protection of Privacy* statutes grant the Commissioner the discretion to refuse to conduct an inquiry where the Commissioner is of the view that either the subject-matter of a request for a review has already been dealt with in an order or investigation report, or other "circumstances warrant refusing to conduct an inquiry." A similar provision is found in Manitoba's legislation.

Other provinces, including Saskatchewan and Quebec, and two of the territories, the Northwest Territories and Nunavut, have statutes that provide further guidance as to when a Commissioner may decide not to review a complaint. With slight variations in wording, these jurisdictions include provisions that enable Commissioners to refuse to review or discontinue a review of a complaint where, for example, the Commissioner is of the opinion that the complaint is trivial, is not made in good faith, is frivolous or vexatious, or amounts to an abuse of the right to access.

Recommendation Number 5

That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner

In 1987, in *Access and Privacy: The Steps Ahead*, its response to a recommendation made by the Standing Committee on Justice and Solicitor General, the government stated:

> *An essential part of making the* Access to Information Act *more effective is to ensure that it is better known and understood by the public. . . The government will also amend the* Access to Information Act *to provide a public education mandate for the office of the Information Commissioner.*

Obtaining access to information in institutional records is critical to the effective participation of citizens in the democratic process. Studies of the *Access to Information Act* consistently re-affirm that Canadians generally lack an awareness and understanding of the rights afforded to them by the legislation. They have also recommended that the legislation be amended to recognize the role of the Information Commissioner in educating the public about the Act and access to government information in general.

The *Open Government Act* included such a proposal and Justice La Forest, in his study of the Offices of the Information and Privacy Commissioners, acknowledged the importance of this function. He stated that "just as there is a need to inculcate access and privacy norms in government, it is also necessary to educate the public about their access and privacy rights and inform them of the threats posed to these rights by various technological, social, and legislative developments."

Providing a mandate for educating the public and conducting research on access rights is fully compatible with the responsibilities of the Information Commissioner. Experiences in other jurisdictions have demonstrated that it poses no risk to the impartiality of the Office. The mandate will help ensure that Canadians are aware of and know how to exercise their rights to information. Ultimately, it promotes informed dialogue and accountability. Therefore, it is recommended that the *Access to Information Act* be amended to provide a public education and research mandate to the Information Commissioner.

Benchmarking

Many Canadian and international access to information laws have incorporated an education and research component that explicitly empowers Commissioners to promote a public understanding of access rights and to conduct research into issues affecting the

public's right to know. As part of the responsibility "for monitoring how this Act is administered to ensure that its purposes are achieved", British Columbia's *Freedom of Information and Protection of Privacy Act* explicitly provides the Commissioner with the mandate to "inform the public about this Act" and "engage in or commission research into anything affecting the achievement of the purposes of this Act."

The federal *Personal Information Protection and Electronic Documents Act* provides an excellent model of a public education mandate. It requires that the "Commissioner shall develop and conduct information programs to foster public understanding," and "undertake and publish research that is related to the protection of personal information." With this mandate, the Privacy Commissioner has achieved admirable results in informing Canadians about their privacy rights with respect to personal information held by private sector organizations and has initiated a comprehensive research program that has produced valuable studies on key privacy issues. The Privacy Commissioner has recommended that the *Privacy Act* be updated to incorporate a similar mandate.

Recommendation Number 6

That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives

Federal Information Commissioners have generally considered it to be an important part of their role and responsibilities to comment on the potential impacts of proposed legislative initiatives. This function is not explicitly reflected in legislation.

The *Report of the Access to Information Review Task Force* stated:

> *We believe that there are many circumstances in which the Treasury Board Secretariat, or a government institution, would benefit from the advice of the Information Commissioner. For example, advice on proposed legislation, regulations, policies or programs that could have an impact on access to information; advice on guidelines; advice on the administration of the Act in an institution; and advice on information management practices and policies.*

This view was endorsed by Justice La Forest in his report entitled, *The Offices of the Information Commissioner and Privacy Commissioners: The Merger and Related Issues*. He recommended that:

> *The* Access to Information Act *and the* Privacy Act *should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction. Ideally, there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage.*

The *Open Government Act* proposed providing an advisory mandate to the Information Commissioner. The provision stated that the "Information Commissioner is generally responsible for monitoring the administration of this Act to ensure that its purposes are achieved. Accordingly, the Information Commissioner may make public comment on the transparency and accountability implications of proposed legislative schemes or government programs."

Therefore, it is recommended that the *Access to Information Act* explicitly recognize the role of the Information Commissioner in providing advice to institutions regarding proposed legislative initiatives. Institutions should be required to notify and consult with

the Commissioner on any legislative matters that may have an impact on the right of Canadians to access government information.

Benchmarking

Many jurisdictions include such a provision in their legislation. Both Alberta's and British Columbia's *Freedom of Information and Protection of Privacy Acts* specifically state that the "Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may … comment on the implications for access to information or for protection of personal privacy of proposed legislative schemes or programs of public bodies."

Recommendation Number 7

That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts

The federal *Access to Information Act* has not kept pace with its provincial, territorial and international counterparts in terms of its coverage of institutions. Notably, it does not currently apply to the Senate, the House of Commons, the Library of Parliament or the judiciary.

In 1986, in *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, the Standing Committee on Justice and Solicitor General recommended that the Act apply to the Senate, the House of Commons, except for the offices of Senators and Members of the House of Commons, and the Library of Parliament. It also referred to the need to protect Parliamentary privileges.

The recommendation was reiterated in the 2002 *Report of the Access to Information Review Task Force, Access to Information: Making it Work for Canadians*. The Task Force also considered a modified redress process to resolve complaints about the handling of requests for these records.

Canadians expect all publicly funded bodies to be publicly accountable under access to information legislation. Therefore, it is recommended that the administrative records of the Senate, the House of Commons, the Library of Parliament and the judicial branch of government be covered by the Act, subject to provisions protecting Parliamentary and judicial privileges.

Benchmarking

Jurisdictions such as Alberta, Newfoundland and Labrador, the United Kingdom, Australia and Ireland include Parliament in the coverage of their legislation. Parliamentary privilege exemptions and provisions to exclude personal, political and constituency records are provided in various forms. Offices of Parliamentarians are not covered by the Acts. The *Freedom of Information Act 2000* in the United Kingdom provides that information is exempt if this "is required for the purpose of avoiding an infringement of the privileges of either House of Parliament."

Court administration records should be available under access legislation. In jurisdictions such as Alberta and British Columbia, the Acts apply to all records "including court administration records." Exclusions are provided for records in court files, for the records of judges and for personal notes, communications or draft decisions of persons who are acting in a judicial or quasi-judicial capacity.

Recommendation Number 8

That the *Access to Information Act* apply to Cabinet confidences

The *Access to Information Act* does not apply to confidences of the Queen's Privy Council for Canada which includes Cabinet records and records of Cabinet committees. The Act provides a representative list of types of documents that constitute a confidence. Once a decision has been rendered that a record is a confidence, it cannot be reviewed either by the Information Commissioner or by the Federal Court. However, the exclusion does not apply where the records have been in existence for more than twenty years or to discussion papers, if the decisions to which the papers relate have been made public or four years have passed since the decisions were made.

The role of Cabinet in a Westminster system of Parliament and the need to protect the Cabinet decision-making process are well understood. However, experience in other provincial, territorial and international jurisdictions with Westminster-style governments has demonstrated that the deliberations and decisions of Cabinet can be properly protected without excluding them from the purview of the legislation.

The *Open Government Act* proposed amending the *Access to Information Act* to provide that confidences of the Queen's Privy Council for Canada be subject to a mandatory exemption from disclosure. It set out a substantive definition of Cabinet confidences. It included information, the disclosure of which would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers. The general definition would remain current in the event of changes to the Cabinet paper process and to the nature and types of records. As with other exemption provisions, a refusal to disclose would have been subject to an investigation by the Information Commissioner and review by the Federal Court. This approach would fulfill the principle of the Act that decisions on the disclosure of government information should be reviewed independently of government.

The status of Cabinet confidences has been under constant debate since the inception of the legislation. Although there have been variations on the theme of how the issue should be resolved, the majority of reports have recommended that confidences be treated as exemptions rather than exclusions. Therefore, it is recommended the *Access to Information Act* apply to Cabinet confidences as discretionary exemptions.

Benchmarking

Most Canadian jurisdictions have exemptions rather than exclusions for Cabinet records. The exemptions are time-limited with periods ranging from ten to twenty-five years. In addition, most laws do not specify document types but focus on information that would reveal the "substance of deliberations" of Cabinet. This concept is contained in the laws of Alberta, British Columbia, Ontario and Prince Edward Island. Alberta and British

Columbia also provide for a public interest override, while Ontario provides for a limited public interest override.

In New Zealand, the *Official Information Act 1982* provides a very broad definition of what constitutes official information for the purposes of the Act. Official information means "any information held by a Minister of the Crown in his official capacity." In addition, New Zealand encourages the practice of proactive disclosure of Cabinet documents. In a speech entitled, *The Official Information Act and Privacy: New Zealand's Story* at the FOI Live 2005 Conference in London in June 2005, Marie Shroff, Privacy Commissioner of New Zealand and former Secretary of the New Zealand Cabinet, stated

> *I have reserved to the last in this list of practical measures the technique of proactive release. Look at any New Zealand government or state sector website and you will find the full text of Cabinet papers and Cabinet decisions and sometimes endless lists of discussion documents on highly sensitive matters of government policy, usually seeking public submissions. Treasury and the Ministry of Transport, for example, have recent Cabinet papers on their websites: Transport about a major roading decision; and Treasury about a savings package which was an important part of last month's 2005 budget.*

Recommendation Number 9

That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond sixty days

The time limit for responding to an access to information request is thirty calendar days following receipt of the request. The limit can be extended "for a reasonable period of time" if the request involves processing a large volume of records, which would interfere with the operations of the institution, if external consultations cannot be completed within thirty days, or if third party notification requirements must be accommodated.

Institutions must notify the Information Commissioner of all extensions greater than thirty days. There are no limitations on the length of extensions and no prescribed criteria for what constitutes "reasonable." Institutions do not universally comply with the requirement to notify the Commissioner of extensions. Although institutions are considered to be in a "deemed refusal" when time limits are exceeded, the *Access to Information Act* does not contain penalties or sanctions in such situations.

In principle, extensions should be required only in exceptional cases and should not unduly impede the release of information to requesters. The Commissioner's *Report Cards: Systemic Issues Affecting Access to Information in Canada 2007 –2008* examined the increasing use of extensions, as well as the length of extensions taken. It notes that the "lack of checks and balances needed to make sure the system is not being abused and that all institutions using extensions are doing so for legitimate and documented reasons" is of concern to this Office.

Greater oversight is required to ensure that extensions do not undermine the timely release of information. Detailed criteria and tests should be developed to assist institutions in determining what constitutes a reasonable period of time. Therefore, it is recommended that the legislation be amended to include a provision requiring the approval of the Information Commissioner for any extension that is greater than sixty days beyond the initial thirty-day limit. Finally, institutions which are deemed to have refused access to information should forfeit the entitlement to charge fees.

Benchmarking

Many jurisdictions prescribe processes whereby public bodies may obtain extensions to initial time limits. Newfoundland and Labrador and Saskatchewan allow for maximum extensions of thirty days. Quebec permits an extension for a maximum of ten days. Extensions of thirty days or more may be granted with the permission of the Commissioners in Alberta, British Columbia, Manitoba, Nova Scotia and Prince Edward Island.

In the United States, institutions that have not responded to requests within the specified twenty days are limited with regards to assessing fees. They cannot charge search fees

or, where the request originates from the media or educational or scientific institutions, duplication fees unless there are unusual or exceptional circumstances surrounding the processing of the request. The *Freedom of Information Act* also includes a provision that allows applicants to request expedited processing if they are able to demonstrate a "compelling need".

Recommendation Number 10

That the *Access to Information Act* specify timeframes for completing administrative investigations

The *Access to Information Act* does not impose specific time limits on the Information Commissioner to investigate administrative complaints. In addition, once an investigation has been initiated, institutions often experience difficulties in responding quickly with the necessary documentation and representations. As a result of these factors, complainants can become frustrated by the failure to resolve their complaints in a timely manner.

The proposed *Open Government Act* suggested that "an investigation into a complaint under this section shall be completed within 120 days after the complaint is received or initiated by the Information Commissioner unless the Commissioner notifies the person who made the complaint, the head of the government institution concerned and any third party involved in the complaint that the Commissioner is extending the time limit, and provides an anticipated date for the completion of the investigation."

The Access to Information Review Task Force noted that provincial Commissioners had informed it that time limits had proven adequate to conduct their investigations. It also remarked that both the Office of the Information Commissioner and institutions would have to adjust their processes and be appropriately resourced to adhere to time limits on investigations. Therefore, it is recommended that the *Access to Information Act* be amended to specify a ninety day timeframe for completing administrative investigations.

Benchmarking

Citing a combination of legislative provisions in Alberta, British Columbia and Manitoba, the Task Force recommended that:

> *[T]he Act be amended to require the Information Commissioner to complete investigations within 90 days, with the discretion to extend this period for a reasonable time if necessary, on giving notice of the extension to the complainant, the government institution involved and any third party.*

Recommendation Number 11

That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals

The *Access to Information Act* does not provide a mechanism by which complainants have direct access to the Federal Court with respect to access refusals. Instead, before a complainant can ask the Federal Court to review a government head's decision to refuse access to requested records, the Information Commissioner must complete his investigation.

For some requesters the two-stage review set out in the Act is contrary to the principle of timely access to requested records. Depending upon such factors as the complexity of the issues raised and the number of exemptions claimed, it is not always possible for the Commissioner to complete his investigation of complaints concerning access refusals within an expedited timeframe. Accordingly, the time required to obtain a binding resolution of a complaint can be excessive. Therefore, it is recommended that complainants have the option of direct recourse to the Federal Court for access refusals.

Benchmarking

Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* provides requesters with a choice. The requester may decide to appeal directly to the court. If the requester chooses to appeal directly to the court, he or she cannot ask the Commissioner to review the decision.

An alternative approach would be to allow a complainant to bring a judicial review application directly to the Federal Court where the complaint concerns an access refusal and the complainant has not received the Information Commissioner's report of finding within a specified time.

Recommendation Number 12

That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester

The *Access to Information Act* gives heads of federal institutions the possibility of extending time limits beyond the initial thirty days to respond to access requests for a reasonable period of time if certain situations present themselves. One of the situations occurs when the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would unreasonably interfere with the operations of the institution.

As it currently stands, the provision for extending time limits cannot be applied to situations where responding to multiple and simultaneous requests from the same applicant interferes with the operations of a government institution. This means that considerable resources can be devoted toward the same requester with no possibility for extending the period of time in which multiple and simultaneous requests are to be responded to.

The *Open Government Act* proposed amending the *Access to Information Act* by substituting a provision that stated that time limits could be extended for a reasonable period of time if "meeting the original time limit would unreasonably interfere with the operations of the government institution and the request is for a large number of records, necessitates a search through a large number of records, or is part of a group of requests for a large number records made by the same person on the same subject within a period of thirty days."

To best ensure that the access rights of all requesters are adhered to, it is recommended that government institutions have the option of claiming time extensions when responding to multiple and simultaneous requests from the same requester would unreasonably interfere with their operations.

Benchmarking

The freedom of information legislation in four Canadian provinces allows for extensions to time limits to respond to multiple requests from the same person. In Saskatchewan, an extension of the time limit for an additional reasonable period is permitted when the application is for access to a large number of records or necessitates a search through a large number of records or there is a large number of requests and completing the work within the original timeframe would unreasonably interfere with the operations of the government institution.

The legislation in both Alberta and Prince Edward Island includes a provision allowing for extensions to time limits, with the Commissioner's permission, "if multiple concurrent

requests have been made by the same applicant or multiple concurrent requests have been made by two or more applicants who work for the same organization or who work in association with each other."

In British Columbia, the Commissioner grants extensions of time limits to government institutions "if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate." Multiple concurrent requests by the same requester could plausibly represent a situation where the Information Commissioner would consider it appropriate to grant such an extension.

Outside Canada, one jurisdiction where limited time extensions are permitted in similar circumstances is Ireland. When compliance with the original time limit of two weeks after receipt of a request is not reasonably possible because the request relates to a large number of records or because numerous requests relating to the records have already been made, the head of a government institution has the option of extending the period up to a maximum of four weeks.