

THE *ACCESS TO INFORMATION ACT*:
A CRITICAL REVIEW

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For the Commissioner's views and recommendations on the subject matter, readers are advised to obtain the *Annual Report -- Information Commissioner 1993-94*. The Commissioner gratefully acknowledges the contribution of this report to ideas presented in the annual report to Parliament.

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EXECUTIVE SUMMARY

The *Access to Information Act* is now more than a decade old. Conceived in the late 1970s, drafted and passed into law in the early 1980s, the Act was quite radical in its impact. It created an enforceable right of access for Canadians, subject to limited and specific exceptions, and provided for an appeal process for refusal of access independent of government, first, to an Information Commissioner and then to the Federal Court. Despite ongoing criticism of the legislation, there is no doubt that it has served to slowly but nevertheless effectively strip away much of the natural resort to secrecy which has been one of the less useful legacies to the country of British parliamentary government. In short, the Act established new standards for the release of information which required often reluctant Ministers and bureaucrats to embrace the tenets of open, more transparent government. One cannot pick up a thoughtful editorial, public affairs magazine or throne speech and not find these concepts now heralded as one of the essential bases of the "new", more relevant politics.

The Act remains an important centrepiece of Canadian information policy, enshrining an important right which all citizens should cherish and protect. Unfortunately, it is now also showing signs of wear and is of becoming dated. Indeed, the Act is in danger of losing relevance as the country's parliamentary system faces the challenges of the rapidly developing Information Society. A parliamentary review of the legislation was undertaken in 1986 and 1987 by the Standing Committee of the House of Commons on Justice and Solicitor General. The resulting report, *OPEN AND SHUT: Enhancing The Right To Know And The Right to Privacy* made a large number of useful suggestions for both legislative and policy amendments. In its response, *Access and Privacy: The Steps Ahead*, the government of the day chose to agree to few meaningful amendments to either the *Access to Information Act* or its companion legislation, the *Privacy Act*; choosing instead to opt for administrative policy solutions, with an overwhelming emphasis on privacy issues. In any case, even the few legislative amendments proposed were not put in place.

It is fair to say, that seven years later, many of the recommendations in *Open and Shut*, while still relevant, now appear as relatively mundane and cry for inclusion in an amended access act. Perhaps more troubling is the fact that provincial freedom of information legislation, particularly in Quebec, Ontario and British Columbia, is viewed by experts as more progressive than their federal counterpart. As well, the rapid revolution in information technology which is washing over all industrialized nations, the changing international scene, and the obvious need to revamp government and parliamentary institutions are all creating conditions which call for a much more creative, innovative and strategic approach to the accessing, dissemination and unfettered use of federal government information.

All this presents pressing reasons to pursue reform of the *Access to Information Act*. It is precisely to inform the debate for reform that the Information Commissioner of Canada has commissioned this critical review of the Act, as well as surrounding information law and policy. The aim is to present options and approaches for amendment of the access legislation which will help assure that it remains an important cornerstone of national policy as the country positions itself for the Information Age.

Chapter 1

OF GENEALOGY AND NEW DIRECTIONS

Overview

Open and accessible government is an essential part of effective democracy. At the present time, it is fair to say that citizens have never been so alienated from their governments since the national crisis of the Great Depression. Federal services, including availability of information, are ranked last by the public, pitifully behind municipalities, and even the much maligned Post Office, which seems to have slipped out of being viewed as a federal institution. As Peter Calami stated last year in an *Ottawa Citizen* Op Ed page, "Canadians simply have stopped believing that their institutions - schools, churches, the media, government - are accountable".

The problem of accountability, with its sub-themes of openness, accessibility and responsiveness, appears to be a recurring theme within modern democracies. Indeed, a crisis in public disaffection has been endemic within the Canadian political process since the late 1960s. In 1968, the seminal Report of the Task Force on Government Information, *To Know and Be Known*, recommended a general national information policy based on a declared recognition of the government's duty to inform the public, the people's right to information, information dissemination and policy consultation in support of "participatory democracy" and social and cultural goals, transmission of scientific and technical information to underpin economic development and educational excellence, regional information offices and establishment of a "federal presence".

Most current federal information policy initiatives, including considerable portions of the *Access to Information Act*, can trace their origins back to *Know and Be Known*. Despite some false starts, such as the unfulfilled experiment with Information Canada, the Task Force fastened upon the Canadian public policy psyche some important approaches for dealing with citizen alienation. Born of the concerns, challenges and potential of the "youth revolution" of the 1960s, its members warned of "resentment about the gap between the old promises of democratic rhetoric and the frequently bitter realities of what the system actually delivered". No fairer description could be given of today's political malaise. The Commissioners opined that it was too simple to argue that every dramatic and alarming public development was a direct or sole result of the failure of our democratic system but they did ascribe to James Madison's famous view that "a popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both". One of their major responses was to call for a much more open government, bound by a "duty to inform" the public and to make accessible that information and data needed by the public to participate intelligently in policy debate and to hold government accountable for the decisions it takes.

These ideas about more responsive, accessible and participatory government would be fused during the 1970s with harder edge of "right to know" and more accountable government. This decade saw a widening distrust of government and bureaucracies which appeared to be distant from the public and lack any accountability for actions taken. Proximity to the United States with its Watergate scandal and dirty tricks campaign brought political pressure for freedom of information reform. Indeed, freedom of information became the rallying cry in the media for basic political reform that a simple access act could

not hope to fulfill. This development would cause considerable difficulties when the access legislation was finally introduced in the early 1980s. Nevertheless, relentless public commentary was a powerful force, which pushed the *Access to Information Act* into law in 1982, along with privacy reform, amendments to the *Canada Evidence Act* and later new legal accountability controls on the law enforcement and security agencies.

Once again, in the early 1990s, the cauldron is boiling. A fractious Canadian public is pressing for forms of government which are at once effective, responsive and cost conscious, as well as, accessible, consultative, accountable and with integrity. Parliamentary reform and restructuring of government services are very much on the table in an attempt to address the major disjoint between citizens and governments. Action on reforming the *Access to Information Act* should be front and centre on the legislative agenda.

Recommendation 1:

It is essential that reform of the Access to Information Act be undertaken as an important part of the political process now underway to renew Canadian democracy. A study of possible amendments to the legislation should be mandated either through a parliamentary committee or whatever body the current government establishes to replace the Law Reform Commission.

Recommendation 2:

It is further recommended that the Information Commissioner request the Prime Minister to write to all Ministers to inform them of the importance of adherence to the requirements of the Act to the integrity of government and his intention to undertake open government reform.

A Question of Leadership

The *Access to Information Act* has been Canada's major legislative response redressing the balance of official secrecy, elitism and non-accountable government. It established a "right to know", set standards for what the government could protect from access and fastened on a Westminster-style government, a system of review of refusals of access, which was independent of ministers. The most notable shortcoming of the legislation was its failure to bring Cabinet Confidences in under the ambit of the access rules. This government amendment, requested by the Prime Minister of the day, Pierre Trudeau and dubbed by Svend Robinson of the New Democratic Party as the "Mack truck" clause, ensured that the Act received a chary reception from the media and other opinion leaders from the very beginning.

In several ways, this was a tragic turn of events. Several important strands were lost in the bittersweet combination of euphoria and virulent criticism which accompanied the Act's passage into law in 1982 and continued as it was brought into force in 1983. One immediate result was the lack of continued, meaningful government and parliamentary leadership on the issue. The last Trudeau government had moved forward with a major accountability and citizens' rights package, which included, among other things, access and privacy legislation; reform of section 41 of the *Federal Court Act*, creation of a civilian security agency, circumscribed by law and parliamentary oversight, and had been intended to include major changes to the *Official Secrets Act*. This was a considerable feat of groundbreaking legislation based on extensive parliamentary debate and ultimately cooperation. There was an

understanding in the fields of access, privacy and security that parliament would return three years after passage of each piece of legislation to review its handiwork and recommend changes. In other words, the initial acts were seen as a starting point for ongoing change and adjustment.

This may have been a relatively naive approach but, in any case, with end of that parliament and the election of 1984, the whole thing seems to have run off the rails. The new Conservative government tried to prepare itself to live under the *Access to Information Act*, but the Prime Minister was personally wounded when records of what appeared to be extravagant travel costs were released. The problem was compounded with the "check with Fred" letter sent by the Clerk of the Privy Council to two deputy ministers instructing them to consult with the Prime Minister's Office before releasing information relating to the Prime Minister. All too quickly, the government lost patience with the legislation.

This had a major impact on government leadership responsibilities for the Act which have been and remain fragmented and unclear to the uninitiated. The Minister of Justice oversees suggested changes to the legislation and provides legal advice. The President of the Treasury Board oversees day to day administration of the legislation and issues government-wide policies regarding both interpretation and implementation of the Act and information dissemination generally. The Treasury Board Secretariat carries out this role for the President, on account of its role as the general manager of government with responsibility to issue policies which govern the operations of departments. There was some tension between Justice and TBS just after passage of the Act, the former wishing to assure a role for itself in regard to the legislation. The respective responsibilities were established by Order in Council. The Privy Council Office has a unique role under the Act in respect of deciding what is and is not a Cabinet Confidence but has sometimes chosen to exercise a more general role of setting an attitudinal tone toward the legislation. This lack of clarity in ministerial leadership and responsibility has perhaps slowed down progress on information policy issues and, in its worst guise, served to send unintended signals to an already reluctant and nervous bureaucracy that openness was not the order of the day. In the late 1980s, the resulting foot-dragging in departments led to a "shooting war" in Court with the Information Commissioner and contributed to the disrepute of the legislation on all sides.

To complicate matters, Parliament, itself, assured that care and nurturing of access legislation and open government initiatives fell to the tender mercies of the federal bureaucracy. This was done more through benign neglect than anything else. The Act included provision for an annual report by departments to Parliament. Members took no interest in what should be reported in these to effectively monitor implementation of the legislation and the reports themselves piled up in the Office of the Clerk to the Standing Committee on Justice and Solicitor General, largely unread.

Members seemed to assume that the public interest in government information issues was being looked after by the small office of their agent, the Information Commissioner. But as the current Commissioner noted in his last Annual Report to parliamentarians, their interest and leadership has been distinctly limited. The Commissioner reports annually and appears before committee once or twice each year to discuss issues and the office's estimates. The *Annual Report* receives media attention for a few days and possibly generates a question or two in the House. However, the Report is usually tabled in June, near the end of the session, and does not receive any sustained committee work such as the Public Accounts Committee provides for the *Auditor General's Report*. This has meant that there has been no sustained attention to problems identified by the Commissioner, which would support that Office in seeking improvements to the legislation and its implementation. It has also meant that little parliamentary research money has been spent on investigating information policy issues since the good work done by

the Research Branch of the Library of Parliament, when the access act was in committee stage.

After urging by the Information Commissioner, the Department of Justice and the Treasury Board Secretariat, Parliament did organize itself for the mandated three year review of the legislation. This was done under the auspices of the Standing Committee on Justice and Solicitor General and led by Blaine Thacker, a Tory Member of Parliament from Alberta with ministerial aspirations. Parliamentary research staff were assigned and two experts, Murray Rankin and David Flaherty, were contracted to prepare the final report. The excellent report, *Open and Shut*, is discussed above and particular recommendations will be dealt with at length later. What is of interest here is that the Committee did not aggressively seek a mandate for ongoing review of the *Access to Information Act*, something that was within its own power (a recommendation weakly asked the government to mandate another three year review); nor, after it became clear that the government was not going to react particularly positively to the Committee's unanimous report for important changes to the legislation, was there any ongoing criticism in Parliament that this was unsatisfactory. In summary, it is fair to say that parliamentary oversight has been, at best, episodic and ineffective, despite receiving good information on which to act from the Information Commissioner.

The upshot of this lack of parliamentary and government leadership has been the cessation of what Parliament originally envisioned as an ongoing process. The *Access to Information Act*, rather than growing and adjusting to the new issues of the Information Age, has stultified and is threatened with losing its relevance in the face of changing government structures and technological innovation. Lack of adequate government leadership at the political level has meant that sound policy developed within the bureaucracy, especially the Treasury Board Secretariat, has often faltered from the lack of clear, consistent and enduring political articulation of intent and support. Any historical review of legislative and policy initiatives in this field will show that there has been systemic problems of leadership, focus and coordination on information issues dating back as early as 1968 that have never been adequately addressed.

Recommendation 3: *That the Information Commissioner meet with the new Speaker of the House of Commons to recommend that a new standing committee be appointed to deal with the pressing issues of the Information Revolution, including ongoing reform of the Access to Information Act.*

Recommendation 4: *That this new Committee set aside time each year to hold hearings on the Information Commissioner's Annual Report and the reports on administration of the Access to Information Act submitted annually by government departments. The Committee should be mandated to ask the Commissioner to undertake special studies and would make recommendations for the ongoing improvement of the access act and information policy.*

Recommendation 5: *That the Committee be given research funds to carry on studies of information issues of interest to Parliament and the Canadian public, similar to the role of the United States Congress' Office of Technology Assessment. Another approach would to mandate the Office of the Information Commissioner*

as the research and policy arm for the Committee.

Recommendation 6: *That a single Minister, preferably the President of the Treasury Board, be named as responsible for the Access to Information Act and that the Treasury Board be the Committee of Cabinet which considers access to information and government information dissemination issues.*

Recommendation 7: *That consideration be given to co-locating the Information Law and Privacy Section of the Department of Justice and the Information, Communications and Security Policy Division of the Treasury Board Secretariat in order to provide a statement of leadership on information issues and a critical mass of staff to work on legislative and policy solutions.*

A Broader Approach To National Information Policy

The second important strand that was lost as the *Access to Information Act* came into effect was ongoing attention to subsection 2(2) of the legislation. This clause provided that the Act was intended to complement not replace other ways of providing information to the public. This was known as the Walter Baker clause after the veteran Tory member for Nepean - Carleton. Baker and others sensed that it was important that the single request mechanisms of the Act not become the major focus for how citizens obtained information from their government. The amendment was added at the Committee stage, with all parties contending that the Act should become a powerful new standard for encouraging government departments to embrace openness and release a wide range of information informally, without a request having been filed.

Unfortunately, this is not really what occurred. As departments nervously began dealing with individual requests, quite often of a controversial nature, they began to manage exemptions and not promote openness. Indeed, some information, which previously had been released to the public, was shut down, largely because it was deemed in violation of the privacy or third party provisions of the legislation. Baker's worst fears now became a reality. Politicians and bureaucrats looked to the *Access to Information Act*, with its single request and, at times, confrontational, time-consuming approach, as the base line for responding to the public. A common refrain when dealing with a troublesome client seeking information was to challenge the individual to "make an access request".

Treasury Board Secretariat tried to address this problem in policy terms under the Act. This was to little avail, in part, because there was no comprehensive, countervailing public information law or policy which placed obligations on departments to actively make information available to the public in an organized form outside the *Access to Information Act*. To make matters worse, the Act exempted from its coverage "published material", making the naive assumption that this type of government information would be either neatly catalogued and ready for access in government or public libraries or available for sale. This was an ill-based assumption. In truth, many government departments have poor control over what they publish, many departmental libraries lack a mandate to enforce collection of the publications of their organization and are not open to the public, and the Depository Services Program, which is supposed to distribute government publications to libraries across the country, is not complete in its coverage and is dominated by university libraries as opposed to public libraries, which directly

serve citizens.

This situation was both mitigated and complicated in the mid-1980s. In 1986, Treasury Board approved the *Management of Government Information Holdings Policy* which required that departments inventory and assert better control over all their information holdings, including publications. Likewise, in 1988, the *Government Communications Policy* was approved. This policy finally imposed a "duty to inform" on departments and charged them with disseminating information, including databases, outside the *Access to Information Act*. This "duty" requires institutions to provide information to the public, at little or no cost, about their policies, programs and services that is accurate, complete, objective, timely, relevant and understandable.

Unfortunately, these policy initiatives were complicated by other seemingly unrelated measures. The Conservative government's preoccupations with smaller government, more efficient operations through use of the private sector and reduction of the cost of government through user fees led it to support licensing of databases to the private sector and the contracting out of various information services. There is certainly nothing wrong with the vast majority of database licenses that have been signed. Rather, it is the absence of any law or policy defining the "public" interest in government information and the lack of a process that ensures an appropriate balance between this interest and the needs of the public purse, which is the problem.

For similar reasons, the Conservatives moved to create a number of Special Operating Agencies, one of which was the Canada Communication Group, formerly the Queen's Printer. Such agencies were removed from many bureaucratic controls, their services made optional and they were asked to compete in the marketplace to sell those services to government. Once again, the overall objective was a good one and in this case reduced the cost of communications services to government. The ancillary problem that this produces, however, is that CCG played a policy and control role in meeting the public interest in government publishing. This is now removed and there is a vacuum with each department left on its own to interpret legal and policy requirements. Such requirements need to be articulated clearly and without ambiguity with central leadership on issues and auditing of compliance.

Given these various developments, it is no longer acceptable to talk about specific narrow changes to the existing *Access to Information Act*. While that legislation has served well in enshrining the "right to know", it has also come to express a single request, confrontational approach to information provision which is not entirely appropriate for an information society. It is absolutely necessary to preserve the legal advances made by the legislation as the ultimate guarantee of information access for the citizen but to surround this with general principles relating to the importance of federal government information in modern Canadian society. This means returning to those issues of general access to and dissemination of information which Walter Baker sensed so clearly and to include provisions which deal with this important area in more than a desultory and passing manner.

Indeed, information is the glue that binds most government organizations and is one of the essential services or products that citizens demand from government. It is time to consider legislation aimed at promoting timely and equitable access to government information in support of business, industry, education, science and individual citizens via a diverse array of sources, both public and private, including provincial and municipal governments and public libraries. Such legislation would recognize that:

- the federal government is the largest single collector and disseminator of information;

- government information is a valuable national resource which provides the public with knowledge of government, society, and the economy;
- information is a means to effectively manage the government's operations and ensure accountability; can help maintain the healthy performance of the economy; and is itself, under appropriate circumstances, a commodity in the marketplace; and
- the free flow of information between the government and the public is essential to a democratic society.

Such an approach should affirm four important points, in a new section of the Act entitled "Government Information - General Management, Access and Dissemination". The first point involves management of information and disclosure. Because the public disclosure of government information is essential to the operation of a democracy, management of federal information holdings should protect the public's right of access to government information. Section 70, powers of the designated minister, should also be revamped to provide that Minister with authority to prepare government institutions to meet this challenge. As well, as is discussed in Chapter 4, the Information Commissioner should be given powers to investigate compliance with these goals.

The second point should be an affirmation of the obligation of government institutions to provide for public access to records where required or appropriate. This would be a legal statement expressing that government institutions have a responsibility to provide information to the public consistent with their missions by:

- providing information describing institutional organization, activities, programs, meetings, systems of information holdings and how the public may gain access to these information resources; and
- providing direct electronic access to institution information holdings, as appropriate and practical;

The obligation to provide access should be buttressed by an additional obligation to actively disseminate information which can be considered part the institution's "duty to inform" the public or may be considered of interest to the public or is essential to the performance of the institution's mission. This should be accompanied by direction to institutions to employ electronic information dissemination mechanisms where this is appropriate, practical and cost-effective and the product is easily accessible and useful to the public.

Finally, there should be a section entitled "Avoiding Improper Restrictions on Information" which establishes criteria governing dissemination by government institutions and private sector partners, including user charges and royalty payments. These might read as follows:

- avoid establishing, or permitting others to establish on their behalf, exclusive, restricted, or other distribution arrangements that interfere with the availability of government information on a timely and equitable basis;
- avoid establishing restrictions and regulations, including charging fees or royalties, that

would preclude a member of the public obtaining access to an information product for his or her own use;

- set user charges for information dissemination products at a level sufficient to recover the cost of dissemination but no higher, excluding costs of collecting and processing the information. Exceptions would be:
 - where statutory requirements are at variance with this principle;
 - where the institution collects, processes, and disseminates the information for the benefit of a specific identifiable group beyond the benefit to the general public;
 - where an exception is approved by the designated Minister after review by the Information Commissioner.

These amendments would substantially alter the nature of the *Access to Information Act* but, at the same time, they would build on concepts already contemplated notionally in the legislation. Reference has already been made to the "Walter Baker" clause, the current access directory provisions in section 5 anticipates providing information about government information; the reading room concept in sub-section 71(1) for manuals presages service centres; the exclusion of published materials in section 68 assumed the proper organization of such documentation for either library reference or purchase; the duty of the designated Minister in paragraph 70(1)(a) to "cause to be kept under review the manner in which records. . .are maintained and managed to ensure compliance with the provisions of the Act . . ." was a somewhat crude and ineffective way to emphasize the importance of proper records organization to access to information.

These were true Canadian innovations when the Act was drafted and served as an important legislative basis for the far reaching administrative information policies brought into force by Treasury Board throughout the 1980s. These approaches were quickly replicated by the Americans in the *Paperwork Reduction Act*, which introduced information resource management concepts to the United States government and Office of Management and Budget, *Circular A-130*, which establishes a national information policy. No other jurisdiction in Canada, or for that matter the Commonwealth, with the exception of some rudimentary steps at the end of the British Columbia legislation, has moved in this direction and this accounts for their overall weaknesses in being able to sort out the issues and problems facing government in the Information Age. Canada should continue with its innovative approach.

To accommodate these enhancements, it is necessary to change the name of the Act. At a bare minimum, the title should be changed to the "Freedom of Information Act". This would parallel the title of similar legislation around the world and would be more affirmative of the rights set out in the Act. A more innovative approach, which would support a broader reform, would be "National Information Act". This would appropriately describe legislation setting out general criteria as to public rights in information, going beyond the right of access to establish government information as a national resource vital to the country's social, cultural and economic development and assert that the unimpeded flow of information between government and citizen is crucial to open, accountable government. Legislation that mandated national reference systems, good organization of information and its active dissemination. Legislation that establishes rules of the road for pricing government information, from free access, through cost of dissemination, up, perhaps, to full cost recovery. Such legislation would also see an expanded role for the Information Commissioner in looking at and commenting on government

organization of information, its public reference systems and dissemination, database licensing, and charging mechanisms and practices.

There is always a debate whether it is necessary to express all these requirements in law. It is fashionable today to talk about minimal law and more government policy, criteria and standards. These latter instruments have been applied to information issues through Treasury Board policy over the 1980s, with some modest success. But the need is now for a seachange of attitudes and practices. Only legislative requirements, with strict parliamentary accountability, will provide the proper incentives to move the federal bureaucracy to the open channels of communication appropriate to an information society. The most desirable alternative should be to set out the appropriate obligations and performance criteria for access to and dissemination of all government information in a new "National Information Act". A second best alternative would be to set these out in other legislation, such as an amended *National Library Act*, which is then referred to in a renamed *Access to Information Act*. A third best alternative would be to establish regulations and policies which derive the power of law from the access act itself. All these approaches would, with varying effectiveness, make the Act the touchstone it should be for dealing with all information access and dissemination issues.

Recommendation 8: *That the strategy for amending the Access to Information Act be a broad one which preserves and strengthens the "right to know" as the ultimate guarantee of information access for the citizen but surrounds this with general principles relating to the importance of government information in modern Canadian society.*

Recommendation 9: *That the title of the Act be changed to either the "Freedom of Information Act" or the "National Information Act", preferably the latter, to better express its purpose and intent.*

Recommendation 10: *That the purpose statement in sub-section 2(1) of the Act be amended to include the idea that unimpeded flow of information between the government and the public is essential to open, accountable government and that government information is a valuable national resource which provides the public with knowledge of government, society, and the economy is a means to effectively manage the government's operations and helps maintain the healthy performance of the economy, and is itself, under appropriate circumstances, a commodity in the marketplace.*

Recommendation 11: *That a new section be added to the Act entitled "Government Information - General Management, Access and Dissemination" which contains provisions emphasizing the protection of the public's right to information as an objective for the management of government information, affirming the obligation of government institutions to provide for public access to records and to actively disseminate some types of information; requiring government institutions to employ*

electronic information dissemination mechanisms where this is appropriate, practical, and cost-effective and the product is easily accessible and useful to the public; and establishing criteria for "Avoiding Improper Restrictions on Information Dissemination". In a consequent amendment, section 70 of the Act, powers of the designated Minister, should be revamped to provide the Minister with the authority to guide government institutions in meeting the requirements to protect the public's right of access to government information.

Recommendation 12:

That section 30 of the Act be amended to include powers for the Information Commissioner to review the organization of information in government for purposes of access and dissemination, the appropriateness of public reference and charging mechanisms and to investigate all submissions for licensing databases.

Recommendation 13:

That section 68 of the Act be amended to eliminate the exclusion of published material from the coverage of the legislation, and that, in addition, that government institutions are required to organize, catalogue and advise the public of the existence of all government publications, including grey literature, through the inventory and government locator system described in the next section.

Access and Information Technology

The third strand which was lost after 1983 was any attempt to deal with the myriad changes in information technology. Once again, the Committee considering the legislation at its inception sensed the need to act. By definition, machine readable records were covered by the *Access to Information Act*. Several members of the Committee sensed, however, that this type of documentation was more difficult to deal with. The Committee added sub-section 4(3) which provided that any record requested under the Act which does not exist but can, subject to regulatory limitation, be produced from a machine readable record under the control of a government institution using computer hardware/software and technological expertise, normally used by the government institution, shall be deemed to be a record under the control of the government institution. This made a good chunk of electronic data buried in structurable databases available that otherwise would not have been accessible in useful form.

These were relatively crude add-ons but they did place the Act ahead of the *Freedom of Information Act* in the United States. There remains, however, several factors which should be addressed to adjust the Act to the technological revolution, including definitional problems and fees for computer generated information which were out of date when they were included in the legislation. The fees provisions simply cannot be applied in the world of personal computers, rapid custom programming and networks.

On the more macro level, the federal government is firmly recognizing and moving to digital

dissemination of information products on the so called "electronic highways". To remain relevant, the *Access to Information Act* must adapt to this emerging situation. As discussed earlier in the chapter, the Act should mandate a government-wide network, which in some circles is now being called the *Canada Information Network*, that would serve as a focal point for locating and accessing government information sources and services, which will rapidly become increasingly available in electronic form. This would position the legislation as an essential regulating factor for the federal government interchanges on the electronic superhighway.

This locator system would aid both in ensuring low cost public access to information and also serve to identify information holdings which may be appropriate for the government itself to sell as value added products or broker to the electronic publishing industry dissemination on private information services. Such an approach will require a more sophisticated look at the nature of government information and databases. Perhaps a useful taxonomy is one that looks at government information as falling within one of four basic modules:

- National public reference and federal directory information. This is the basic information about the organization of the Government of Canada, its programs and services, and information indexes and reference systems;
- Public documents. These are the basic documents of Canadian democracy such as the records of Parliament, the Statutes of Canada, basic explanations of government programs and services, and information relating to public health, public safety and protection of the environment, among other things;
- Research and technical information. Basically, this is the output of government scientific research and technical studies, such as mapping and product testing; and,
- Specialized databases, such as those for bankruptcy or corporate names, which underwrite specific programs which have traditionally been underwritten by user fees.

This taxonomy will permit policy options which would start to reconcile the need for fairness and universal access with user fees and use of the private sector as an information provider. The electronic dissemination model being proposed is an extension of the model in place for the dissemination of hard-copy meta-government information under the banner of *Info Source*. It would become a major focal point for the dissemination of government information and locator data to the public on a variety of networks across the country.

The existing *Info Source - Guide to Sources of Federal Government Information* would be expanded to become a comprehensive federal directory and public reference tool, which would be the guts of the locator system. There would be an intelligent natural language interface that would be available via the developing electronic highway. Consideration would have to be given to installing this basic module on the Depository Library System and in government information centres. The components are as described above but would also include the basic organization of the government, a description of services, the government telephone directory, the locator, subject index and natural language thesaurus, access to a catalogue of all government publications, including an ordering mechanism, press releases and speeches relating to government activities and access to other detailed locator systems such as *EnviroSource* at the Department of the Environment. The important point here is that such a system would serve to make the Act a crucial reference point for government institutions

dealing with public access to and dissemination of electronic information.

Over the last few years licensing agreements between government agencies and the electronic publishing industry has meant that information that might not otherwise have been made available has been distributed to various service subscribers. This relatively new Canadian industry is a vital part of the emerging high technology economy in the country. It needs development and already feels at a disadvantage to American competitors because of government reluctance to adjust investment and tax policies in its favour and, also, to make available a wide range of attractive databases without Crown Copyright restrictions (this latter point of view mirrors the United States, where there is no government copyright).

Investment and tax policies are beyond the scope of this study. However, the inventory proposals described above could begin to redress the need of the industry to know what databases are available for licensing. The Information Commissioner has already indicated that he believes that Crown Copyright needs to be reviewed as a possible irritant in blocking wider public access to government information. Others, as well, have raised concerns, particularly in regard to Canadian statutes and court decisions. The case, however, is not totally against Crown Copyright. The unregulated American system can lead to much greater abuses of exclusive contracts to distribute government information at high cost. It is also far from convincing that database information created at considerable expense to the general taxpayer should be available to anyone company or group, which will then market it at a profit, without some return of revenue to the Crown. Other concerns turn around how much value is actually added to databases by the private sector and the accuracy and reliability of the data when this occurs. All this indicates that the issue is a complex one. It probably is possible to remove Crown Copyright and still be able to collect royalties on use of government information, where this is appropriate through contract. The other issues are more complicated. Thus any review of the *Access to Information Act* and surrounding information policy should include an extensive review of whether or not Crown Copyright is still a viable and needed concept.

Easier database licensing is, however, only one side of the coin. Other critics express the fear that traditional systems, such as libraries, which have supported low cost access to public government information will be squeezed within this new private sector arrangement and that the high cost for database access, which is now fairly prevalent in the industry, will constrain the amount of information available to the ordinary citizen. This fear is expressed in terms of creating a society of "information rich and poor", which will further reinforce class divisions and make it virtually impossible to close. The era of the "techno-peasant" may well be on its way to arriving.

The issue has been debated extensively in the United States but is only now being joined in Canada because most database licensing arrangements have either dealt with very specialized information or there have been alternative forms of access (usually printed copies available for purchase or in libraries) to augment the database. This will rapidly change as the federal government moves much more to electronic formats over the next five years.

This is a serious situation which requires policy consideration. Part of the solution may be found in re-examining the concepts of "duty to inform" and "information available for purchase" currently expressed in the *Government Communications Policy*. The first dictum confirms the principle of openness; stating that the government has a clear responsibility to ensure that information about federal policies, programs and services is made available in all regions of Canada. This could include the databases in the first two categories of the taxonomy described above: public reference and directory materials and

public documents. Much of this information should be made available free or at the cost of dissemination and where value-added products exist, there should be a public system available to reduce access charges for those unable to afford to subscribe to private database services.

The second dictum recognizes that information which is of interest to specific parts of the Canadian public (as opposed to the general public) should be made available through purchase or user charges (public or private) where there is sufficient demand. Most databases that would qualify for this type of approach fall in to the second two categories of the taxonomy: research and technical information and specialized databases. Pricing in these cases would take into account the preparation, production and dissemination costs or private sector pricing, as appropriate. In some of these cases, the databases would be more directly involved in program delivery (e.g., the bankruptcy register) rather than communication or dissemination of information by the government.

The United States has tried to deal with the dichotomy between wishing to nurture an electronic publishing industry and supporting general low cost access to electronic information for ordinary citizens through legislation. Originally, some members of the U.S. Congress envisioned that the proposed *Government Printing Office (GPO) Electronic Information Access Improvement Bill* would establish a public database system at the GPO, which serve as the access point for ordinary citizens to a wide range of electronic information, at little or no cost, using the American Depository Library System. It was assumed that the information would not be the value-added products available from the private information providers but that government institutions would be required to deposit basic, perhaps even raw, electronic data with the GPO.

The Act actually passed is a good deal less than this, as the electronic publishing industry made its views known and the impracticality of a big database system at the GPO became evident. Indeed, Office of Management and Budget has now sponsored infrastructure legislation which would disband the GPO. What the GPO is now building is a public online system which covers the *Federal Register*, the *Congressional Record*, an electronic directory of federal public information stored electronically; other appropriate documents distributed by the Superintendent of Documents and information in other federal agencies upon their requesting it. This American experience and the principles in the *Communications Policy* may provide some clues to solutions for this thorny issue. First, the criteria underlying the database taxonomy, described above, could be included in the *Access to Information Act*. Second, government institutions should be required to make available, through their offices, the Depository Library Program or, where appropriate, for home or office access category one and two databases at no more than the cost of dissemination. This would not prevent the electronic publishing industry of developing value-added products, as well, for these databases but it would require government institutions to be very clear about what information falls within the rubric of "duty to inform" and thus should be made available to the public at no or little cost. In this scenario, a citizen should be able to go into a service centre or library and request a copy on diskette of the federal *Fisheries Act* for his or her personal use and receive it at absolutely no more than the cost of dissemination and copying. This would occur even commercial users of the highly indexed considerable connect rates for the service.

The Depository Library System (DSP) is a program of the Treasury Board Secretariat. It has been the safety net for citizens who cannot afford or do not wish to purchase priced government publications, though it attempts to cover all such material, priced or not. There are fifty full depositories across the country and several hundred partial depositories. The system is dominated by the university libraries, which are weaker elements in promoting public access. The program costs the government \$16 million annually and the libraries probably put up an equal amount in staff time and space. The Depositories are

beginning to receive electronic publications but not really databases. There is a need to study the role of the DSP to determine whether or not it can play a dynamic part in the dissemination of electronic information. Also the DSP does not have a legislative and should have one, either in the *National Library Act* or the *Access to Information Act*.

The following recommendations will help the *Access to Information Act* adjust to and play an important role in the world of electronic information:

Recommendation 14: *Amend the definition of record in sub-section 4(1) of the Act to read "information in records". This serves several ends. It clarifies the notion of relevance and the scope of the requests but, most important, it recognizes the concept of automated information, where records are less easy to isolate than information.*

Recommendation 15: *Amend section 11 of the Act and consequent regulatory power to provide a sensible modern way of charging for electronic information, which form part of an access request. This would have the salutary effect of making government institutions able to demonstrate how easy and cheap it is to make information available electronically.*

Recommendation 16: *That section 5 of the Act be amended to require government institutions to organize and index their information holdings and compile and maintain in a current state an electronic inventory of these for effective decision-making and to support both active dissemination of useful information to appropriate publics and general accessibility to non-exempted documentation. (All references to accessing manuals currently in the legislation should be wrapped up into this requirement.)*

Recommendation 17: *That section 5 of the Act be further amended to require an automated locator and inventory system maintained by the designated Minister and require that it be built on similar automated inventories (as described above) maintained in government institutions. This locator should be the engine of the Canada Information Network.*

Recommendation 18: *Add a section to the Act which sets out the criteria for the taxonomy of databases and require government institutions to identify all databases in accordance with the taxonomy.*

Recommendation 19: *Add a section to the Act which would place an obligation on government institutions to make accessible in open digital systems that majority of information that is not exempt and assure that any databases falling into categories one and two of the taxonomy are actively disseminated and are made*

available through public systems mandated by Act or consequent regulation. Institutions should be required to maintain an open database of information already released under the Access to Information Act.

Recommendation 20: *Consider placing a new provision in the Act, which would set out the criteria to be considered by a government institution, including public interest and pricing or royalties guidance, when contemplating licensing a database to a private sector information provider, and clearly mandate public-private sector partnerships.*

Recommendation 21: *Amend sub-section 71(1) of the Act to require government institutions to incorporate "access reading room" activities in any Info Centre, Business Centre, Single Window or other Service Centre approach, especially as these develop as electronic access points. These should be rationalized with the current access points used by Info Source, as public reference points for government information.*

Recommendation 22: *Provide a legislative direction that federal public reference tools be joined with provincial directories, such as the B.C. Online Freenet Project and should include any electronic versions of major documents released under the Act.*

Recommendation 23: *Advocate a full review of Crown Copyright to determine whether or not it is still relevant in the electronic world and subsequent rapid amendment of the Copyright Act once the review is completed.*

Recommendation 24: *Seek a legislative mandate for the Depository Services Program either in the National Library Act or the Access to Information Act after a full review to establish the systems role in the dissemination of public government information in digital formats.*

Lack of attention to adjusting the *Access to Information Act* means that it is out of date as the government and Parliament changes their structures and tilt the balance clearly to doing business electronically. This chapter has outlined a program for substantial reform of the Act, which would serve to modernize it and keep it a vital part of Canadian democracy. The following chapters will deal with more specific amendments, which would further revitalize the legislation.

Chapter 2

EXEMPTIONS AND OTHER THINGS WHICH GO BUMP IN THE NIGHT

After a statement of principle and scope, the exemptions are the most important part of a "freedom of information" statute. The exemptions form a kind of standard as to how open a government is. They should be designed to protect only those very few interests which must, demonstrably, be held secret for the effective operation of a democratic government and those non-governmental interests, such as personal privacy and business trade secrets, which society, in general, holds appropriate to be kept confidential. All other government information should be deemed to be accessible to the public upon query or request.

The current exemptions in the *Access to Information Act* are the result of a careful balancing of all these variety of interests which was undertaken between 1979 and 1982, while the Act was being drafted and debated in Parliament. The exemptions are based on either an "injury test" or "class test". Some exemptions are discretionary while others are mandatory. Exemptions which incorporate an "injury test" take into consideration whether the disclosure of certain information could reasonably be expected to be injurious to a specified interest. Information relating to activities essential to the national interest, the security of persons or their commercial affairs are examples. "Class exemptions" refer to a situation in which a category of records is exempt because it is deemed that an injury could reasonably be expected to arise if they were disclosed. An example of this is information obtained in confidence from the government of a province or one of its institutions.

Discretionary exemptions allow the head of a government institution to decide whether the exemption needs to be invoked. Mandatory exemptions provide no discretion to the head of the government institution and must be invoked.

Thus if a record, or part of a record, comes within a specific exemption, then a government institution will be justified, or in some cases required, to refuse access to all or part of the information sought. The government institution is required to cite, in general terms, the statutory ground for refusing access or what it would be if the record existed. At the present time, the institution is not required to confirm whether a particular record actually exists, since such disclosure may, in and of itself, provide valuable exemptible information. An institution must "sever" exempted portions of records and provide access to the rest.

Discretion and Injury

So much for what exists. Exemptions are difficult creatures to draft and even more difficult to obtain consensus on, thus it is with some trepidation that changes are suggested. Nevertheless, the access exemptions have drawn considerable fire over the years and some amendment is long over due, particularly given the change in the nature of government and the altered international environment after the end of the Cold War. The Standing Committee made only one general recommendation in *Open and Shut* concerning exemptions:

"That subject to the following specific proposals, each exemption contained in the *Access to Information Act* be redrafted so as to contain an injury test and to be discretionary in nature. Only the exemption in respect of Cabinet records (which is proposed later in this Report) should be relieved of the statutory onus of demonstrating that significant injury to a stated interest would result from disclosure. Otherwise, the government institution may withhold records....only 'if disclosure could reasonably be expected to be significantly injurious' to a stated interest."

At first glance, this appears as a very fair proposal where the object of reform is to promote more open and accountable government. Further investigation, however, uncovers a major problem which must be considered. If section 19, Personal Information, were to be converted into a discretionary, injury-based exemption, the present basis for protection of personal information through the *Privacy Act* would be substantially altered.

As is clearly understood, section 19 is a mandatory, class exemption for the simple reason that it was the drafter's intent to make any public disclosure of personal information subject to the regime of the *Privacy Act*. The section does permit the head of an institution some discretion but this is coincident with the privacy legislation. Admittedly, this is a different approach to that taken in other jurisdictions. In the United States, release of personal information under the *Freedom of Information Act* is subject to a test to determine whether or not disclosure would constitute a "clearly unwarranted invasion of privacy". Ontario combines access and privacy provisions in a single statute and permits disclosure of personal information where there is no "unjustified invasion of personal privacy". British Columbia has a similar structure but its test is an "unreasonable invasion of personal privacy".

It is far from clear that this is a better approach to balancing the protection of privacy with accountable government. To embrace this type of approach, legislation must set out what is and is not an invasion of personal privacy, under whatever test is established. Further, both Ontario and B.C. have seen fit to establish third party notification of individuals when the head of a public body intends to give access to a record that he or she has reason to believe contains exemptible personal information. While the process is fair, it also appears to be an onerous and bureaucratic process bound to result in time delays. On the whole this type of regime seems to be no improvement over the current federal legislation and may, in fact, weaken existing privacy provisions.

Recommendation 25: *The Information Commissioner should only advocate an unwarranted invasion of privacy test for the release of personal information as has been adopted in Ontario and B.C. if he believes it essential that more personal information needs to be released as a result of ATI requests.*

It should also be pointed out that Ontario and British Columbia have both chosen to protect on a mandatory basis third party trade secrets and confidential business information. It is not clear that a discretionary clause would substantially reduce the protection offered under the section 20 of the federal Act, at least for that information other than trade secrets. With this in mind, it is suggested that all exemptions, with the exception of section 19, paragraph 20(1)a and any new provision dealing with Cabinet Confidences, be discretionary in nature and injury-based.

Recommendation 26: *That all exemptions under the Access to Information Act with*

the exception of section 19, paragraph 20(1)(a), and any new provision dealing with Cabinet Confidences, be discretionary in nature and injury-based.

There has been comment from time to time that the threshold of the normal injury test in the exemptions should be raised to put an onus on a government institution to demonstrate "significant" injury before information could be refused to a requester. The Committee members took up this cause in *Open and Shut*, though the text of their recommendation 3.1 (see above) seems garbled in this regard. Other jurisdictions such as Ontario and British Columbia have not chosen to strengthen the test beyond "could reasonably be expected to be injurious" to a particular interest, in the same mode as the federal legislation. There is a school of thought that it would be impossible to realistically judge the degree of injury in any situation. It is rather analogous to the argument that a person cannot be a little bit dead; either there is injury or there is not. The discretionary part of the exemption then gives the head the obligation to decide whether or not to live with the consequences of releasing the information. There are better ways to tip the *Access to Information Act* more to openness, which will be set out later in this chapter. Thus, it is suggested that it is not necessary to deal with the degree of injury in any redrafting of the exemption criteria.

Recommendation 27: *That the degree of injury in exemptions not be altered in any reform process.*

Public Interest Override

The Standing Committee also discussed another innovation from the *Ontario Freedom of Information and Protection of Privacy Act*, which was then in draft form. This provision stated that:

"Despite any other provision of this Act, a head shall, as soon as practical, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public."

Murray Rankin, one of the Committee's expert researchers recently stated that he was particularly taken with this approach which he felt went much beyond the original public interest override for third party business information in subsection 20(6) of the federal Act. Where the federal provision is triggered by an individual request, the Ontario provision is an affirmative duty imposed on the head of an institution to disclose records under specified conditions, despite whatever exemptions may be involved.

It was not noted by the Committee that Ontario went further in section 23 of its Act in providing that an exemption from disclosure of a record under sections 13 (advice), 15 (relations with other governments), 17 (third party), 18 (economic and other interests), 20 (danger to health and safety) and 21 (personal privacy) does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. British Columbia, at Rankin's urging was quick to pick up on the Ontario approach.

British Columbia includes a whole division (4) in its legislation entitled "Public Interest Paramount". This section requires the head of a government institution to disclose to the public; to an affected group of people or to an applicant, without delay, whether or not a request has been made, information:

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

The disclosure is to occur despite any other provision of the *Freedom of Information and Protection of Privacy Act*. There is a notification provision where the head must advise, if practicable, any third party to whom the information relates and the Information and Privacy Commissioner. A substitute procedure permits a notice to be sent to the last known address of the third party if no other means are practical. British Columbia does not have overrides for specific provisions.

There is no doubt that an effective public interest override would go a long way towards opening up the federal legislation and possibly be much more preferable and practical than adjusting the injury test. Unfortunately, it is not at all clear how a general public interest override would work. Certainly, at the federal level, Ministers have been reluctant to use the public interest override in subsection 20(6) because, if release is in the public interest, they should have released the information before receiving an access request. There is no doubt, however, such a provision would have had an impact, for instance, in the "Tuna Gate" scandal where the Minister appeared to be trying to contain, if not cover up, a problem with the fish plant inspection system to deal with tainted products. It is possible that the British Columbia model places too high an onus on the heads of institutions, since it does not clearly set out the public interests involved and the test to be used.

The Ontario model may be the more realistic approach with its emphasis on health, safety and the environment, especially if it was combined with a complementary provision, which clearly tilted the balance toward openness, by indicating that discretion in applying the exemptions should be toward release not refusal whenever practical. This again would be an easier approach to heightening the injury barrier for refusal. Indeed, it would be possible to extend the public interest at the federal level to include law enforcement, administration of justice and national defence and security. One other final refinement is again with personal information. Ontario does apply the override to this type of record. The federal *Privacy Act* includes a provision for release of personal information in the public interest, with appropriate notification provisions. It would be better to leave this to operate under the current regime, outside the purview of the access act.

Recommendation 28: *Provide a principle statement that indicates that the public interest is paramount where records reveal a grave environmental, health or safety hazard to the public on the model of the Ontario legislation.*

Recommendation 29: *Again following the Ontario model, provide a specific public interest override for section 21 (advice), section 13 (information in confidence from other governments), section 14 (federal-provincial affairs), section 17 (safety of individuals), section 18 (economic interests of government), section 22 (tests and audits), section 23 (solicitor-client privilege), and section 24 (statutory prohibitions). The public interest should be in protection of public health, public safety, the environment, law enforcement, the administration of justice and national defence*

and security.

Recommendation 30: *Leave the public interest disclosure mechanism for personal information within the purview of the Privacy Act.*

Recommendation 31: *Extend the public interest override in subsection 20(6) of the Act to cover paragraph 20(1)(a), trade secrets.*

Recommendation 32: *Add a general provision at the beginning of the exemptions part of the Act which obliges heads of institutions to use their discretion in favour of access and openness as opposed to refusal.*

Two Long Standing Irritants

Two other items have been irritants to requesters for some time. Both were raised by the Committee in *Open and Shut*. The first concerns the power to confirm or deny the existence of a record when refusal of access is made. The current provision in section 10 is needlessly wide. It should be narrowed to its intended scope of law enforcement and security and intelligence matters and an admonition made that the provision should be used only when it is strictly necessary.

Recommendation 33: *Section 10 of the Act should be amended so that the power to neither confirm or deny the existence of a record is restricted to records relating to law enforcement and security and intelligence and an admonition made that the provision is to be used only when strictly necessary.*

The second involves the recording of reasons for exempting and excluding information again in section 10. Most institutions provide in the text of the record itself the reason for severing information. Others provide an accompanying document. A few do not provide enough information to connect severed information with an exemption or exclusion. Section 10 should be amended to ensure that the reason for severing specific information is made clear to a requester.

Recommendation 34: *Section 10 of the Act should be amended to ensure that the reason for severing specific information in a record is made clear to a requester.*

Polling

Access to polling and survey information became a "cause célèbre" during the years of the Mulroney government. That government used public opinion research widely and centralized controls over such activity in the Coordinator of Public Opinion Research (CPOR), hosted by the then Department of Supply and Services, but reporting directly to the Chairman of the Cabinet Committee on Communications. This measure split apart the information collection approval function which had resided in Statistics Canada since the "rule of ten" (i.e. approval had to be sought for any collection

involving ten or more respondents) policy of the mid-1960s.

Consideration had been given at the drafting stage to putting special provisions regarding polling data in the *Access to Information Act* at the urging of the then NDP leader, Ed Broadbent. The NDP suggestion was to follow the practice used in Ontario of tabling all polls conducted in the Legislature on a six month schedule. The principle underlying such release is the one which still underpins the issue. At their heart, polling and survey data are nothing more than the opinions of citizens about issues. They have been subjected to research analysis but they remain public opinion obtained by a government institution which had the money to fund the research. The Ontario model was rejected in favour of letting the Act apply to each case since it was considered that few, if any exemptions, would cover such records. Some consideration was given to maintaining some public central listing of poll being undertaken or completed but this was never acted upon.

The creation of the CPOR Group gave much more centralized control over polling and public opinion research and, as well, polling projects were fitfully recorded in the Central Registry of Information Collection which was still maintained until last year by Statistics Canada. Growing interest in polling meant that such projects began to attract access requests. At first, the polling data was released fairly routinely because, as had been surmised, no exemptions were found to apply. This caused some consternation among the government's polling experts, particularly as the big issues of Free Trade and Constitutional Reform loomed on the horizon.

These were so-called "sensitive" polls which the government saw as an essential part of its policy making process. A stand was made on various constitutional polls; resulting in the Information Commissioner having to take the Privy Council Office to Court. The government contended that section 14, injury to federal-provincial affairs, could be applied to these polls. The Court stated that it could see instances where some exemptions might apply to polling data but did not find the actual case to be one of them. This has returned the situation to the status quo ante; unless a convincing exemption can be invoked (and these are even scarcer than before) then the polling or survey data must be released in response to a request.

The current government appears to be dismantling the elaborate Conservative mechanisms for controlling polling and may be amenable to establishing some routine release requirements for polling data. Certainly, the government should be encouraged to do so since this would send a clear signal of more "open" government. There are a number of approaches which might be taken. First, since amendment of the *Access to Information Act* may be a protracted process, the government should be asked by the Commissioner to establish a policy that polling and survey data will not be subject to exemptions under the Act and that government institutions maintain a listing of such data in the office of their Access to Information Coordinator which is updated no less frequently than every two months.

In amending the Act, consideration could be given to excluding polling data from its coverage with the obligation on government institutions to routinely account for and disclose this information. This is not a viable option since it removes compliance from review by the Information Commissioner. A second option would be to simply require institutions to release the results of polls in the absence of a request, perhaps under the public interest provision discussed above. A third approach would be to follow the British Columbia model which specifically excludes public opinion polls from the advice and recommendations exemption. This option would, however, still permit an innovative institution to try another exemption and does not further the cause much beyond the current state. Fourth, a new provision could expressly set up a special regime for polling results which would require institutions to

publicly list all polling and surveys within two months (60 days) of the project being undertaken and to routinely release the results when requested informally to do so. In the two month period, requests could be refused much like the current section 26, preparing for publication, currently operates. This option has the advantage of giving the institution, which is trying to accomplish some particular policy objective with the poll, some flexibility while also promoting accountability and information disclosure. A final option would be to stay with the status quo, where polling results are simply requested on a case by case basis under the Act.

One last point on polling, the Commissioner should support any efforts to create a public repository for polling data. This would mean that all results would be available for ongoing social and economic research. Queen's University has made such a proposal and, should it re-surface with the current government, the idea should be supported.

Recommendation 35: *The government should be encouraged to issue a policy which states that no exemptions will be applied to results of public opinion research; that a listing of such research, updated no less frequently than each two months (60 days), must be maintained in the office of each institution's Access to Information Coordinator; and that the listing and public opinion results must be provided upon informal request by the public.*

Recommendation 36: *That the Act be amended to establish a separate regime for public opinion research which would require government institutions to list all such research within two months (60 days) of a project being undertaken and to release the results when requested informally to do so. Within the two month period, requests could be refused much in the same way as section 26, preparing a publication, currently operates.*

Recommendation 37: *That the Information Commissioner advocate and support a public repository for the results of public opinion research, preferably at a Canadian university.*

Section 13: Information Obtained in Confidence from Other Governments

Section 13 of the *Access to Information Act* provides mandatory class protection for records "obtained in confidence" from other governments, foreign, provincial and municipal, as well as, international organizations. The need for such an exemption is undeniable since each government should be generally responsible for controlling and releasing its own information. Indeed, this courtesy needs to be extended to the subdivisions of foreign states (e.g. an American state) and perhaps also to self-governing native bands. The first extension was recommended by the Standing Committee in *Open and Shut*.

Having stated the above, it is fair to also say that both the international and federal-provincial scenes have changed substantially over the last few years. Certainly, with the Clinton administration in the United States, there have been indications that it would like to declassify a large amount of older foreign

relations and military information. The Americans might also be supportive of a less onerous "confidence" protection. All this to say that no one has really looked at this area for a long time. It is analogous to the security classification and personnel vetting system, which seemed hopelessly bogged down in international standards and conventions. However, when some intelligent questioning occurred, many of the obstacles turned out to be mythical and there was a fair international consensus for change.

All this to say that, while it may be premature to jump into a discretionary, injury test exemption for "information given in confidence" from international organizations and foreign states, it is time that a more thorough study was undertaken of the implications of such a move. It may, in fact, be quite practical.

On the provincial front, no study is necessary. Progressive freedom of information legislation in Ontario and British Columbia already have discretionary exemptions for records relating to "intergovernmental relations" which verge on injury tests (i.e. "could reasonably be expected to reveal a confidence). Any amendment should opt for a discretionary, injury based exemption for provincial, municipal, Indian band, etc. information. A general 15-year rule should apply to all such "confidences" unless the information relates to law enforcement or security and intelligence matters, which are subject to extensive and active international agreements and arrangements which will be very difficult to change. As well, the public interest override should apply to this exemption.

The Committee recommended in *Open and Shut* a complicated appeal procedure, including recourse to the Information Commissioner and the Federal Court, for other governments if they wished to appeal release of information. This seems impractical, if not counter to international protocol. The power of discretion lays with the government institution controlling the information. It should be able to justify refusals, on the one side, and, sort out release mechanisms on the other.

Recommendation 38: *Section 13 of the Act should be amended to include the institutions or governments of components of foreign states and self-governing native bands.*

Recommendation 39: *The Information Commissioner should either request the government to undertake a study or mandate one himself to study the feasibility of making section 13(a) discretionary, injury based exemption in relation to the confidences of international organizations and foreign states.*

Recommendation 40: *Section 13 of the Act should be amended to make it a discretionary, injury-based exemption for provinces, municipalities, self-governing native bands and any other government entities in Canada*

Recommendation 41: *Section 13 of the Act should be incorporated into the public interest override.*

Recommendation 42: *Section 13 of the Act should be amended to have the confidence end 15 years after the date on the record, except for those records relating to law enforcement, and security and intelligence.*

Section 14: Federal-Provincial Affairs

There is a long-standing recommendation, going back to the original drafting of the Act and repeated in *Open and Shut*, that the word "affairs" be replaced by the word "negotiations". This would serve to narrow the exemption without damaging the interest involved. The change should be supported.

The only other amendment would be to make the section subject to a public interest override.

Recommendation 43: *Section 14 of the Act should be amended to replace the word "affairs" with "negotiations".*

Recommendation 44: *Section 14 of the Act should be incorporated into the public interest override.*

Section 15: International Affairs and National Defence

There have been ongoing complaints from requesters as to how the various parts of this complicated exemption are applied. The Standing Committee summed it up best in *Open and Shut*:

"After a broadly worded injury test, nine classes of information which may be withheld are listed. Arguably, any information found in the broad classes listed, whether or not it would be injurious if released, must be withheld. The Information Commissioner has interpreted this section as requiring the department or agency to establish that the records withheld are not only of the kind or similar in kind to those enumerated in the subsequent paragraphs, but also that the Department must provide some evidence as to the kind of injury that could reasonably be expected if the record in question were released. On the other hand, the Department of Justice has asserted that one of the specific heads in the paragraphs need not be applied to information before the exemption can be claimed, as long as the specific injury test is met."

The Committee worried that as currently interpreted the section was not adequately linking injury to the nine classes or illustrations. The Committee's concern remains valid and we repeat its recommendation here.

Recommendation 45: *That section 15 of the Act be amended to clarify that the classes of information listed are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analogous to those sorts of state interest listed in the exemption.*

Section 16: Law Enforcement

The only change contemplated to section 16 of the Act is to alter paragraphs 16(1)(a) and (b) into injury based clauses. This will be very controversial within the law enforcement community but more closely parallels the law enforcement provisions in the Ontario and British Columbia Acts.

Recommendation 46: *Amend section 16 of the Act to introduce an injury test into paragraphs 16(1)(a) and (b).*

Section 17: Safety of Individuals

British Columbia has made a useful modification to the concept of "threats to the safety of individuals", by adding "mental or physical health". This should probably be added to the current wording of section 17. The section should also be made subject to a specific public interest override.

Recommendation 47: *That section 17 of the Act be amended to incorporate the words "mental or physical health" into the threat to an individual's safety.*

Recommendation 48: *That section 17 of the Act be subject to a public interest override.*

Section 18: Economic Interests of Canada

Section 18 deals with a potpourri of issues. It is, however, roughly the government equivalent of section 20, protection for economic and technical information. For this reason, the provision should be amended to parallel section 20 in regard to the release of the results of product and environmental safety. This was recommended by the Standing Committee in *Open and Shut*. As well, the term "substantial value" in paragraph 18(a), relating to trade secrets and financial, commercial, scientific and technical information should be modified and narrowed by the term "monetary". Another issue which has arisen is the problem of protecting "confidential business" information for the government's Special Operating Agencies (SOAs). Several of these are being asked to compete with the private sector without the protection other companies have under section 20, third party information. Adjusting section 18 is infinitely preferable to eliminating SOAs from coverage of the legislation, which several of them have requested informally. Finally, the whole section should be subject to the public interest override.

Recommendation 49: *Section 18 of the Act should be amended so that it could not be used to withhold the results of product or environmental testing done by the government on its own activities.*

Recommendation 50: *Paragraph 18(a) of the Act should be amended to narrow the term "substantial value", relating to government trade secrets and financial, commercial, scientific and technical information, to "substantial monetary value".*

Recommendation 51: *Section 18 of the Act should be adjusted to protect the "confidential business" information of Special Operating Agencies.*

Recommendation 52: *That section 18 be subject to a public interest override.*

Section 19: Personal Information

As discussed above, this report recommends no major changes to section 19, especially the addition of an "unwarranted invasion of privacy" test, since it remains unclear that this type of approach would bring any improvement to the Act and would create a large bureaucratic notification process. Indeed, such changes may be seen as attempting to undermine privacy protection at a time when public concern in this area is at an all time high.

It should be pointed out that the government would undoubtedly attempt to change Section 19 to close the access to personal information through consent of the individual upheld in the "LoveBirds Case". This would involve an amendment to ensure that the head of a government institution is not required to disclose personal information where the requirement set out in paragraph 19(2)(a) or (b) or (c) have been met, so that the *Privacy Act* would continue to set the standard for the disclosure of personal information.

Section 20: Third Party Information

Section 20 of the Act protects certain kinds of information furnished to a government institution by a third party. A third party may be any person, group of persons or organization that is not a government institution for purposes of the Act. Generally, section 20 protects trade secrets, confidential, financial and technical information; information which, if released, would likely have an adverse impact on a business or interfere with contractual and other negotiations. While section 20 is one of the most used and litigated exemptions under the *Access to Information Act*, it is still a balanced and fair approach to the protection of third party information.

The Standing Committee made several recommendations in *Open and Shut*, which would improve the section while not altering its nature. These should be adopted in any reform process.

Recommendation 53: *That the term "trade secret" should be defined in the Access to Information Act.*

The Committee offers a definition as follows:

"A secret, commercially valuable plan, process or device, that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."

Recommendation 54: *That the above definition be subjected to legal scrutiny before inclusion in the Act to ensure that it meets the requirements of the strict law in this area.*

Recommendation 55: *That the public interest override currently in subsection 20(6) of the Act be extended to paragraph 20(1)(a), trade secrets.*

Recommendation 56: *That section 20 be amended to allow substitutional service of notification (e.g., by public notice or advertisement) where this is effective, practical and less costly.*

Recommendation 57: *That the Act be amended to clarify that third parties bear the onus of proof before the Federal Court when they challenge decisions to disclose records that may contain confidential business information.*

In addition to the suggestions of the Standing Committee, two other changes merit consideration. The first involves the intervention of third parties to the Federal Court in order to prevent disclosure as set out in section 44. There is no incentive for the third party to proceed to hearing in an expeditious manner and the whole process can be used as a delaying tactic. There should be a provision that requires the third party to seek a hearing within 20 or 30 days.

Recommendation 58: *That the Act be amended to provide in section 44 a time limit (20 or 30 days) by which an intervening third party must seek a hearing before the Federal Court.*

The second point refers again to Indian Bands, which deserve to have their information protected under section 20.

Recommendation 59: *That section 20 of the Act be amended to permit protection of information (i) supplied by Indian bands, band associations and tribal councils recognized by the Department of Indian Affairs, and, (ii) about Indian band trust accounts which are held by government institutions, but not supplied by the band.*

Section 21: Advice and Recommendations

The advice and recommendations exemption ranks with the exclusion of Cabinet Confidences and the fees provisions as one of the most controversial clauses in the *Access to Information Act*. From the early debates on the drafting of the Act, critics have attacked its broad language which would seem to embrace wide swaths of government information. The Standing Committee stated in *Open and Shut* that it was the provision "has the greatest potential for routine misuse". The government seemed to agree; taking pains in policy guidance to admonish caution and to build in the injury test omitted from the legislation.

The question then is what to do to reform section 21? The Standing Committee recommended that the provision be redrafted to contain an injury test, involving candour of the decision-making process as is currently required in the Treasury Board policy manual. The Committee went on to advocate another clarification which would assure that the exemption only applies to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process of government. Finally, the Committee recommended the lowering of the time limitation in the current exemption from 20 to 10 years, which seems an appropriate time to protect material used in a decision-making process. This would not mean that other exemptions might be applied to the record.

This is more than a good start but the reform needs to be taken further. The provision should emulate Ontario and British Columbia, where there is a long list of types of information not covered by the exemption, including factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements, reports of internal task forces, and so on. There should also be an attempt to define the term advice in the balanced way currently set out in the policy manual. The provision is also really intended to cover the internal operations of government. Thus the exemption should be limited to advice to and from public servants, ministerial staff and Ministers. As well, the provision should be made subject to the public interest override. All these changes will serve to more closely define what information needs protection to preserve the necessary decision-making space for government.

Finally, paragraph 21(1)(d) should be amended in regard "plans" not yet brought into effect. This permits the bureaucracy to refuse many personnel and administration plans that were devised and never approved. As is currently the case in the British Columbia legislation, rejected plans should be open to public scrutiny.

Recommendation 60: *That section 21 of the Act be amended to encompass an injury test.*

Recommendation 61: *That section 21 of the Act be clarified as to the type of sensitive decision-making information it covers and include a listing of those type of documents it specifically does not cover.*

Recommendation 62: *That section 21 of the Act be amended to reduce the current time limit on the exemption from 20 to 10 years.*

Recommendation 63: *That section 21 of the Act be amended in order to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers.*

Recommendation 64: That section 21 of the Act be amended to add a definition of advice, perhaps the balanced definition currently in the Treasury Board policy manual.

Recommendation 65: *Section 21 of the Act be incorporated in the public interest override provision.*

Recommendation 66: *That paragraph 21(1)(d) of the Act be amended to exclude rejected plans from the coverage of the exemption.*

Section 22: Tests and Audits

Recommendation 67: *That section 22 of the Act be incorporated in the specific public override provision.*

Section 23: Solicitor-Client Privilege

There have been many complaints that information that might otherwise be available to an applicant has been refused because it is contained as part of a legal opinion and thus subject to a blanket coverage of solicitor-client privilege. The Standing Committee recommended that a clarification was necessary to restrict the exemption to only those cases where litigation or negotiations are underway or are reasonably foreseeable. This is worth considering though its application may be difficult. It has also been suggested that the provision could be amended so that, to facilitate disclosure, the privilege is waived in respect of part of the protected records, without prejudicing the application of privilege to the balance of the records.

Recommendation 68: *That amendment be considered for section 23 that either clarifies that the exemption will only be used in cases where litigation or negotiations are underway or are reasonably foreseeable, or alternatively, permits the waiving of solicitor-client privilege for a portion of the requested records, without prejudicing the claim for the other portion.*

Recommendation 69: *That section 23 of the Act be incorporated in the specific public interest override.*

Section 24: Statutory Prohibitions

There is a problem with the increasing number of statutory prohibitions against disclosure under the *Access to Information Act*. There is a need to dramatically and effectively intervene to restrict the growing use of such clauses in other statutes. There would appear to be a number of options.

One way would be to simply adopt the report of the Standing Committee in *Open and Shut* and roll back most of the prohibitions against disclosure. This would require an order to the Department of Justice to review all the Acts, including those recently added, and prepare a report and legislative package.

Another option would be to stipulate those Acts which mandate the heads of institutions not only require refusal but also mandate release. Because these are specific statutes, they sometimes mandate that more information be released than under the *Access to Information Act*. Section 24 could be reconfigured along the lines of section 19, personal information, to oblige heads of institutions to refuse to disclose information restricted by other statutes, but require release where the other statutes requires it. Release would have to be in accordance with the provision of the other statute. This has the advantage of regularizing the *Access to Information Act* with release conditions in other statutes. Whichever option is selected, section 24 should be subject to the specific public interest override.

Recommendation 70: *That the review of statutes under section 24 undertaken by the Standing Committee be immediately reviewed by the Department of Justice and a public report issued as to which statutes are being summarily removed from the list and suggestions made as to how section 24 will be reformed to prevent it becoming a loophole around the Access to*

Information Act. *The Commissioner should suggest to the Minister of Justice that this is a small but very tangible step toward open and accountable government.*

Recommendation 71: *Section 24 should be made subject to the specific public interest override provision.*

Section 25: Severance

Severance is an essential process for ensuring that applicants under the Act receive as much information, as possible, about their chosen subject. Generally, the process of excising exemptible information for releasable information works well, though there are still complaints about the workload it imposes. Section 25 could, however, be improved by two technical amendments.

Recommendation 72: *That section 25 be clarified to reinforce the principle that severance applies not only to records, a part of which could be protected by a discretionary exemption, but also to records where part is protected by a mandatory exemption.*

Recommendation 73: *That section 25 of the Act be amended to indicate that access is to "information" and not to "records". This would aid access to computer-based information and perhaps to resolve the debate over relevance where information pertinent to a request is mixed up with information not involved with the subject.*

Section 26: Information to be Published

Recommendation 74: *That section 26 of the Act be amended to reduce the time involved in printing a document from 90 days to 60 days. This is ample time given modern printing methods and would further reduce time delays.*

Possible New Exemption

The British Columbia legislation sets out an exemption for information the disclosure of which could reasonably be expected to result in damage to or interfere with natural and human heritage sites (section 19). There has been some concern at the federal level over the release of information that might endanger endangered species. Thus it might be prudent to include a provision similar to British Columbia's in the Act.

Recommendation 75: *That the Act be amended to include an exemption dealing with information the disclosure of which could be harmful to the conservation of endangered species or heritage sites.*

Chapter 3

ALADDIN'S LAMP OR OLD CONFIDENCES FOR NEW

As stated in Chapter 1 of this report, no single action brought as much disrepute on the *Access to Information Act* than the decision to exclude Confidences of the Queen's Privy Council for Canada from the legislation's coverage. It was then Prime Minister Trudeau's price for proceeding with the access bill. Dubbed the "Mack Truck" clause, the exclusion of Confidences was immediately seen by the media as the primary reason for the new Act being ineffective. They forgot that the Confidences exemption that had been drafted was a tight mandatory provision that would have provided slim pickings for applicants. Nevertheless, a symbol of secrecy had been created. Three years later little had changed. The Standing Committee claimed that it received more briefs and comments on section 69, the Confidences provision, than on any other part of the legislation. Truly a symbol had been born.

The exclusion in section 69 covers a wide variety of documentation from memoranda to Cabinet; discussion papers; Cabinet agenda; communications between Ministers on Cabinet business; briefing material; and draft legislation and Orders in Council. Cabinet Confidences are excluded from the Act for a period of 20 years, thus creating a trade in Confidences of previous governments while the current one is left in peace. The special nature of Cabinet Confidences is eloquently put in the Treasury Board policy manual concerning access to information and privacy:

"The Canadian government is based on a Cabinet system. Thus, responsibility rests not in a single individual but on a committee of Ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of collective responsibility of Ministers by enabling them to support government decisions, whatever their personal views. The rule also enables Ministers to engage in full and frank discussions necessary for the effective functioning of a Cabinet system of government."

All this is well and good, but does it merit exclusion of Cabinet Confidences from the scope of the legislation? The Standing Committee thought not. Having reviewed the various reasons for "Cabinet confidentiality" and found ample reason to justify it, the Members went on to state in *Open and Shut*:

"Nevertheless, the Committee does not believe that the background materials containing factual information submitted to cabinet should enjoy blanket exclusion from the ambit of the Acts. It is vital that subjective policy advice be severed from factual material found in Cabinet memoranda...(But) factual material should generally be available under the Act - unless, of course, it might otherwise be withheld under an exemption in the legislation."

The Committee found support in the Williams Commission on Freedom of Information and Privacy in Ontario which recommended that Cabinet records be dealt with as a mandatory exemption and not as an exclusion. This was adopted in the Ontario *Freedom of Information and Protection of Privacy Act* and emulated in other provincial legislation, especially in British Columbia. The latter jurisdiction

went on to adopt a 15-year rule for moving Cabinet documents out of the mandatory exemption and to exclude from the provision

- information in a record of decision made by the Executive Council or any of its committees on appeal under an Act; or,
- information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if: (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 years or more have passed since the decision was made or considered.

The last part of the B.C. provision is built on the now defunct Discussion Papers clause in paragraph 69(3)(b) of the federal Act, which established criteria for releasing this type of Cabinet document. It is also analogous to the Mulroney government's decision to lift the veil of Cabinet secrecy somewhat by allowing the Auditor General access to the analysis portions of memoranda to Cabinet after Kenneth Dye took the government to Court over documents relating to the purchase of PetroFina Ltd. in order to test the access to information provisions of the *Auditor General's Act*.

Any reform of the *Access to Information Act* will have to address the "symbol of secrecy" - Cabinet Confidences. Building on the Committee deliberations in *Open and Shut*, the following recommendations are made:

Recommendation 76: *Section 69 of the Act should be amended to convert it into a mandatory, class exemption.*

Recommendation 77: *The current twenty-year exemption covering the exclusion of Cabinet documents from the Act should be converted into a fifteen-year rule as to when documents fall outside the mandatory, class exemption for Cabinet Confidences and may only be exempted under some other provision (e.g., law enforcement or national security). The period of fifteen years was arrived at by the Committee as the maximum duration of three Parliaments. This seems reasonable and has been adopted by British Columbia.*

Recommendation 78: *That paragraph 69(3)b be redrafted to cover analysis portions of Memoranda to Cabinet now made available to the Auditor General and these be made releasable if a decision has been made public, the decision has been implemented, or five years have passed since the decision was made or considered.*

Recommendation 79: *That appeals of decisions under the Cabinet records exemption should be heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.*

The Standing Committee hoped to make the Cabinet Confidence exemption more palatable to the government by restricting the appeal mechanism solely to the Associate Chief Justice of the Federal

Court. It is agreed that consistency and due consideration should underpin decisions whether or not to disclose Cabinet Confidences. This is much more likely to come from the Information Commissioner, with an office dealing daily with the Act and the precedents derived from it. It is agreed, however, that the appeal mechanism to the courts should be to a senior judge.

Chapter 4

**OMBUDSMEN AND QUASI-JUDICIAL POTENTATES:
WHITHER THE ROLE OF THE INFORMATION COMMISSIONER**

There has developed in Canada two distinct models for an Information Commissioner. The first is the federal model where the Commissioner has ombudsman-like powers. The federal Commissioner has very strong investigative authority, but makes recommendations as to how to resolve differences over refusals of access. Appeal from the Commissioner to the Federal Court, while not encouraged, is a reasonably straight-forward process.

The second might be called the provincial model. This establishes a Commissioner with broad investigative authority and the power to issue binding orders. There is the possibility of a negotiated settlement, but it is overshadowed by the Commissioner's quasi-judicial presence. Further appeal to the Courts is much more difficult and would normally occur as a result of alleged procedural irregularities rather than the substantive questions of refusal of access.

The field of complaint and investigation is roughly the same: problems of access, fees, time extensions, difficulties with the publications required under the legislation, and general matters relating to obtaining access. The British Columbia legislation goes on to give some other powers: to conduct investigations and audits to ensure compliance with the Act, to inform the public about the Act, to receive comments from the public about the administration of the Act, to engage or commission research in the field of the Act, to comment on the implications of legislative on access to information, and to bring to the attention of the head of a public body any failure to meet prescribed standards for fulfilling the duty to assist applicants.

The federal and provincial models continue to diverge on the scope of the respective offices. At the provincial level administration of the freedom of information and privacy provisions are combined under one Commissioner. At the federal level, there are two distinct offices; the Office of the Information Commissioner and the Office of the Privacy Commissioner. The federal *Budget of 1992* proposed the combining of the two federal offices, largely as a cost cutting measure. This was not followed through, however, and will not probably be an issue until the two offices are vacant, after the terms of the present Commissioners have expired. It should be remembered that the Standing Committee made a very firm recommendation that the mandates of the two Commissioners should be kept quite separate.

There is also not much likelihood that the federal government will move away from the general ombudsman approach to resolving access issues. Alternate dispute resolution concepts are now very popular in a new age of cooperation and collegiality. This will not be popular, however, with critics, who, despite discovering some warts on the process evolved by the order issuing Commissioners, remain reasonably enamoured of the provincial model, unless some adjustments can be made to the federal Commissioner's powers. Indeed, it is fair to say that the powers for dealing with findings and recommendations in section 37 of the Act are limited and sometimes lead to rigid findings which do not really reflect the Commissioner's role in resolving disputes and getting information out to the public.

Ombudsmen and Quasi-Judicial Potentates: Whither the Role of the Information Commissioner - Chapter 4

One approach might be to split the powers of the Commissioner into some separate streams. This was the approach of the Standing Committee in *Open and Shut*, where there were recommendations to give the Information Commissioner audit powers on government compliance with access requirements and authority to make binding orders on fee waivers. This could be done in the following way.

On the purely administrative side, the Commissioner could be given authority to issue binding orders in regard to fees and fee waiver issues, time extensions, language of access, and issues around the publications. The Commissioner could be given the power to carry out investigations regarding institutional compliance with the provisions of the Act, including new provisions relating to inventorying, indexing and disseminating information and any alleged failure by an institution to meet the prescribed standards for fulfilling the duty to assist applicants, including delays. These investigations would be public documents provided to Parliament, the institution and the designated Minister, in which the Commissioner would make recommendations on the subjects involved.

In addition, institutions would be required to consult the Information Commissioner on any project to licence or otherwise remove from the public domain federal government information sources and receive the Commissioner's recommendations regarding such proposals. This process would work much like the "Data Matching Policy" under the *Privacy Act*. All these investigations and reports should be made public by the Information Commissioner through a database accessed through the *Canada Information Network*, mandated through a reformed *Access to Information Act*. The complaints regarding refusal of access would be dealt with exactly as they are at the present time. This new approach would not basically violate the Commissioner's role as an ombudsman while more closely meeting the new concern in the public sector for better accountability by government institutions.

Recommendation 80: *That section 37 and other appropriate parts of the Act be amended to redefine the Commissioner's power and role as described in the above two paragraphs.*

Recommendation 81: *That the Commissioner establish a database of reports, investigations, rulings and other public documentation which will be available through the Canada Information Network.*

The Standing Committee raised the question of a public education mandate for the Commissioner. This should be recognized in legislation, along with a mandate to engage in or commission research into access issues, as set out in the British Columbia legislation. This leads to another needed power - the requirement to comment on the implications for access to information of proposed legislative schemes or programs of public bodies.

Recommendation 82: *That the Act be amended to give the Commissioner mandates for public education, to engage in or commission research into access issues and power to comment on the implications for access to information of proposed legislative schemes or programs of public bodies.*

Frivolous or Vexatious Requests

There remains the troublesome issue of dealing with frivolous or vexatious requests. Of course, some institutions would view all access requests in this vein. The reality is, however, that many freedom of information acts attempt to deal with the situation where an individual or group decides to use the legislation, not to exercise "information rights", but rather to obstruct the business of government. The most recent attempt in this regard is British Columbia which includes a provision that the "If the head of a public body asks, the Commissioner may authorize the public body to disregard requests.... that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body."

Two important elements emerge in this provision. First, the head of an institution must request relief and the Commissioner then rules. Given the important right being abbreviated, it would be preferable to let any cessation order be appealed to the Federal Court. The order would stand, however, until the Court made a ruling which negated it. This would seem to be an appropriate way to deal with a difficult issue. Another way to deal with the situation is to permit the head of an institution to cease to respond to requests of a similar nature to the above, subject to appeal to the Information Commissioner and the Federal Court. This solution, however, might be open to more charges of abuse.

Recommendation 83: *That the Act be amended to permit the head of a government institution to request from the Information Commissioner an order to cease to respond to access requests that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the institution. The Commissioner would only issue an order after an immediate investigation of the situation and this order would be reviewable by the Federal Court.*

Technical Items

There are a number of technical items relating to the Commissioner and the Courts that have been raised over the years which could be dealt with in any amendment to the *Access to Information Act*.

Recommendation 84: *That sections 49 and 50 of the Act be amended so as to provide a single de novo standard of review.*

Recommendation 85: *That the Act be clarified to explicitly establish the Federal Court's general jurisdiction to substitute its judgement for that of the government institution in interpreting the scope of all exemptions.*

To address the concern that information passing between the institution and the Office of the Information Commissioner is not protected there may be the need to amend section 35.

Recommendation 86: *That section 35 of the Act be amended to make it clear that representation made by one party during the private investigation of a complaint by the Commissioner are not*

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accessible by the other parties to the complaint through another access request. There is a similar need to protect information which has been prepared during the litigation stage.

There has also been concern over delays of appeals going to the Federal Court. It is understood that these are being addressed by new court rules developed under the auspices of the Information Commissioner. For that reason, no recommendation is made in regard to that issue.

Chapter 5

WHERE LIES THE KINGDOM OF ACCESS? THE QUESTION OF APPLICATION AND SCOPE

From the period of first debate over the *Access to Information Act*, there was criticism over what government institutions would be covered by the legislation. The saw-off for the original Act was all departments, ministries of state, organizations treated like departments (e.g. the National Archives of Canada) and non-competitive Crown Corporations. The institutions actually covered by the Act are set out in a customized schedule attached to the legislation. The critics charged that all Crown Corporations, especially agencies such as the CBC, Canadian National Railways, Air Canada and PetroCanada, should be covered precisely because they were arms length from government and needed to be held more accountable for their actions and for the public money they spent.

The Standing Committee took up this refrain in *Open and Shut*. The Members were attracted by the Ontario Commission on Freedom of Information and Individual Privacy (the Williams Commission) which had recommended that freedom of information legislation should apply "to those public institutions normally perceived by the public to be part of the institutional machinery of the government." The question, of course, is where to draw the line along the vague concept of "normally perceived" but the Committee did take a crack at it, setting out two criteria. First, if a public institution is exclusively financed out of the Consolidated Revenue Fund, it should be covered. Second, for institutions not financed exclusively in this way, but able to raise funds through public borrowing, the major determinant should be the degree of government control.

The Committee then went on to argue that all Crown Corporations and wholly-owned subsidiaries should be covered. It exempted not wholly-owned subsidiaries and mixed ventures because these organizations are not controlled by a majority of public funds. As practical justification for this stance, it was pointed out that in March, 1986, the Government of Ontario expanded its freedom of information legislation to cover its Crown Corporations. Ontario has since been joined by other provinces which have undertaken a similar coverage. The only exception granted was the program material of the CBC, which it was agreed should not be subject to access legislation. The Committee also recommended coverage of Parliament and its institutions and agents but did not recommend that the offices of Senators and Members of Parliament be subject to an obligation to disclose information.

Well, where does this leave us in 1994? On one side, after the large number of privatizations of the late 1980s, there are certainly far less Crown Corporations to be covered by access legislation. On the other, there is a new type of structure called a Special Operating Agency (SOA), which did not exist when the Act came into force. These SOAs are parts of departments which have been selected as service agencies. They have a lot of the normal bureaucratic rules removed from their operations and are instructed to focus on their clients, compete, where necessary with the private sector, and try to be self-sustaining, if not, make a profit on their operations. They are designed to improve service to the public and cut the costs of government. SOAs are, however, still a full part of government, meeting the Standing Committee's criteria, and one of the bureaucratic impediments that should not be lifted from

them is the *Access to Information Act*.

This throws us back on the original recommendations of the Standing Committee.

Recommendation 87: *That all federal government institutions, including Special Operating Agencies and Crown Corporations, be covered by the Access to Information Act unless Parliament chooses to exclude an entity in explicit terms.*

This recommendation has the advantage of inclusiveness. It makes it much more difficult for Ministers and bureaucrats to except an institution from coverage simply by not putting a provision in a governing piece of legislation or failing to pass the requisite Order in Council. Parliament has to make a specific decision to exclude a body. Its disadvantage is that no schedule or list is required. Such an instrument is necessary to inform the public which institutions are actually covered by the Act.

Recommendation 88: *That the Department of Justice be instructed to create, maintain and make generally available to the public an up-to-date list of those institutions covered by the Access to Information Act.*

Recommendation 89: *That special provision be made to exclude from the coverage of the Access to Information Act all program materials of the CBC.*

Recommendation 90: *That Parliament be asked to include in amended legislation coverage of the Senate, the House of Commons, the Library of Parliament and all parliamentary agent bodies, but excluding the offices of Senators and Members of Parliament.*

Recommendation 91: *That special provisions for determination of complaints and appeal be included in the Access to Information Act to enable the Office of the Information Commissioner to be covered by the legislation.*

Recommendation 92: *That where the federal government controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then the Access to Information Act should apply to it.*

Recommendation 93: *That provision be made in the Access to Information Act for the removal from the official schedule maintained by the Department of Justice of institutions which are defunct or for some other reason are no longer subject to the legislation.*

At present, the *Access to Information Act* does not really have a scope section. The British Columbia legislation has included a scope section which combines some of the federal section 3, interpretation and section 68, exclusions to the legislation. The section reads as follows:

"This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;

(c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

(d) a record of a question that is to be used in an examination or test;

(d¹) a record containing teaching materials or research materials or research information of employees of a post-secondary educational body;

(e) material placed in the British Columbia Archives and records Service by or for a person or agency other than a public body;

(f) material placed in the archives of a public body by or for a person or agency other than the public body;

(g) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(h) a record of an elected official of a local public body that is not in the custody or control of the local public body.

(2) This Act does not limit the information available by law to a party to a proceeding."

Such a statement should set out the breadth of the coverage of the Act; that it was basically governing how Canadians obtained access to all government information, with a few limited exclusions. Presumably, examples of exclusions would be:

- personal notes, communications, and draft decisions of a person acting in a judicial or quasi-judicial capacity, including perhaps notes of military court martials;
- information from the Commissioner for Federal Judicial Affairs, or any record relating to judges wherever it may be located (This would be a controversial exclusion since, as is

well known, there have been attempts to obtain information about judges through the Department of Justice. The decision would turn on the arguments and balance of the case to protect judges in their independent state);

- ministerial records, that is non-departmental records of a Minister's office. This is the approach taken in Australia and New Zealand and would incorporate the definition of such records in the *National Archives Act*.

Published material would no longer be excluded from the coverage of the legislation but the other materials in section 68 would still fall in the excluded category.

Recommendation 94: *That the Act be amended to include a statement of scope at its beginning on the British Columbia model which clearly sets out what is and what is not subject to the Access to Information Act.*

Chapter 6

A TECHNICIAN'S DELIGHT: ADMINISTRATION AND FEES

The Standing Committee made a bevy of recommendations relating to the administration of the *Access to Information Act*, many of which have been put into effect by regulation and policy. A few are outstanding and some of these merit consideration. As well, a small number of other technical issues have surfaced which need to be addressed. The following recommendations do this.

Recommendation 95: *Section 6 of the Act, request for access to a record, should be amended to refer to "information in records" to bring it in line with similar amendments and aid in solving the problem of relevance in relation to requests that uncover documents of a mixed nature.*

Recommendation 96: *Section 8 of the Act, transferring requests, should be amended to provide that where a request is not transferred by the recipient institution to the institution of greater interest in what is sought, the recipient institution must give the institution of greater interest reasonable notice of its intention to disclose unless; (i) the recipient institution has already consulted the institution of greater interest on the particular request; or, (ii) there is an agreement between the two institutions waiving such notice.*

Delays

The Committee was concerned about time delays both in institutions and the Commissioner's Office. The latter issue has been addressed, in a variety of ways by the Commissioner and the situation has improved. Thus, there seems to be no merit in imposing the sixty-day rule suggested in the *Report* on investigations of the Information Commissioner. Delay in institutions remains a problem. Unfortunately, little that is suggested in *Open and Shut* is likely to ameliorate the situation. Lowering time limits in a period of severe resource restraint will only cause performance statistics to plummet. Declaring that an institution cannot collect fees when they are late will have a negligible effect when so few fees are collected. Institutions do generally try to do their best in processing requests and exhortations from the designated minister usually brings some limited results. There are, however, some chronic laggards and the suggestion of giving the Commissioner specific powers to investigate in this area and to report to the Minister involved, publicly to Parliament and to the designated Minister on the offenders (see chapter 4) does seem to be the best approach available.

In order to make this type of approach effective, a provision should be included, similar to the British Columbia legislation, which imposes a duty on the head of a government institution to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". This establishes a standard against which the Information Commissioner can make a judgement. In addition, it would be possible to restrict delegation to extend time limits to a reasonably

senior level (perhaps Assistant Deputy Minister) in cases where time extensions are required. This would serve to highlight the accountability for the decision and the performance required.

Recommendation 97: *That a new provision be added to the Act which imposes on the head of a government institution the "duty to assist applicants".*

Recommendation 98: *That section 9 of the Act, extension of time limits, be amended to restrict the delegation of granting time extensions to a senior official, perhaps Assistant Deputy Minister level, with the hopes of increasing the accountability for performance by institutions.*

It should be noted that the government will likely wish to add to the conditions under which an institution can seek a time extension. The conditions will turn around heavy workload and would probably cast as trying to obtain an agreement between an institution and the requester or declaring it would be unreasonable for the department to meet the deadline because of the number of requests it has to process. The revision is aimed at problems in a few institutions such as National Revenue, which have been inundated with requests from time to time. The addition of conditions for time extensions should be approached with caution. It may be better to attack this problem through new categories in the fees provisions which permit requests of a commercial nature to be treated differently than to amend section 9.

The Standing Committee was concerned that Access Coordinators be recognized in the *Access to Information Act* because of their critical role in the access regime. The job of Access Coordinator, while still difficult, is now better integrated into the public service and it is not necessary to recognize it in legislation. If the basis of the legislation is broadened as recommended in this report, the Act impinges on a wide range of service officials beyond the Coordinators, including informatics and information management personnel, librarians, and a wide range of program managers.

Fees

We now come to the difficult and controversial question of fees. It may be best to start this section with a couple of principles. First, anyone seeking information for the purpose of holding the government accountable or for their own personal interest should pay minimal fees for obtaining the information, if they make a reasonable and specific request (i.e. not "give me everything you have on NAFTA"). Second, the Act is used by those who seek information of great interest and in reasonable bulk for resale purposes. In these cases, the government should be entitled to either direct the individual or company to another stream for negotiating a licensing agreement or some other arrangement for providing the information or be charged something close to the actual cost of production of the information. If the former route is chosen those arrangements would be subject to the information dissemination criteria set out in the act and reviewable by the Information Commissioner.

The Standing Committee made several recommendations regarding fees. The first was that the application fee should be rescinded. Certainly, no other Canadian jurisdiction requires an application fee but no other also provides five free hours of service (British Columbia provides three hours to locate and retrieve the record). In tough fiscal times, it may be very difficult to rescind the application fee and, indeed, even more difficult to stop it from being raised. The committee also wished to preserve the five

hours free service. This might form the basis of a trade-off.

Recommendation 99:

That the strategy on an application fee should be to have it rescinded but if this is not possible then an application fee should buy the current five hours of free service for non-commercial requests. A reasonable compromise might be a \$15.00 application fee, which buys the five free hours and fifty pages of photocopying or some other appropriate amount of other copies.

The Committee also recommended that no fees be payable if a search did not reveal any records. While this seems reasonable, at first glance, much work is often expended in a fruitless search which cannot be conducted at no cost. Institutions have acted fairly responsibly in this type of situation and, since no other jurisdiction has seen fit to include this type of provision, it does not seem to merit inclusion in a reformed Act.

Another, recommendation in *Open and Shut* was that the fees regulations be adjusted to stipulate a market rate for photocopying. The comment in the Report is symptomatic of a general need to adjust the regulation making power in section 77 of the *Access to Information Act* to reflect constantly adjusting rate structures, especially for computer systems; new media such as diskettes, CD-ROMs and video; and alternative formats for the handicapped. As well, with virtually no adjustment in fees since 1982, there is a need to bring rates and labour costs into line with current levels.

Recommendation 100:

That the regulatory making powers in section 77 of the Act be revised to enable them to reflect reasonableness in pricing and new, cheaper formats for presenting information and rates and labour costs adjusted to reflect current levels.

If the above adjustments were made, the ordinary requester could be left with roughly the same structuring of fees as now exists. Currently, the average fee for a request, including the application fee, ranges just above \$12.00. This would rise a few dollars but still would be very reasonable amount. The change would be for commercial requests. The Act could have criteria upon which to determine whether or not a request was considered to fall within the commercial category. These could turn around the nature of the information being sought and the extent that it contributed to government accountability or was of purely personal interest to the requester or the disclosure was in the public interest.

When a request was deemed commercial by an institution, the requester would be informed of the alternatives: either go forward with a licensing agreement or another arrangement for gaining access to the information or proceed with processing of the request under a fee system which would pass on much more of the actual costs, including review time and shipping charges, and would provide for no free period or copies. An estimate of costs would be provided and a deposit required, except where the cost was less than \$150.00, when full payment would be required. The decision of the institution would be appealable to the Information Commissioner and the clock would stop on the request until such time as the requester agreed on the method of proceeding. This type of commercial request would not apply to the media or even a company seeking information on a competitor. It is designed to deal with the information broker that makes a large number of requests for large amounts of information which is then sold.

Recommendation 101:

That section 11 of the Act be amended to include criteria for deciding when a request is commercial in nature and provision made for procedures for dealing with such requests, including alternative processing, with the requirement for review by the Information Commissioner; special fee structures more reflective of actual costs; an estimate of costs; payment of a deposit and regulatory power to set detailed rates and procedures.

The Standing Committee also made an extensive recommendation for the inclusion of fee waivers in the Act. Both Ontario and British Columbia have dealt with fee waiver specifically in their legislation. The Committee criteria are basically all right. They suggest consideration of whether:

- there will be a benefit to a population group of some size, which is distinct from the benefit of the applicant;
- there can be an objectively reasonable judgement by the applicant as to the academic or public policy value of the particular subject of the research in question;
- the information released meaningfully contributes to public development or understanding of the subject at issue;
- the information has already been made public, either in a reading room or by means of publication;
- the applicant can make some showing that the research effort is likely to be disseminated to the public and that the applicant has the qualifications and ability to disseminate the information. The mere representation that someone is a researcher or 'plans to write a book' should be insufficient to meet this later criterion.

The *Government Communications Policy* sets out more utilitarian waiver criteria:

"Institutions should reduce or waive fees and charges to users where there is a clear duty to inform the public, i.e. when the information:

- is needed by individuals to make use of a service or program for which they may be eligible;
- is required for public understanding of a major new priority, law, policy, program, or service;
- explains the rights, entitlements and obligations of individuals;
- informs the public about dangers to health, safety or the environment....

The Ontario legislation adds a wrinkle of "whether the payment will cause a financial hardship for the person requesting the record".

All this to say that what appeared novel and difficult to prescribe in law in 1987 is now fairly run of the mill and deserves to be considered in any reform of the *Access to Information Act*.

Recommendation 102: *That fee waiver criteria based generally on the text in Open and Shut be incorporated in any amendment of the Act.*

In connection with fee waivers, it is also suggested that the Information Commissioner have the power of making binding orders in this area. This is part of the new powers suggested for the Commissioner in Chapter 4.

Recommendation 103: *That the Information Commissioner be given the power to make binding orders in regard to fee waiver decisions.*

Finally, there is some feeling that performance of institutions under the Act would improve if they were able to retain the fees paid to them rather than depositing them in the Consolidated Revenue Fund. It must be said that this is a very small amount of money for most institutions and would remain so even if they were more diligent in collecting fees. For some, however, such as Revenue Canada, a change might help to offset the costs of the access shop. There is a danger that institutions might see access fees as a new source of revenue and become quite ruthless in charging. The fee structure does make making large dollars reasonable difficult, however, and, along with charging, comes the demand from clients for improved performance. To a limited extent then, such a measure would support some of the performance goals in regard to meeting time deadlines.

Recommendation 104: *That the Act be amended to permit institutions to enter into an agreement with the Treasury Board to retain all or part of the fees they collect and apply them to improving the access program.*

Method of Access

Section 12 of the *Access to Information Act* needs to be modernized to permit accessing and charging for other formats in which information is now presented. As well, it should read "access to information in records".

Recommendation 105: *That section 12 of the Act be modernized to permit access and charging mechanisms for information in other than traditional formats (including alternative formats for the handicapped) and also be amended to read "access to information in record".*

Conclusion - Part 1

INFORMATION ARISTOCRACY OR DIGITAL DEMOCRACY

Open and accessible government is an essential part of an effective democracy and critical in a knowledge-based society and economy. The *Access to Information Act* is entering its eleventh year of existence. In its infancy, it was a bold step to change the process of government in Canada. That it has only partially met the expectations of its critics is not surprising or alarming. The United States, which is approaching thirty years of experimentation with Freedom of Information legislation, has not solved many of the difficult issues that Canadian commentators would see done in the "snap of the fingers". What is troublesome, however, is that the Americans see their legislation growing and continuously supporting their democracy. That spirit and intent is missing in this country. It seems that Parliament has indulged itself in a "collective amnesia" about information rights while the bureaucrats have given scrupulous lip-service to the letter of the law but little inspired leadership for open, accessible and responsive government.

Will the situation change? Only if there is a ground-swell of popular agitation to modernize the Act and make it effective in the face of the information revolution that is seizing the modern world. The present Act did not magically occur. It was the result of a broad coalition of interests which pressed Parliament and the government of the day for change. There is a need to rediscover that coalition for open government and the enlightened reform of Canadian information law and policy. The need for a "public interest" lobby was never more pressing; the stakes never greater for we stand on the brink of deciding, as the *Economist* has put it, whether we will have an information aristocracy or a digital democracy.

This paper provides a specific agenda for the change and reform of the *Access to Information Act*. The Recommendations, which are summarized below, present a thorough-going review of the legislation which will both protect and enhance the current "right to know" enshrined in the legislation and modernize the Act so that it can play an important, preeminent role in helping Canadian democracy adjust to the mores of the Information Age. A major argument today is that we, as a country, cannot afford meaningful reform in any sphere. This paper has not dealt with costs. Suffice it to say that the current *Access to Information Act* costs taxpayers about \$20 million per year. Nothing that is suggested here would increase that amount and the suggestions to better organize government information holdings and disseminate them electronically to the public would actually reduce costs in departments. This does not factor in the effect that information may have on the Canadian economy and the influence it would have in reversing the cynical view of government shared by many citizens. In short, costs are not a factor. It is a time for action. The challenge is considerable but failure to meet it will leave public information policy, like Matthew Arnold, in the *Grande Chartreuse*, "wandering between two worlds, one dead the other powerless to be born....". That, indeed would move farce to tragedy.

Conclusion - Part 2

SUMMARY OF RECOMMENDATIONS

To aid the process of reform, the report makes the following summary of recommendations:

Chapter 1: Of Genealogy and Future Directions

- Recommendation 1:** *It is essential that reform of the Access to Information Act be undertaken as an important part of the political process now underway to renew Canadian democracy. A study of possible amendments to the legislation should be mandated either through a parliamentary committee or whatever body the current government establishes to replace the Law Reform Commission.*
- Recommendation 2:** *It is further recommended that the Information Commissioner request the Prime Minister to write to all Ministers to inform them of the importance of adherence to the requirements of the Act to the integrity of government and his intention to undertake open government reform.*
- Recommendation 3:** *That the Information Commissioner meet with the new Speaker of the House of Commons to recommend that a new standing committee be appointed to deal with the pressing issues of the Information Revolution, including ongoing reform of the Access to Information Act.*
- Recommendation 4:** *That this new Committee set aside time each year to hold hearings on the Information Commissioner's Annual Report and the reports on administration of the Access to Information Act submitted annually by government departments. The Committee should be mandated to ask the Commissioner to undertake special studies and would make recommendations for the ongoing improvement of the access act and information policy.*
- Recommendation 5:** *That the Committee be given research funds to carry on studies of information issues of interest to Parliament and the Canadian public, similar to the role of the United States Congress' Office of Technology Assessment. Another approach would to mandate the Office of the Information Commissioner as the research and policy arm for the Committee.*

- Recommendation 6:** *That a single Minister, preferably the President of the Treasury Board, be named as responsible for the Access to Information Act and that the Treasury Board be the Committee of Cabinet which considers access to information and government information dissemination issues.*
- Recommendation 7:** *That consideration be given to co-locating the Information Law and Privacy Section of the Department of Justice and the Information, Communications and Security Policy Division of the Treasury Board Secretariat in order to provide a statement of leadership on information issues and a critical mass of staff to work on legislative and policy solutions.*
- Recommendation 8:** *That the strategy for amending the Access to Information Act be a broad one which preserves and strengthens the "right to know" as the ultimate guarantee of information access for the citizen but surrounds this with general principles relating to the importance of government information in modern Canadian society.*
- Recommendation 9:** *That the title of the Act be changed to either the "Freedom of Information Act" or the "National Information Act", preferably the latter, to better express its purpose and intent.*
- Recommendation 10:** *That the purpose statement in sub-section 2(1) of the Act be amended to include the idea that unimpeded flow of information between the government and the public is essential to open, accountable government and that government information is a valuable national resource which provides the public with knowledge of government, society, and the economy as a means to effectively manage the government's operations and helps maintain the healthy performance of the economy; and is itself, under appropriate circumstances, a commodity in the marketplace.*
- Recommendation 11:** *That a new section be added to the Act entitled "Government Information - General Management, Access and Dissemination" which contains provisions emphasizing the protection of the public's right to information as an objective for the management of government information, affirming the obligation of government institutions to provide for public access to records and to actively disseminate some types of information; requiring government institutions to employ electronic information dissemination mechanisms where this is appropriate, practical, and cost-effective and the product is easily accessible and useful to the public; and establishing criteria for "Avoiding Improper Restrictions on Information Dissemination". In a consequent amendment, section 70 of the*

Act, powers of the designated Minister, should be revamped to provide the Minister with the authority to guide government institutions in meeting the requirements to protect the public's right of access to government information.

- Recommendation 12:** *That section 30 of the Act be amended to include powers for the Information Commissioner to review the organization of information in government for purposes of access and dissemination, the appropriateness of public reference and charging mechanisms and to investigate all submissions for licensing databases.*
- Recommendation 13:** *That section 68 of the Act be amended to eliminate the exclusion of published material from the coverage of the legislation, and that, in addition, that government institutions are required to organize, catalogue and advise the public of the existence of all government publications, including grey literature, through the inventory and government locator system described in the next section.*
- Recommendation 14:** *Amend the definition of record in section 4 of the Act to read "information in records". This serves several ends. It clarifies the notion of relevance and the scope of the requests but, most important, it recognizes the concept of automated information, where records are less easy to isolate than information.*
- Recommendation 15:** *Amend section 11 of the Act and consequent regulatory power to provide a sensible modern way of charging for electronic information, which form part of an access request. This would have the salutary effect of making government institutions able to demonstrate how easy and cheap it is to make information available electronically.*
- Recommendation 16:** *That section 5 of the Act be amended to require government institutions to organize and index their information holdings and compile and maintain in a current state an electronic inventory of these for effective decision-making and to support both active dissemination of useful information to appropriate publics and general accessibility to non-exempted documentation. (All references to accessing manuals currently in the legislation should be wrapped up into this requirement.)*
- Recommendation 17:** *That section 5 of the Act be further amended to require an automated locator and inventory system maintained by the designated Minister and require that it be built on similar automated inventories (as described above) maintained in government institutions. This locator should be the engine of the Canada Information Network.*

- Recommendation 18:** *Add a section to the Act which sets out the criteria for the taxonomy of databases and require government institutions to identify all databases in accordance with the taxonomy.*
- Recommendation 19:** *Add a section to the Act which would place an obligation on government institutions to make accessible in open digital systems that majority of information that is not exempt and assure that any databases falling into categories one and two of the taxonomy are actively disseminated and are made available through public systems mandated by Act or consequent regulation. Institutions should be required to maintain an open database of information already released under the Access to Information Act.*
- Recommendation 20:** *Consider placing a new provision in the Act, which would set out the criteria to be considered by a government institution, including public interest and pricing or royalties guidance, when contemplating licensing a database to a private sector information provider and clearly mandate public-private sector partnerships.*
- Recommendation 21:** *Amend sub-section 71(1) of the Act to require government institutions to incorporate "access reading room" activities in any Info Centre, Business Centre, Single Window or other Service Centre approach, especially as these develop as electronic access points. These should be rationalized with the current access points used by Info Source, as public reference points for government information.*
- Recommendation 22:** *Provide a legislative direction that federal public reference tools be joined with provincial directories, such as the B.C. Online Freenet Project and should include any electronic versions of major documents released under the Act.*
- Recommendation 23:** *Advocate a full review of Crown Copyright to determine whether or not it is still relevant in the electronic world and subsequent rapid amendment of the Copyright Act once the review is completed.*
- Recommendation 24:** *Seek a legislative mandate for the Depository Services Program either in the National Library Act or the Access to Information Act after a full review to establish the systems role in the dissemination of public government information in digital formats.*

- Recommendation 25:** *The Information Commissioner should only advocate an unwarranted invasion of privacy test for the release of personal information as has been adopted in the Ontario and B.C. legislation if he believes it essential that more personal information needs to be released as a result of ATI requests.*
- Recommendation 26:** *That all exemptions under the Access to Information Act with the exception of section 19, paragraph 20(1)(a), and any new provision dealing with Cabinet Confidences, be discretionary in nature and injury-based.*
- Recommendation 27:** *That the degree of injury in exemptions not be altered in any reform process.*
- Recommendation 28:** *Provide a principle statement that indicates that the public interest is paramount where records reveal a grave environmental, health or safety hazard to the public on the model of the Ontario legislation.*
- Recommendation 29:** *Again following the Ontario model, provide a specific public interest override for section 21 (advice), section 13 (information in confidence from other governments), section 14 (federal-provincial affairs), section 17 (safety of individuals), section 18 (economic interests of government), section 22 (tests and audits), section 23 (solicitor-client privilege), and section 24 (statutory prohibitions). The public interest should be in protection of public health, public safety, the environment, law enforcement, the administration of justice and national defence and security.*
- Recommendation 30:** *Leave the public interest disclosure mechanism for personal information within the purview of the Privacy Act.*
- Recommendation 31:** *Extend the public interest override in subsection 20(6) of the Act to cover paragraph 20(1)(a), trade secrets.*
- Recommendation 32:** *Add a general provision at the beginning of the exemptions part of the Act which obliges heads of institutions to use their discretion in favour of access and openness as opposed to refusal.*
- Recommendation 33:** *Section 10 of the Act should be amended so that the power to neither confirm or deny the existence of a record is restricted to records relating to law enforcement and security and intelligence and an admonition made that the provision is to be used only when strictly necessary.*

- Recommendation 34:** *Section 10 of the Act should be amended to ensure that the reason for severing specific information in a record is made clear to a requester.*
- Recommendation 35:** *The government should be encouraged to issue a policy which states that no exemptions will be applied to results of public opinion research; that a listing of such research, updated no less frequently than each two months (60 days), must be maintained in the office of each institution's Access to Information Coordinator; and that the listing and public opinion results must be provided upon informal request by the public.*
- Recommendation 36:** *That the Act be amended to establish a separate regime for public opinion research which would require government institutions to list all such research within two months (60 days) of a project being undertaken and to release the results when requested informally to do so. Within the two month period, requests could be refused much in the same way as section 26, preparing a publication, currently operates.*
- Recommendation 37:** *That the Information Commissioner advocate and support a public repository for the results of public opinion research, preferably at a Canadian university.*

Section 13: Information Obtained In Confidence From Other Governments

- Recommendation 38:** *Section 13 of the Act should be amended to include the institutions or governments of components of foreign states and self-governing native bands.*
- Recommendation 39:** *The Information Commissioner should either request the government to undertake a study or mandate one himself to study the feasibility of making section 13(a) discretionary, injury based exemption in relation to the confidences of international organizations and foreign states.*
- Recommendation 40:** *Section 13 of the Act should be amended to make it a discretionary, injury-based exemption for provinces, municipalities, self-governing native bands and any other government entities in Canada*
- Recommendation 41:** *Section 13 of the Act should be incorporated into the public interest override.*
- Recommendation 42:** *Section 13 of the Act should be amended to have the confidence end 15 years after the date on the record, except for those records*

relating to law enforcement, and security and intelligence.

Section 14: Federal-Provincial Affairs

Recommendation 43: *Section 14 of the Act should be amended to replace the word "affairs" with "negotiations".*

Recommendation 44: *Section 14 of the Act should be incorporated into the public interest override.*

Section 15: International Affairs and Defence

Recommendation 45: *That section 15 of the Act be amended to clarify that the classes of information listed are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analogous to those sorts of state interest listed in the exemption.*

Section 16: Law Enforcement

Recommendation 46: *Amend section 16 of the Act to introduce an injury test into paragraphs 16(1)(a) and (b).*

Section 17: Safety of Individuals

Recommendation 47: *That section 17 of the Act be amended to incorporate the words "mental or physical health" into the threat to an individual's safety.*

Recommendation 48: *That section 17 of the Act be subject to a public interest override.*

Section 18: Economic Interests of Canada

Recommendation 49: *Section 18 of the Act should be amended so that it could not be used to withhold the results of product or environmental testing done by the government on its own activities.*

Recommendation 50: *Paragraph 18(a) of the Act should be amended to narrow the term "substantial value", relating to government trade secrets and financial, commercial, scientific and technical information, to "substantial monetary value".*

Recommendation 51: *Section 18 of the Act should be adjusted to protect the "confidential business" information of Special Operating Agencies.*

Recommendation 52: *That section 18 be subject to a public interest override.*

Section 20: Third Party Information

Recommendation 53: *That the term "trade secret" should be defined in the Access to Information Act.*

Recommendation 54: *That the above definition be subjected to legal scrutiny before inclusion in the Act to ensure that it meets the requirements of the strict law in this area.*

Recommendation 55: *That the public interest override currently in subsection 20(6) of the Act be extended to paragraph 20(1)(a), trade secrets.*

Recommendation 56: *That section 20 be amended to allow substitutional service of notification (e.g., by public notice or advertisement) where this is effective, practical and less costly.*

Recommendation 57: *That the Act be amended to clarify that third parties bear the onus of proof before the Federal Court when they challenge decisions to disclose records that may contain confidential business information.*

Recommendation 58: *That the Act be amended to provide in section 44 a time limit (20 or 30 days) by which an intervening third party must seek a hearing before the Federal Court.*

Recommendation 59: *That section 20 of the Act be amended to permit protection of information (i) supplied by Indian bands, band associations and tribal councils recognized by the Department of Indian Affairs, and, (ii) about Indian band trust accounts which are held by government institutions, but not supplied by the band.*

Section 21: Advice and Recommendations

Recommendation 60: *That section 21 of the Act be amended to encompass an injury test.*

Recommendation 61: *That section 21 of the Act be clarified as to the type of sensitive decision-making information it covers and include a listing of those type of documents it specifically does not cover.*

- Recommendation 62:** *That section 21 of the Act be amended to reduce the current time limit on the exemption from 20 to 10 years.*
- Recommendation 63:** *That section 21 of the Act be amended in order to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers.*
- Recommendation 64:** *That section 21 of the Act be amended to add a definition of advice, perhaps the balanced definition currently in the Treasury Board policy manual.*
- Recommendation 65:** *Section 21 of the Act be incorporated in the public interest override provision.*
- Recommendation 66:** *That paragraph 21(1)(d) of the Act be amended to exclude rejected plans from the coverage of the exemption.*

Section 22: Tests and Audits

- Recommendation 67:** *That section 22 of the Act be incorporated in the specific public interest override provision.*

Section 23: Solicitor-Client Privilege

- Recommendation 68:** *That amendment be considered for section 23 that either clarifies that the exemption will only be used in cases where litigation or negotiations are underway or are reasonably foreseeable, or alternatively, permits the waiving of solicitor-client privilege for a portion of the requested records, without prejudicing the claim for the other portion.*
- Recommendation 69:** *That section 23 of the Act be incorporated in the specific public interest override provision.*

Section 24: Statutory Prohibitions

- Recommendation 70:** *That the review of statutes under section 24 undertaken by the Standing Committee be immediately reviewed by the Department of Justice and a public report issued as to which statutes are being summarily removed from the list and suggestions made as to how section 24 will be reformed to prevent it becoming a loophole around the Access to Information Act. The Commissioner should suggest to the Minister of Justice that this is a small but very tangible step*

toward open and accountable government.

Recommendation 71: *Section 24 should be made subject to the specific public interest override provision.*

Section 25: Severance

Recommendation 72: *That section 25 be clarified to reinforce the principle that severance applies not only to records, a part of which could be protected by a discretionary exemption, but also to records where part is protected by a mandatory exemption.*

Recommendation 73: *That section 25 of the Act be amended to indicate that access is to "information" and not to "records". This would aid access to computer-based information and perhaps to resolve the debate over relevance where information pertinent to a request is mixed up with information not involved with the subject.*

Section 26: Information to be Published

Recommendation 74: *That section 26 of the Act be amended to reduce the time involved in printing a document from 90 days to 60 days. This is ample time given modern printing methods and would further reduce time delays.*

Possible New Exemption

Recommendation 75: *That the Act be amended to include an exemption dealing with information the disclosure of which could be harmful to the conservation of endangered species or heritage sites.*

Chapter 3: Aladdin's Lamp or Old confidences for New

Recommendation 76: *Section 69 of the Act should be amended to convert it into a mandatory, class exemption.*

Recommendation 77: *The current twenty-year exemption covering the exclusion of Cabinet documents from the Act should be converted into a fifteen-year rule as to when documents fall outside the mandatory, class exemption for Cabinet Confidences and may only be exempted under some other provision (e.g., law enforcement or national security). The period of 15 years was arrived at by the Committee as the maximum duration of three Parliaments. This seems reasonable and has been adopted by*

British Columbia.

Recommendation 78: *That paragraph 69(3)(b) be redrafted to cover analysis portions of Memoranda to Cabinet now made available to the Auditor General and these be made releasable if a decision has been made public, the decision has been implemented, or five years have passed since the decision was made or considered.*

Recommendation 79: *That appeals of decisions under the Cabinet records exemption should be heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.*

Chapter 4: Ombudsmen and Quasi-Judicial Potentates:
Whither the role of the Information Commissioner

Recommendation 80: *That section 37 and other appropriate parts of the Act be amended to redefine the Commissioner's power and role as described in the above two paragraphs.*

Recommendation 81: *That the Commissioner establish a database of reports, investigations, rulings and other public documentation which will be available through the Canada Information Network.*

Recommendation 82: *That the Act be amended to give the Commissioner mandates for public education to engage in or commission research into access issues and power to comment on the implications for access to information of proposed legislative schemes or programs of public bodies.*

Recommendation 83: *That the Act be amended to permit the head of a government institution to request from the Information Commissioner an order to cease to respond to access requests that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the institution. The Commissioner would only issue an order after an immediate investigation of the situation and this order would be reviewable by the Federal Court.*

Recommendation 84: *That sections 49 and 50 of the Act be amended so as to provide a single de novo standard of review.*

Recommendation 85: *That the Act be clarified to explicitly establish the Federal Court's general jurisdiction to substitute its judgement for that of the government institution in interpreting the scope of all exemptions.*

Recommendation 86: *That section 35 of the Act be amended to make it clear that*

representation made by one party during the private investigation of a complaint by the Commissioner are not accessible by the other parties to the complaint through another access request. There is a similar need to protect information which has been prepared during the litigation stage.

Chapter 5: Where Lies the Kingdom of Access?:
The Question of Application and Scope.

- Recommendation 87:** *That all federal government institutions, including Special Operating Agencies and Crown Corporations, be covered by the Access to Information Act unless Parliament chooses to exclude an entity in explicit terms.*
- Recommendation 88:** *That the Department of Justice be instructed to create, maintain and make generally available to the public an up-to-date list of those institutions covered by the Access to Information Act.*
- Recommendation 89:** *That special provision be made to exclude from the coverage of the Access to Information Act all program materials of the CBC.*
- Recommendation 90:** *That Parliament be asked to include in amended legislation coverage of the Senate, the House of Commons, the Library of Parliament and all parliamentary agent bodies, but excluding the offices of Senators and Members of Parliament.*
- Recommendation 91:** *That special provisions for determination of complaints and appeal be included in the Access to Information Act to enable the Office of the Information Commissioner to be covered by the legislation.*
- Recommendation 92:** *That where the federal government controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then the Access to Information Act should apply to it.*
- Recommendation 93:** *That provision be made in the Access to Information Act for the removal from the official schedule maintained by the Department of Justice of institutions which are defunct or for some other reason are no longer subject to the legislation.*
- Recommendation 94:** *That the Act be amended to include a statement of scope at its beginning on the British Columbia model which clearly sets out what is and what is not subject to the Access to Information Act.*

Chapter 6: A Technician's Delight: Administration Fees

- Recommendation 95:** *Section 6 of the Act, request for access to a record, should be amended to refer to "information in records" to bring it in line with similar amendments and aid in solving the problem of relevance in relation to requests that uncover documents of a mixed nature.*
- Recommendation 96:** *Section 8 of the Act, transferring requests, should be amended to provide that where a request is not transferred by the recipient institution to the institution of greater interest in what is sought, the recipient institution must give the institution of greater interest reasonable notice of its intention to disclose unless; (i) the recipient institution has already consulted the institution of greater interest on the particular request; or, (ii) there is an agreement between the two institutions waiving such notice.*
- Recommendation 97:** *That a new provision be added to the Act which imposes on the head of a government institution the "duty to assist applicants".*
- Recommendation 98:** *That section 9 of the Act, extension of time limits, be amended to restrict the delegation of granting time extensions to a senior official, perhaps Assistant Deputy Minister level, with the hopes of increasing the accountability for performance by institutions.*
- Recommendation 99:** *That the strategy on an application fee should be to have it rescinded but if this is not possible then an application fee should buy the current five hours of free service for non-commercial requests. A reasonable compromise might be a \$15.00 application fee, which buys the five free hours and fifty pages of photocopying or some other appropriate amount of other copies.*
- Recommendation 100:** *That the regulatory making powers in section 77 of the Act be revised to enable them to reflect reasonableness in pricing and new, cheaper formats for presenting information and rates and labour costs adjusted to reflect current levels.*
- Recommendation 101:** *That section 11 of the Act be amended to include criteria for deciding when a request is commercial in nature and provision made for procedures for dealing with such requests, including alternative processing, with the requirement for review by the Information Commissioner; special fee structures more reflective of actual costs; an estimate of costs; payment of a*

deposit and regulatory power to set detailed rates and procedures.

Recommendation 102: *That fee waiver criteria based generally on the text in Open and Shut be incorporated in any amendment of the Act.*

Recommendation 103: *That the Information Commissioner be given the power to make binding orders in regard to fee waiver decisions.*

Recommendation 104: *That the Act be amended to permit institutions to enter into an agreement with the Treasury Board to retain all or part of the fees they collect and apply them to improving the access program.*

Recommendation 105: *That section 12 of the Act be modernized to permit access and charging mechanisms for information in other than traditional formats (including alternative formats for the handicapped) and also be amended to read "access to information in records".*

Note: This consolidation is included for reference use only. It has no official sanction, should not be relied upon to resolve legal questions, and is not necessarily current.

The Access to Information Act with Recommendations -- Appendix A

ACCESS TO INFORMATION ACT

CHAPTER A-1

An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada

SHORT TITLE

Short title

1. This Act may be cited as the *Access to Information Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "1".

Recommended Change: That the title of the Act be renamed either the Freedom of Information Act or the National Information Act.

PURPOSE OF ACT

Purpose

2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Recommended Change: That the purpose statement in sub-section 2(1) of the Act be amended to include the idea that unimpeded flow of information between the government

and the public is essential to open, accountable government and that government information is a valuable national resource which provides the public with knowledge of government, society, and the economy as a means to effectively manage the government's operations and helps maintain the healthy performance of the economy; and is itself, under appropriate circumstances, a commodity in the marketplace.

Legislative History

1980-81-82-83, c. 111, Sch. I "2".

Recommended Change: That the Act be amended to include a statement of scope at its beginning on the British Columbia model which clearly sets out what is and what is not subject to the legislation.

INTERPRETATION

Definitions

3. In this Act,

"alternative format", with respect to a record, means a format that allows a person with a sensory disability to read or listen to that record;

"Court"

"Court" means the Federal Court--Trial Division;

"designated Minister"

"designated Minister", in relation to any provision of this Act, means such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of that provision;

"foreign state"

"foreign state" means any state other than Canada;

"government institution"

"government institution" means any department or ministry of state of the Government of Canada listed in Schedule I or any body or office listed in Schedule I;

"head"

"head", in respect of a government institution, means

(a) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada presiding over that institution, or

(b) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

"Information Commissioner"

"Information Commissioner" means the Commissioner appointed under section 54;

"record"

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

"sensory disability"

"sensory disability" means a disability that relates to sight or hearing;

"third party"

"third party", in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

Legislative History

1980-81-82-83, c. 111, Sch. I "3"; 1992, c. 21, s. 1.

ACCESS TO GOVERNMENT RECORDS

Right of Access

Right to access to records

4.(1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of the *Immigration Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

Extension of right by order

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

Records produced from machine readable records

(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

Legislative History

1980-81-82-83, c. 111, Sch. I "4"; 1992, c. 1, s. 144 (Sch. VII, item 1(F)).

Recommended Change: Amend the definition of record to read "information about Government Institutions".

Information about Government Institutions

Publication on government institutions

5.(1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

(c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

(d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

Bulletin

(2) The designated Minister shall cause to be published, at least twice each year, a bulletin to bring the material contained in the publication published under subsection (1) up to date and

to provide to the public other useful information relating to the operation of this Act.

Descriptions in publication and bulletins

(3) Any description that is required to be included in the publication or bulletins published under subsection (1) or (2) may be formulated in such a manner that the description does not itself constitute information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act.

Publication and bulletin to be made available

(4) The designated Minister shall cause the publication referred to in subsection (1) and the bulletin referred to in subsection (2) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access thereto.

Legislative History

1980-81-82-83, c. 111, Sch. I "5".

Recommended Change: That a new section be added to the Act entitled "Government Information - General Management, Access and Dissemination" which contains provisions emphasizing the protection of the public's right to information as an objective for the management of government information, affirming the obligation of government institutions to provide for public access to records and to actively disseminate some types of information; requiring government institutions to employ electronic information dissemination mechanisms where this is appropriate, practical, and cost-effective and the product is easily accessible and useful to the public; and establishing criteria for "Avoiding Improper Restrictions on Information Dissemination".

Recommended Change: That section 5 be amended to require government institutions to organize and index their information holdings and compile and maintain in a current state an electronic inventory of these for effective decisionmaking and to support both active dissemination of useful information to appropriate publics and general accessibility to non-exempted documentation. All references to accessing manuals currently in section 71 should be wrapped up into this requirement.

Recommended Change: That section 5 be further amended to require an automated locator and inventory system maintained by the designated Minister and require that it be built on similar automated inventories (as described above) maintained in government institutions. This locator should be the engine of the Canada Information Network.

Recommended Change: Add a new section to the Act which sets out the criteria for the taxonomy of databases and require government institutions to identify all databases in accordance with the taxonomy.

Recommended Change: Add a section to the Act which would place an obligation on government institutions to make accessible in open digital systems that majority of information that is not exempt and assure that any databases falling into categories one and two of the taxonomy are actively disseminated and are made available through

public systems mandated by Act or consequent regulation. Institutions should be required to maintain an open database of information already released under the Access to Information Act.

Recommended Change: Add a section to the Act which would set out the criteria to be considered by a government institution, including public interest and pricing or royalties guidance, when contemplating licensing a database to a private sector information provider and clearly mandate public-private sector partnerships.

Recommended Change: Provide a legislative direction that federal public reference tools be joined with provincial directories and should include any electronic versions of major documents released under the Act.

Requests for Access

Request for access to record

6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

Legislative History

1980-81-82-83, c. 111, Sch. I "6".

Recommended Change: Section 6 of the Act should be amended to refer to "information in records" to bring it in line with similar amendments elsewhere.

Notice where access requested

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "7".

Recommended Change: That a new provision be added to the Act which imposes on the head of a government institution the "duty to assist applicants".

Transfer of request

8.(1) Where a government institution receives a request for access to a record under this Act and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, subject to such conditions as may be prescribed by regulation, within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

Deeming provision

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

Meaning of greater interest

(3) For the purpose of subsection (1), a government institution has a greater interest in a record if

(a) the record was originally produced in or for the institution; or

(b) in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "8".

Recommended Change: Section 8 of the Act should be amended to provide that where a request is not transferred by the recipient institution to the institution of greater interest in what is sought, the recipient institution must give the institution of greater interest notice of its intention to disclose unless; (i) the recipient institution has already consulted the institution of greater interest on the particular request; or, (ii) there is an agreement between the two institutions waiving such notice.

Extension of time limits

9.(1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(b) consultations are necessary to comply with the request that cannot reasonably be

completed within the original time limit, or

(c) notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

Notice of extension to Information Commissioner

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Legislative History

1980-81-82-83, c. 111, Sch. I "9".

Recommended Change: That section 9 of the Act be amended to restrict the delegation of granting time extensions to a senior official, perhaps Assistant Deputy Minister level, with the hopes of increasing the accountability for performance by institutions.

Where access is refused

10.(1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested

under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Legislative History

1980-81-82-83, c. 111, Sch. I "10".

Recommended Change: Amend section 10 so that the power to neither confirm or deny the existence of a record is restricted to records relating to law enforcement and security and intelligence and an admonition made that the provision is to be used only when strictly necessary.

Recommended Change: Section 10 of the Act should be amended to ensure that the reason for severing specific information in a record is made clear to a requester.

Fees

11.(1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

(a) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation;

(b) before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and

(c) before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced.

Additional payment

(2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

Where a record is produced from a machine readable record

(3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

Deposit

(4) Where the head of a government institution requires payment of an amount under

subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

Notice

(5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

(a) give written notice to the person of the amount required; and

(b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

Waiver

(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section..

Legislative History

1980-81-82-83, c. 111, Sch. I "11"; 1992, c. 21, s. 2.

Recommended Change: Amend section 11 and consequent regulatory power to provide a sensible modern way of charging for electronic information, which form part of an access request.

Recommended Change: That the strategy in regard to an application fee should be to have it rescinded but if this is not possible then an application fee should buy the current five hours of free service for non-commercial requests. A reasonable compromise might be a \$15.00 application fee, which buys the five free hours and fifty pages of photocopying or some other appropriate amount of other copies.

Recommended Change: That section 11 be amended to include criteria for deciding when a request is commercial in nature and provision made for procedures for dealing with such requests, including alternative processing, special fee structures more reflective of actual costs; an estimate of costs; payment of a deposit and regulatory power to set detailed rates and procedures.

Recommended Change: That fee waiver criteria be incorporated in this provision of the Act.

Recommended Change: That the Information Commissioner be given the power to make binding orders in regard to fee waiver decisions.

Recommended Change: That the Act be amended to permit institutions to enter into an agreement with the Treasury Board to retain all or part of the fees they collect and apply

them to improving the access program.

Access

Access to record

12.(1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

Language of access

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

Access to record in alternative format

(3) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given has a sensory disability and requests that access be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format

(a) forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the person's right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.

Legislative History

1980-81-82-83, c. 111, Sch. I "12"; R.S., 1985, c. A-1, s. 12; R.S., 1985, c. 31 (4th Supp.), s. 100(E); 1992, c.21, s. 3.

Recommended Change: That section 12 of the Act be modernized to permit access and charging mechanisms for information in other than traditional formats (including alternative formats for the handicapped) and also be amended to read "access to information in records".

EXEMPTIONS

Responsibilities of Government

Recommended Change: That all exemptions under the Access to Information Act with the exception of section 19, paragraph 20(1)(a), and any new provision dealing with Cabinet Confidences, be discretionary in nature and injury-based.

Recommended Change: That the degree of injury in exemptions not be altered in any reform process.

Recommended Change: Provide a principle statement that indicates that the public interest is paramount where records reveal a grave environmental, health or safety hazard to the public on the model of the Ontario legislation.

Recommended Change: Again following the Ontario model, provide a specific public interest override for section 21 (advice), section 13 (information in confidence from other governments), section 14 (federal-provincial affairs), section 17 (safety of individuals), section 18 (economic interests of government), section 22 (tests and audits), section 23 (solicitor-client privilege), and section 24 (statutory prohibitions). The public interest should be in protection of public health, public safety, the environment, law enforcement, the administration of justice and national defence and security.

Recommended Change: Add a general provision at the beginning of the exemptions part of the Act which obliges heads of institutions to use their discretion in favour of access and openness as opposed to refusal.

Recommended Change: That the Act be amended to establish a separate regime for public opinion research which would require government institutions to list all such research within two months (60 days) of a project being undertaken and to release the results when requested informally to do so. Within the two month period, requests could be refused much in the same way as section 26, preparing a publication, currently operates.

Recommended Change: That the Information Commissioner advocate and support a public repository for the results of public opinion research, preferably at a Canadian university.

Information obtained in confidence

13.(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

(a) the government of a foreign state or an institution thereof;

(b) an international organization of states or an institution thereof;

(c) the government of a province or an institution thereof; or

(d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

(a) consents to the disclosure; or

(b) makes the information public.

Legislative History

1980-81-82-83, c. 111, Sch. I "13".

Recommended Change: Section 13 of the Act should be amended to include the institutions or governments of components of foreign states and self-governing native bands.

Recommended Change: The Information Commissioner should either request the government to undertake a study or mandate one himself to study the feasibility of making section 13(a) discretionary, injury based exemption in relation to the confidences of international organizations and foreign states.

Recommended Change: Section 13 of the Act should be amended to make it a discretionary, injury-based exemption for provinces, municipalities, self-governing native bands and any other government entities in Canada.

Recommended Change: Section 13 of the Act should be incorporated into the public interest override.

Recommended Change: Section 13 of the Act should be amended to have the confidence end 15 years after the date on the record, except for those records relating to law enforcement, and security and intelligence.

Federal-provincial affairs

14. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information

(a) on federal-provincial consultations or deliberations; or

(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

Legislative History

1980-81-82-83, c. 111, Sch. I "14".

Recommended Change: Section 14 of the Act should be amended to replace the word "affairs" with "negotiations".

Recommended Change: Section 14 of the Act should be incorporated into the public interest override provision.

International affairs and defence

15.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

(d) obtained or prepared for the purpose of intelligence relating to

(i) the defence of Canada or any state allied or associated with Canada, or

(ii) the detection, prevention or suppression of subversive or hostile activities;

(e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

(f) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;

(g) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

(i) relating to the communications or cryptographic systems of Canada or foreign states used

(i) for the conduct of international affairs,

(ii) for the defence of Canada or any state allied or associated with Canada, or

(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

Definitions

(2) In this section,

"defence of Canada or any state allied or associated with Canada"

"defence of Canada or any state allied or associated with Canada" includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada;

"subversive or hostile activities"

"subversive or hostile activities" means

(a) espionage against Canada or any state allied or associated with Canada,

(b) sabotage,

(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,

(d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,

(e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and

(f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Legislative History

1980-81-82-83, c. 111, Sch. I "15".

Recommended Change: That section 15 be amended to clarify that the classes of information listed are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analogous to those sorts of state interest listed in the exemption.

Law enforcement and investigations

16.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

- (i) the detection, prevention or suppression of crime,
- (ii) the enforcement of any law of Canada or a province, or
- (iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the record came into existence less than twenty years prior to the request;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

- (i) relating to the existence or nature of a particular investigation,
- (ii) that would reveal the identity of a confidential source of information, or
- (iii) that was obtained or prepared in the course of an investigation;
or

(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Security

(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(a) on criminal methods or techniques;

(b) that is technical information relating to weapons or potential weapons; or

(c) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

Policing services for provinces or municipalities

(3) The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.

Definition of "investigation"

(4) For the purposes of paragraphs (1)(b) and (c), "investigation" means an investigation that

(a) pertains to the administration or enforcement of an Act of Parliament;

(b) is authorized by or pursuant to an Act of Parliament; or

(c) is within a class of investigations specified in the regulations.

Legislative History

1980-81-82-83, c. 111, Sch. I "16"; 1984, c. 21, s. 70.

Recommended Change: Amend section 16 to introduce an injury test into paragraphs 16(1)(a) and (b).

Safety of individuals

17. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

Legislative History

1980-81-82-83, c. 111, Sch. I "17".

Recommended Change: That section 17 be amended to incorporate the words "mental or physical health" into the threat to an individual's safety.

Recommended Change: That section 17 be subject to a public interest override.

Economic interests of Canada

18. The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;

(b) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution;

(c) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

(d) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including, without restricting the generality of the foregoing, any such information relating to

(i) the currency, coinage or legal tender of Canada,

(ii) a contemplated change in the rate of bank interest or in government borrowing,

(iii) a contemplated change in tariff rates, taxes, duties or any other revenue source,

(iv) a contemplated change in the conditions of operation of financial institutions,

(v) a contemplated sale or purchase of securities or of foreign or Canadian currency, or

(vi) a contemplated sale or acquisition of land or property.

Legislative History

1980-81-82-83, c. 111, Sch. I "4"; 1992, c. 1, s. 144 (Sch. VII, item 1(F)).

Recommended Change: Section 18 should be amended so that it could not be used to withhold the results of product or environmental testing done by the government on its own activities.

Recommended Change: Paragraph 18(a) should be amended to narrow the term "substantial value", relating to government trade secrets and financial, commercial, scientific and technical information, to "substantial monetary value".

Recommended Change: Section 18 of the Act should be adjusted to protect the "confidential business" information of Special Operating Agencies.

Recommended Change: That section 18 be subject to a public interest override provision.

Personal Information

Personal information

19.(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

- (a) the individual to whom it relates consents to the disclosure;
- (b) the information is publicly available; or
- (c) the disclosure is in accordance with section 8 of the *Privacy Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "19".

Recommended Change: The Information Commissioner should only advocate an unwarranted invasion of privacy test for the release of personal information as has been adopted in the Ontario and B.C. legislation if he believes it essential that more personal information needs to be released as a result of ATI requests.

Recommended Change: Leave the public interest disclosure mechanism for personal information within the purview of the *Privacy Act*.

Third Party Information

Third party information

20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

Methods used in testing

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

Preliminary testing

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

Disclosure if a supplier consents

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

Disclosure authorized if in public interest

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

Legislative History

1980-81-82-83, c. 111, Sch. I "4"; 1992, c. 1, s. 144 (Sch. VII, item 1(F)).

Recommended Change: That the term "trade secret" should be defined in the Access to Information Act.

Recommended Change: That the above definition be subjected to legal scrutiny before inclusion in the Act to ensure that it meets the requirements of the strict law in this area.

Recommended Change: Extend the public interest override in subsection 20(6) of the Act to cover paragraph 20(1)(a), trade secrets.

Recommended Change: That section 20 be amended to allow substitutional service of notification (e.g., by public notice or advertisement) where this is effective, practical and less costly.

Recommended Change: That section 20 be amended to clarify that third parties bear the onus of proof before the Federal Court when they challenge decisions to disclose records that may contain confidential business information.

Recommended Change: That section 20 be amended to permit protection of information (i) supplied by Indian bands, band associations and tribal councils recognized by the Department of Indian Affairs, and, (ii) about Indian band trust accounts which are held by government institutions, but not supplied by the band.

Operations of Government

Advice, etc.

21.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

Exercise of a discretionary power or an adjudicative function

(2) Subsection (1) does not apply in respect of a record that contains

(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(b) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

Legislative History

1980-81-82-83, c. 111, Sch. I "21".

Recommended Change: That section 21 be amended to encompass an injury test.

Recommended Change: That section 21 be clarified as to the type of sensitive decision-making information it covers and include a listing of those type of documents it specifically does not cover.

Recommended Change: That section 21Act be amended to reduce the current time limit on the exemption from 20 to 10 years.

Recommended Change: That section 21 be amended in order to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers.

Recommended Change: That section 21be amended to add a definition of advice, perhaps the balanced definition currently in the Treasury Board policy manual.

Recommended Change: Section 21 be incorporated in the public interest override provision.

Recommended Change: That paragraph 21(1)(d) be amended to exclude rejected plans from the coverage of the exemption.

Testing procedures, tests and audits

22. The head of a government institution may refuse to disclose any record requested under this Act that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits.

Legislative History

1980-81-82-83, c. 111, Sch. I "22".

Recommended Change: That section 22 be incorporated in the specific public interest override provision.

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

Legislative History

1980-81-82-83, c. 111, Sch. I "23".

Recommended Change: That amendment be considered for section 23 that either clarifies that the exemption will only be used in cases where litigation or negotiations are underway or are reasonably foreseeable, or alternatively, permits the waiving of solicitor-client privilege for a portion of the requested records, without prejudicing the claim for the other portion.

Recommended Change: That amendment be considered for section 23 that either clarifies that the exemption will only be used in cases where litigation or negotiations are underway or are reasonably foreseeable, or alternatively, permits the waiving of solicitor-client privilege for a portion of the requested records, without prejudicing the claim for the other portion.

Statutory Prohibitions

Statutory prohibitions against disclosure

24.(1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

Review of statutory prohibitions by Parliamentary committee

(2) Such committee as may be designated or established under section 75 shall review

every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.

Legislative History

1980-81-82-83, c. 111, Sch. I "24".

Recommended Change: That the review of statutes under section 24 undertaken by the Standing Committee be immediately reviewed by the Department of Justice and a public report issued as to which statutes are being summarily removed from the list and suggestions made as to how section 24 will be reformed to prevent it becoming a loophole around the Access to Information Act. The Commissioner should suggest to the Minister of Justice that this is a small but very tangible step toward open and accountable government.

Recommended Change: Section 24 should be made subject to the specific public interest override provision.

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

Legislative History

1980-81-82-83, c. 111, Sch. I "25".

Recommended Change: That section 25 be clarified to reinforce the principle that severance applies not only to records, a part of which could be protected by a discretionary exemption, but also to records where part is protected by a mandatory exemption.

Recommended Change: That section 25 be amended to indicate that access is to "information" and not to "records".

Refusal of Access

Refusal of access where information to be published

26. The head of a government institution may refuse to disclose any record requested under this Act or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by a government institution, agent of the Government of Canada or minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for

the purpose of printing it.

Legislative History

1980-81-82-83, c. 111, Sch. I "4"; 1992, c. 1, s. 144 (Sch. VII, item 1(F)).

Recommended Change: That section 2 be amended to reduce the time involved in printing a document from 90 days to 60 days. This is ample time given modern printing methods and would further reduce time delays.

Recommended Change -- Possible New Exemption: That the Act be amended to include an exemption dealing with information the disclosure of which could be harmful to the conservation of endangered species or heritage sites.

THIRD PARTY INTERVENTION

Notice to third parties

27.(1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(a) trade secrets of a third party,

(b) information described in paragraph 20(1)(b) that was supplied by a third party, or

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Waiver of notice

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

Contents of notice

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

Extension of time limit

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Legislative History

1980-81-82-83, c. 111, Sch. I "27".

Representations of third party and decision

28.(1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

Representations to be made in writing

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

Contents of notice of decision to disclose

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access

thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Disclosure of record

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Legislative History

1980-81-82-83, c. 111, Sch. I "28".

Where the Information Commissioner recommends disclosure

29.(1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

(a) the person who requested access to the record; and

(b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

Contents of notice

(2) A notice given under subsection (1) shall include

(a) a statement that any third party referred to in paragraph (1)(b) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Legislative History

1980-81-82-83, c. 111, Sch. I "29".

COMPLAINTS

Receipt and investigation of complaints

30.(1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(a) from persons who have been refused access to a record requested under this Act or a part thereof;

(b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

(e) in respect of any publication or bulletin referred to in section 5; or

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

Complaints submitted on behalf of complainants

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

Information Commissioner may initiate complaint

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "30"; 1992, c. 21, s. 4.

Recommended Change: That section 30be amended to include the powers of the Information Commissioner a right to review the organization of information in government for purposes of access and dissemination, the appropriateness of public reference and charging mechanisms and to investigate all submissions for licensing databases.

Written complaint

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall, where the complaint relates to a request for access to a record, be made within one year from the time when the request for the record in respect of which the complaint is made was received.

Legislative History

1980-81-82-83, c. 111, Sch. I "31".

INVESTIGATIONS

Notice of intention to investigate

32. Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

Legislative History

1980-81-82-83, c. 111, Sch. I "32".

Notice to third parties

33. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof and receives a notice under section 32 of a complaint in respect of the refusal, the head of the institution shall forthwith advise the Information Commissioner of any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "33".

Regulation of procedure

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

Legislative History

1980-81-82-83, c. 111, Sch. I "34".

Investigations in private

35.(1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

Right to make representations

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(a) the person who made the complaint,

(b) the head of the government institution concerned, and

(c) where the Information Commissioner intends to recommend under subsection 37(1) that a record or a part thereof be disclosed that contains or that the Information Commissioner has reason to believe might contain

(i) trade secrets of a third party,

(ii) information described in paragraph 20(1)(b) that was supplied by a third party, or

(iii) information the disclosure of which the Information Commissioner could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the third party, if the third party can reasonably be located,

but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Legislative History

1980-81-82-83, c. 111, Sch. I "35".

Recommended Change: That section 35 be amended to make it clear that representation made by one party during the private investigation of a complaint by the Commissioner are not accessible by the other parties to the complaint through another access request. There is a similar need to protect information which has been prepared during the litigation stage.

Powers of Information Commissioner in carrying out investigations

36.(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(a) to summon and enforce the appearance of persons before the Information

Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Evidence in other proceedings

(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under this Act, or in a review before the Court under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Witness fees

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Return of documents, etc.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is

made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

Legislative History

1980-81-82-83, c. 111, Sch. I "36"; R.S., 1985, c. A-1, s. 36; R.S., 1985, c. 27 (1st Supp.), s.187 (Sch. V, item 1(1)).

Findings and recommendations of Information Commissioner

37.(1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

(b) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

Matter to be included in report to complainant

(3) Where a notice has been requested under paragraph (1)(b) but no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

Access to be given

(4) Where, pursuant to a request under paragraph (1)(b), the head of a government institution gives notice to the Information Commissioner that access to a record or a part thereof will be given to a complainant, the head of the institution shall give the complainant access to the

record or part thereof

(a) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(b) in the matter; or

(b) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(b), if that notice is given, unless a review of the matter is requested under section 44.

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

Legislative History

1980-81-82-83, c. 111, Sch. I "37".

REPORTS TO PARLIAMENT

Annual report

38. The Information Commissioner shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.

Legislative History

1980-81-82-83, c. 111, Sch. I "38".

Recommended Change: That section 37 and other appropriate parts of the Act be amended to redefine the Commissioner's role to give that office the power to make binding decisions regarding fees and fee waivers, time extensions, language of access and difficulties with the publications and power to carry out investigations regarding institutions' compliance with the Act, including new provisions relating to inventorying, indexing and disseminating information.

Recommended Change: That the Commissioner establish a database of reports, investigations, rulings and other public documentation which will be available through the Canada Information Network.

Recommended Change: That the Act be amended to give the Commissioner mandates for public education to engage in or commission research into access issues and power to comment on the implications for access to information of proposed legislative schemes or programs of public bodies.

Recommended Change: That the Act be amended to permit the head of a government institution to request from the Information Commissioner an order to cease to respond to access requests that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the institution. The Commissioner would only issue an order after an immediate investigation of the situation and this order would be reviewable by the Federal Court.

Special reports

39.(1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereof should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

Where investigation made

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 37 have been followed in respect of the investigation.

Legislative History

1980-81-82-83, c. 111, Sch. I "39".

Transmission of reports

40.(1) Every report to Parliament made by the Information Commissioner under section 38 or 39 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

Reference to Parliamentary committee

(2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

Legislative History

1980-81-82-83, c. 111, Sch. I "40".

REVIEW BY THE FEDERAL COURT

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Legislative History

1980-81-82-83, c. 111, Sch. I "41".

Information Commissioner may apply or appear

42.(1) The Information Commissioner may

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(b) appear before the Court on behalf of any person who has applied for a review under section 41; or

(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

Applicant may appear as party

(2) Where the Information Commissioner makes an application under paragraph (1)(a) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

Legislative History

1980-81-82-83, c. 111, Sch. I "42".

Notice to third parties

43.(1) The head of a government institution who has refused to give access to a record requested under this Act or a part thereof shall forthwith on being given notice of any application made under section 41 or 42 give written notice of the application to any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.

Third party may appear as party

(2) Any third party that has been given notice of an application for a review under subsection (1) may appear as a party to the review.

Legislative History

1980-81-82-83, c. 111, Sch. I "43"; 1992, c. 1, s. 144 (Sch. VII, item 2 (F)).

Third party may apply for a review

44.(1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Notice to person who requested record

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

Person who requested access may appear as party

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Legislative History

1980-81-82-83, c. 111, Sch. I "44"; R.S., 1985, c. A-1, s. 44; R.S., 1985, c. 1 (4th Supp.), s. 45 (Sch. III, item 1(F)).

Recommended Change: That the Act be amended to provide in section 44 a time limit (20 or 30 days) by which an intervening third party must seek a hearing before the Federal Court.

Hearing in summary way

45. An application made under section 41, 42 or 44 shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "45".

Access to records

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

Legislative History

1980-81-82-83, c. 111, Sch. I "46".

Court to take precautions against disclosing

47.(1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.

Disclosure of offence authorized

(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "47".

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Legislative History

1980-81-82-83, c. 111, Sch. I "48".

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Legislative History

1980-81-82-83, c. 111, Sch. I "49".

Order of Court where reasonable grounds of injury not found

50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Legislative History

1980-81-82-83, c. 111, Sch. I "50".

Recommended Change: That sections 49 and 50 be amended so as to provide a single *de novo* standard of review.

Recommended Change: That the Act be clarified to explicitly establish the Federal Court's general jurisdiction to substitute its judgement for that of the government institution in interpreting the scope of all exemptions.

Order of Court not to disclose record

51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

Legislative History

1980-81-82-83, c. 111, Sch. I "51".

Applications relating to international affairs or defence

52.(1) Any application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason of paragraph 13(1)(a) or (b) or section 15 shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear such applications.

Special rules for hearings

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(a) be heard *in camera*; and

(b) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

Ex parte representations

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

Costs

53.(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Legislative History

1980-81-82-83, c. 111, Sch. I "53".

OFFICE OF THE INFORMATION COMMISSIONER

Information Commissioner

Information Commissioner

54.(1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.

Tenure of office and removal

(2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons.

Further terms

(3) The Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years.

Absence or incapacity

(4) In the event of the absence or incapacity of the Information Commissioner, or if the office of Information Commissioner is vacant, the Governor in Council may appoint another qualified person to hold office instead of the Commissioner for a term not exceeding six months, and that person shall, while holding that office, have all of the powers, duties and functions of the Information Commissioner under this or any other Act of Parliament and be paid such salary or other remuneration and expenses as may be fixed by the Governor in Council.

Legislative History

1980-81-82-83, c. 111, Sch. I "54".

Rank, powers and duties generally

55.(1) The Information Commissioner shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of Information Commissioner under this or any other Act of Parliament and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

Salary and expenses

(2) The Information Commissioner shall be paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that Court, and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this or any other Act of Parliament.

Pension benefits

(3) The provisions of the *Public Service Superannuation Act*, other than those relating to tenure of office, apply to the Information Commissioner, except that a person appointed as Information Commissioner from outside the Public Service, as defined in the *Public Service Superannuation Act*, may, by notice in writing given to the President of the Treasury Board not more than sixty days after the date of appointment, elect to participate in the pension plan provided in the *Diplomatic Service (Special) Superannuation Act*, in which case the provisions of that Act, other than those relating to tenure of office, apply to the Information Commissioner from the date of appointment and the provisions of the *Public Service*

Superannuation Act do not apply.

Other benefits

(4) The Information Commissioner is deemed to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "55.

Assistant Information Commissioner

Appointment of Assistant Information Commissioner

56.(1) The Governor in Council may, on the recommendation of the Information Commissioner, appoint one or more Assistant Information Commissioners.

Tenure of office and removal of Assistant Information Commissioner

(2) Subject to this section, an Assistant Information Commissioner holds office during good behaviour for a term not exceeding five years.

Further terms

(3) An Assistant Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding five years

Legislative History

1980-81-82-83, c. 111, Sch. I "56".

Duties generally

57.(1) An Assistant Information Commissioner shall engage exclusively in such duties or functions of the office of the Information Commissioner under this or any other Act of Parliament as are delegated by the Information Commissioner to that Assistant Information Commissioner and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

Salary and expenses

(2) An Assistant Information Commissioner is entitled to be paid a salary to be fixed by the

Governor in Council and such travel and living expenses incurred in the performance of duties under this or any other Act of Parliament as the Information Commissioner considers reasonable.

Pension benefits

(3) The provisions of the *Public Service Superannuation Act*, other than those relating to tenure of office, apply to an Assistant Information Commissioner.

Other benefits

(4) An Assistant Information Commissioner is deemed to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "57.

Staff

Staff of the Information Commissioner

58.(1) Such officers and employees as are necessary to enable the Information Commissioner to perform the duties and functions of the Commissioner under this or any other Act of Parliament shall be appointed in accordance with the *Public Service Employment Act*.

Personnel Technical assistance

(2) The Information Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of those persons.

Legislative History

1980-81-82-83, c. 111, Sch. I "58".

Delegation

Delegation by Information Commissioner

59.(1) Subject to subsection (2), the Information Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this or any other Act of Parliament except

(a) in any case other than a delegation to an Assistant Information Commissioner, the power to delegate under this section; and

(b) in any case, the powers, duties or functions set out in sections 38 and 39.

Delegations of investigations relating to international affairs and defence

(2) The Information Commissioner may not, nor may an Assistant Information Commissioner, delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part of a record by reason of paragraph 13(1)(a) or (b) or section 15 except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting those investigations.

Delegation by Assistant Information Commissioner

(3) An Assistant Information Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Assistant Information Commissioner may specify, any of the powers, duties or functions of the Information Commissioner under this or any other Act of Parliament that the Assistant Information Commissioner is authorized by the Information Commissioner to exercise or perform.

Legislative History

1980-81-82-83, c. 111, Sch. I "59".

General

Principal office

60. The principal office of the Information Commissioner shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Legislative History

1980-81-82-83, c. 111, Sch. I "60".

Security requirements

61. The Information Commissioner and every person acting on behalf or under the direction of the Commissioner who receives or obtains information relating to any investigation under this or any other Act of Parliament shall, with respect to access to and the use of that information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of that information.

Legislative History

1980-81-82-83, c. 111, Sch. I "61".

Confidentiality

62. Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

Legislative History

1980-81-82-83, c. 111, Sch. I "62".

Disclosure authorized

63.(1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(a) that, in the opinion of the Commissioner, is necessary to:

(i) carry out an investigation under this Act, or

(ii) establish the grounds for findings and recommendations contained in any report under this Act; or

(b) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Disclosure of offence authorized

(2) The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution if in the opinion of the Commissioner there is evidence thereof.

Legislative History

1980-81-82-83, c. 111, Sch. I "63"; R.S., 1985, c. A-1, s. 63; R.S., c. 27 (1st Supp.), s. 187 (Sch. V, item 1(2)).

Information not to be disclosed

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act;

or

(b) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

Legislative History

1980-81-82-83, c. 111, Sch. I "64".

No summons

65. The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Legislative History

1980-81-82-83, c. 111, Sch. I "65"; R.S., 1985, c. A-1, s. 65; R.S., 1985, c. 27 (1st Supp.), s. 187 (Sch. V, item 1(3)).

Protection of Information Commissioner

66.(1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

(2) For the purposes of any law relating to libel or slander,

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged; and

(b) any report made in good faith by the Information Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

Legislative History

1980-81-82-83, c. 111, Sch. I "66".

OFFENCES

Obstruction

67.(1) No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.

Offence and punishment

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

Legislative History

1980-81-82-83, c. 111, Sch. I "67".

GENERAL

Act does not apply to certain materials

68. This Act does not apply to

(a) published material or material available for purchase by the public;

(b) library or museum material preserved solely for public reference or exhibition purpose; or

(c) material placed in the National Archives of Canada, the National Library, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions.

Legislative History

1980-81-82-83, c. 111, Sch. I "68"; R.S., 1985, c. A-1, s. 68; R.S., 1985, c. 1 (3rd Supp.), s. 12; 1990, c.3, s. 32; 1992, c. 1, s.143 (Sch. VI, item 1 (E)).

Recommended Change: That section 68 be amended to eliminate the exclusion of published material from the coverage of the legislation, and that, in addition, that government institutions are required to organize, catalogue and advise the public of the existence of all government publications, including grey literature, through the inventory and government locator system described in section 5.

Confidences of the Queen's Privy Council for Canada

69.(1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) memoranda the purpose of which is to present proposals or recommendations to Council;

(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) agenda of Council or records recording deliberations or decisions of Council;

(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

(f) draft legislation; and

(g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

Definition of "Council"

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(3) Subsection (1) does not apply to

(a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

(b) discussion papers described in paragraph (1)(b)

(i) if the decisions to which the discussion papers relate have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

Legislative History

1980-81-82-83, c. 111, Sch. I "69"; 1992, c. 1, s. 144 (Sch. VII, item 3(F)).

Recommended Change: That section 69 be amended to convert it into a mandatory,

class exemption.

Recommended Change: That the current twenty-year exemption covering the exclusion of Cabinet documents from the Act should be converted into a fifteen-year rule as to when documents fall outside the mandatory, class exemption for Cabinet Confidences.

Recommended Change: That paragraph 69(3)(b) be redrafted to cover analysis portions of Memoranda to Cabinet now made available to the Auditor General and these be made releasable if a decision has been made public, the decision has been implemented, or five years have passed since the decision was made or considered.

Recommended Change: That appeals of decisions under the Cabinet records exemption should be heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.

Exception Duties and functions of designated Minister

70.(1) Subject to subsection (2), the designated Minister shall

(a) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;

(b) prescribe such forms as may be required for the operation of this Act and the regulations;

(c) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations; and

(d) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

Exception for Bank of Canada

(2) Anything that is required to be done by the designated Minister under paragraph (1)(a) or (c) shall be done in respect of the Bank of Canada by the Governor of the Bank of Canada.

Legislative History

1980-81-82-83, c. 111, Sch. I "70".

Recommended Change: That the President of the Treasury Board be named as the sole Minister responsible for the Access to Information Act.

Recommended Change: That the powers of the designated Minister should be revamped to provide the Minister with the authority to guide government institutions in meeting the requirements to protect the public's right of access to government information.

Manuals may be inspected by public

71.(1) The head of every government institution shall, not later than July 1, 1985, provide facilities at the headquarters of the institution and at such offices of the institution as are reasonably practicable where the public may inspect any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public.

Exempt information may be excluded

(2) Any information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act may be excluded from any manuals that may be inspected by the public pursuant to subsection (1).

Legislative History

1980-81-82-83, c. 111, Sch. I "71").

Recommended Change: Amend sub-section 71(1) of the Act to require government institutions to incorporate "access reading room" activities with all government services centres and current access points for InfoSource.

Report to Parliament

72.(1) The head of every government institution shall prepare for submission to Parliament an annual report on the administration of this Act within the institution during each financial year.

Tabling of report

(2) Every report prepared under subsection (1) shall be laid before each House of Parliament within three months after the financial year in respect of which it is made or, if that House is not then sitting, on any of the first fifteen days next thereafter that it is sitting.

Reference to Parliamentary committee

(3) Every report prepared under subsection (1) shall, after it is laid before the Senate and the House of Commons under subsection (2), be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

Legislative History

1980-81-82-83, c. 111, Sch. I "72".

Recommended Change: That a new Parliamentary Standing Committee be formed to deal with the pressing challenges of the revolution in Information Technology and its

impact on society.

Recommended Change: That the Committee set aside time each year to review the Annual Report submitted by the Information Commissioner and government institutions and make recommendations for improving access to and dissemination of government information.

Recommended Change: That the new Committee be given research funds or mandate the Office of the Information Commissioner to carry out research on information issues much like Congress mandates of the Office of Technology Assessment in the United States.

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

Legislative History

1980-81-82-83, c. 111, Sch. I "73".

Recommended Change: That all federal government institutions, including Special Operating Agencies and Crown Corporations, be covered by the Access to Information Act unless Parliament chooses to exclude an entity in explicit terms.

Recommended Change: That the Department of Justice be instructed to create, maintain and make generally available to the public an up-to-date list of those institutions covered by the Access to Information Act.

Recommended Change: That special provision be made to exclude from the coverage of the Access to Information Act all program materials of the CBC.

Recommended Change: That Parliament be asked to include in amended legislation coverage of the Senate, the House of Commons, the Library of Parliament and all parliamentary agent bodies, but excluding the offices of Senators and Members of Parliament.

Recommended Change: That special provisions for determination of complaints and appeal be included in the Access to Information Act to enable the Office of the Information Commissioner to be covered by the legislation.

Recommended Change: That where the federal government controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then the Access to Information Act should apply to it.

Recommended Change: That the regulatory making powers in section 77 of the Act be

revised to enable them to reflect reasonableness in pricing and new, cheaper formats for presenting information and rates and labour costs adjusted to reflect current levels.

Recommended Change: That provision be made in the Access to Information Act for the removal from the official schedule maintained by the Department of Justice of institutions which are defunct or for some other reason are no longer subject to the legislation.

Recommended Change: Undertake a full review of Crown Copyright to determine whether or not it is still relevant in the electronic world and subsequent rapid amendment of the Copyright Act once the review is completed.

Recommended Change: Seek a legislative mandate for the Depository Services Program either in the National Library Act or the Access to Information Act after a full review to establish the systems role in the dissemination of public government information in digital formats.

Protection from civil proceeding or from prosecution

74. Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown or any government institution, for the disclosure in good faith of any record or any part of a record pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

Legislative History

1980-81-82-83, c. 111, Sch. I "74".

Permanent review of Act by Parliamentary committee

75.(1) 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.

Review and report to Parliament

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

Legislative History

1980-81-82-83, c. 111, Sch. I "75".

Binding on Crown

76. This Act is binding on Her Majesty in right of Canada.

Legislative History

1980-81-82-83, c. 111, Sch. I "76".

Regulations

77.(1) The Governor in Council may make regulations

(a) prescribing limitations in respect of records that can be produced from machine readable records for the purpose of subsection 4(3);

(b) prescribing the procedure to be followed in making and responding to a request for access to a record under this Act;

(c) prescribing, for the purpose of subsection 8(1), the conditions under which a request may be transferred from one government institution to another;

(d) prescribing a fee for the purpose of paragraph 11(1)(a) and the manner of calculating fees or amounts payable for the purposes of paragraphs 11(1)(b) and (c) and subsections 11(2) and (3);

(e) prescribing, for the purpose of subsection 12(1), the manner or place in which access to a record or a part thereof shall be given;

(f) specifying investigative bodies for the purpose of paragraph 16(1)(a);

(g) specifying classes of investigations for the purpose of paragraph 16(4)(c); and

(h) prescribing the procedures to be followed by the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner in examining or obtaining copies of records relevant to an investigation of a complaint in respect of a refusal to disclose a record or a part of a record under paragraph 13(1)(a) or (b) or section 15.

Additions to Schedule I

(2) The Governor in Council may, by order, amend Schedule I by adding thereto any department, ministry of state, body or office of the Government of Canada.

Legislative History

1980-81-82-83, c. 111, Sch. I "77"; 1992, c.21, s.5.

Note: This consolidation is included for reference use only. It has no official sanction, should not be relied upon to resolve legal questions, and is not necessarily current.

Canada Evidence Act -- Appendix B

Disclosure of Government Information

Objection to disclosure of information

37.(1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Where objection made to superior court

37.(2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection(1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstance of the case, the public interest in disclosure outweighs in importance the specified public interest.

Where objection not made to superior court

37.(3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by

(a) the Federal Court -- Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or

(b) the trial division or trial court of the superior court of the province within which the court, person or body exercise its jurisdiction, in any other case.

Limitation period

37.(4) An application pursuant to subsection (3) shall be made within ten days after the objection is made or within such further or lesser time as the court having jurisdiction to hear the application considers appropriate in the circumstances.

Appeal to court of appeal

37.(5) An appeal lies from a determination under subsection (2) or (3)

(a) to the Federal court of Appeal from a determination of the Federal Court -- Trial Division;
or

(b) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of a province.

Limitation period for appeal under subsection (5)

37.(6) An appeal under subsection (5) shall be brought within ten days from the date of the determination appealed from or within such further time as the court having jurisdiction to hear the appeal considers appropriate in the circumstances.

Limitation periods for appeals to Supreme Court of Canada

37.(7) Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made pursuant to subsection (5) shall be made within ten days from the date of the judgment appealed from or within such further time as the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and

(b) where leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within such time as the court that grants leave specifies.

Objection relating to international relations or national defence or security

38.(1) Where an objection to the disclosure of information is made under subsection 37(1) on grounds that the disclosure would be injurious to international relations or national defence or security, the objection may be determined, on application, in accordance with subsection 37(2) only by the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications.

Limitation period

38.(2) An application under subsection (1) shall be made within ten days after the objection is made or within such further or lesser time as the Chief Justice of the Federal Court, or such other judge of that Court as the chief Justice may designate to hear such applications, considers appropriate.

Appeal to federal Court of Appeal

38.(3) An appeal lies from a determination under subsection (1) to the Federal Court of Appeal.

Subsection 36(6) and (7) apply

38.(4) Subsection 37(6) applies in respect of appeals under subsection (3), and subsection 37(7) applies in respect of appeals from judgments made pursuant to subsection(3), with such modifications as the circumstances require.

Special rules for hearings

38.(5) An application under subsection (1) or an appeal brought in respect of the application shall

(a) be heard *in camera*, and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

***Ex parte* representations**

38.(6) During the hearing of an application under subsection (1) or an appeal brought in respect of the application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*.

Objection relating to a confidence of the Queen's Privy Council

39.(1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

39.(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that

are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of "Council"

39.(3) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

39.(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.