

**Office of the Information Commissioner of Canada: Response to the
Government's Action Plan for Reform of the *Access to Information Act***

(Including the reform elements contained in the proposed *Federal Accountability Act*
and in the Discussion Paper of April 11, 2006:
"Strengthening the *Access to Information Act*")

A Special Report to Parliament

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Introduction

On April 11, 2006, the Conservative government made public its legislative proposals and action plan to make government more accountable and transparent.

Included in the proposals and action plan are a number of proposed changes to the *Access to Information Act* (which are set out in the *Federal Accountability Act*) and a discussion paper (strengthening the *Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*).

The government's approach to the access to information elements of its accountability package of reforms, came as a surprising disappointment to many – including the Information Commissioner. Many of the key reforms which the government had promised to enact, failed to find their way into the *Federal Accountability Act*. Instead, the government proposes to send them to committee for further study and discussion. Such a process raises concerns about the government's commitment to access reform. Yet, of even more serious concern, is the content of the discussion paper issued by the government to aid the study and discussion of access reform. All of the positions the government now takes in the discussion paper are contrary to the positions the Conservative Party took, and its leader espoused, during the election campaign.

As well, the changes to the *Access to Information Act* made in the *Federal Accountability Act* are concerning. They add institutions to the coverage of the Act, but they do little to increase public access to information held by the newly added entities.

Information Commissioners have come to expect that governments will find it hard to push forward with real access reform. Yet the disappointment is particularly poignant this time, because the promises for reform had been made with such detail and conviction. This is not a report which this Commissioner expected to write and is not one in which he takes any pleasure.

The decision to make this Special Report to Parliament – a course of action which the law requires be reserved for situations of "urgency" or "importance" – resulted from a number of factors. First, the government has announced its intention to fast-track consideration of the *Federal Accountability Act* with a view to having it enacted into law before the summer recess. In such a circumstance, the Commissioner's concerns about the content of this legislation cannot await publication of the 2005-06 Annual Report, which is ordinarily tabled just prior to the summer recess.

Second, in his announcement extending the term of office of the Information Commissioner for six months (from April 1 to September 30, 2006) the Prime Minister expressed a desire to have the benefit of the views of the Information Commissioner on the government's proposals to reform the *Access to Information Act*.

Finally, and most important, the content of the *Federal Accountability Act*, and the government's discussion paper on access reform, is a cause for grave concern. What the government now proposes – if accepted – will reduce the amount of information

available to the public, weaken the oversight role of the Information Commissioner and increase government's ability to cover-up wrongdoing, shield itself from embarrassment and control the flow of information to Canadians.

No previous government, since the *Access to Information Act* came into force in 1983, has put forward a more retrograde and dangerous set of proposals to change the *Access to Information Act*. Most recently, in 2002, the Liberal government of Jean Chrétien established a Task Force of government insiders to come up with recommendations for "reform" of the access law. The result was so pro-secrecy that it prompted this Information Commissioner to table a Special Report to Parliament, in September 2002, raising this alarm:

"Once again we are, with this Task Force Report, confronted with the reality that bureaucrats like secrets – they always have; they will go to absurd lengths to keep secrets from the public and even from each other. Bureaucrats don't yet grasp the profound advance our democracy made with the passage, in 1983, of the *Access to Information Act*. They continue to resent and resist the intentional shift of power, which Parliament mandated, away from officials to citizens. A bureaucrat's dream of reform is to get back as much lost power over information as possible" (p. 10).

The current government's proposals are every bit as much "a bureaucrat's dream" as were those of the Chrétien government.

This Special Report, as did the 2002 Special Report, sounds this alarm: The government's access to information reform plan will not strengthen the accountability of government through transparency – it will weaken it.

There is no more eloquent testimonial to the power of the forces of secrecy in government than the radical change they have wrought, in a few short weeks, to the Prime Minister's election promises for access reform. In his role as Leader of the Opposition, Stephen Harper ridiculed the Martin government's decision to release a discussion paper, rather than to introduce a bill to reform the *Access to Information Act*.

Prior to the election, Stephen Harper, also ridiculed the content of the Martin government's discussion paper saying that: "it proposes to make the government more secretive than it already is, to propose a new 20 year gag order on draft internal audit reports and working papers, and to try to prevent the release of consultant reports for agencies for 20 years." (Conservative Party press release, June 2, 2005).

The new government has done exactly the things for which its predecessor had been ridiculed. The government has issued a discussion paper rather than a comprehensive reform bill and in the proposed *Federal Accountability Act*, it has thrown a blanket of secrecy over draft internal audit reports and working papers, for 15 years (no need to demonstrate any potential for injury from disclosure!). Also, the government proposes to keep secret forever all records relating to investigations of wrongdoing in government. The previous government pushed through a secrecy provision for such records (over the objections of the Information Commissioner, public service unions and whistleblowers), but limited its operation to a five-year period.

Here a digression on the government's decision to refer the Commissioner's proposals for access reform (the *Open Government Act*) for more study and debate before being introduced into Parliament. Now is the time for action, not talk! That is the message the Commissioner gave the Standing Committee on Access to Information, Privacy and Ethics on October 25, 2005 – and it remains his position.

The most recent of a long list of exhaustive, detailed, open and professional inquiries was the Gomery Commission of Inquiry. Justice Gomery's second report – *Restoring Accountability* (February 1, 2006) – was informed by an extensive national consultation with respect, *inter alia*, to access to information reform, including, the receipt of comments to a website from the public at large, consultations with experts in five moderated roundtables throughout Canada, receipt of written submissions from experts, academics, interested parties and specific commissioned research.

Based on that widespread consultation with all relevant stakeholders, Justice Gomery made recommendations with respect to access to information reform – specifically, with respect to the reforms contained in the *Open Government Act* which this Commissioner prepared (at the request of the Standing Committee on Access to Information, Privacy and Ethics) and made public in September of 2005. The views and recommendations of Justice Gomery are set out in Appendix "A". They constitute an affirmation that access to information reform is required and an endorsement of the reforms proposed in the *Open Government Act*.

To end this digression, then, there are no gaps in the knowledge base on which proper policy choices can be made for access to information reform; there has been full opportunity for debate, critique and persuasion. There is no reason – apart from a loss of political will – to refrain from proceeding with the reforms contained in the *Open Government Act* as endorsed by Justice Gomery, the Conservative election platform and in the Seventh Report of the Standing Committee on Access to Information, Privacy and Ethics presented to the House of Commons on November 21, 2005.

Part I of this Special Report, will examine the provisions of the *Federal Accountability Act* which affect the *Access to Information Act*. Part II, will offer preliminary comments on the government's April 11, 2006, access to information reform discussion paper.

PART I: FEDERAL ACCOUNTABILITY ACT

New Institutions

The proposed *Federal Accountability Act* adds 19 entities to Schedule I of the *Access to Information Act*; they are:

1. Office of the Commissioner of Lobbying (s. 91)
2. Office of the Director of Public Prosecutions (s. 131)
3. Atomic Energy of Canada Limited (s. 165)
4. Canada Post Corporation (s. 165)
5. Canadian Broadcasting Corporation (s. 165)

6. Export Development Canada (s. 165)
7. National Arts Center (s. 165)
8. Public Sector Pension Investment Board (s. 165)
9. Via Rail Inc. (s. 165)
10. Canada Foundation for Innovation (s. 165)
11. Canada Foundation for Sustainable Development Technology (s. 165)
12. Canada Millennium Scholarship Foundation (s. 165)
13. Office of the Auditor General (s. 165)
14. Chief Electoral Officer (s. 165)
15. Office of the Commissioner of Official Languages (s. 165)
16. Office of the Privacy Commissioner (s. 165)
17. Office of the Information Commissioner (s. 165)
18. Office of Public Sector Integrity Commissioner (s. 201)
19. Registry of the Public Servants Disclosure Tribunal (s. 201)

New Exemptions

The proposed *Federal Accountability Act* amends the *Access to Information Act* by adding 10 new exemptions authorizing additional reasons for secrecy (beyond those available to the institutions which are already subject to the *Access to Information Act*); they are:

1. With respect to the Commissioner of Lobbying, a mandatory, class exemption (with no time limit) for "any record --- that contains information that was obtained or created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by or under the authority of the Commissioner (s. 89).
2. With respect to the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner, a mandatory, class exemption (with no time limit) for "any record --- that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority... (s. 146).
3. With respect to the Chief Electoral Officer, a mandatory, class exemption (with no time limit) for "any record --- that contains information that was obtained or created by or on behalf of a person who conducts an examination or review under the *Canada Elections Act* (s. 147).
4. With respect to the Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail Canada Inc., a discretionary, class exemption (with no time limit) for "a record --- that contains trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by (these institutions) (s. 149).

This exemption does not authorize these institutions to refuse to disclose information relating to their general administration, nor does it authorize Canada Post Corporation to refuse to disclose information relating to any activity fully funded out of moneys appropriated by parliament. (s. 149). [See N.B. at p. 15).

5. With respect to the National Arts Centre Corporation, a mandatory, class exemption (with no time limit) for "a record --- if the disclosure would reveal the terms of a contract for the services of a performing artist or the identity of a donor who has made a donation in confidence and if the Corporation has consistently treated the information as confidential" (s. 150).
6. With respect to the Public Sector Pension Investment Board, a mandatory, class exemption (with no time limit) for "a record --- that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential" (s. 150).
7. With respect to the Export Development Corporation (by means of an amendment to the *Export Development Act* and an amendment to Schedule II of the *Access to Information Act*) a mandatory, class exemption (with no time limit) for information "in relation to its customers" except with the "written consent of the person to whom the information relates" (s. 179).
8. With respect to the Public Sector Integrity Commissioner, a mandatory, class exemption (with no time limit) for "any record --- that contains information
 - a. obtained or created by him or her or on his or her behalf in the course of an investigation into a disclosure made under the *Public Servants Disclosure Protection Act* or an investigation commenced under section 33 of that Act; or
 - b. received by a conciliator in the course of attempting to reach a settlement of a complaint filed under subsection 19.1(1) of that Act.

Note: Secrecy is mandatory under paragraph (b), even through the proposed s. 20(4) of the *Public Servants Disclosure Protection Act* authorizes disclosure of information received by a conciliator with the consent of the person who gave the information (s. 222).

9. With respect to all government institutions, a mandatory class exemption (with no time limit) for "any record – that contains information created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act" (s. 222).
10. With respect to all government institutions (new and existing) a discretionary, class exemption (for 15 years) for "any record that contains a draft report of an internal audit of a government institution or any related audit working paper..."

If a final audit report is not produced within two years of the commencement of an internal audit, the most recent draft report becomes accessible (s. 152).

New Exclusions

The proposed *Federal Accountability Act* amends the *Access to Information Act* by adding two exclusions:

1. With respect to the CBC, information is excluded "that relates to its journalistic, creative or programming activities, other than information that relates to its general administration" (s. 161).

2. With respect to AECL, information is excluded "other than information that relates to
 - a. its general administration; or
 - b. its operation of any nuclear facility within the meaning of section 2 of the *Nuclear Safety and Control Act* that is subject to regulation by the Canadian Nuclear Safety Commission established under section 8 of that Act" (s. 161).

N.B. The proposed *Federal Accountability Act* contains a provision which clarifies the meaning of the phrase "information that relates to the general administration of a government institution" as follows:

"For greater certainty, for the purposes of this Act, information that relates to the general administration of a government institution includes information that relates to expenses paid by the institutions for travel, including lodging, and hospitality" (s. 144).

Observations With Respect to the Proposed New Exemptions and Exclusions

It is regrettable that the new government did not consult with the Information Commissioner with respect to the need for, or the wording of, the 12 new exemptions to, and exclusions from, the right of access, which are included in the *Federal Accountability Act*. (The Commissioner offered to play a constructive role during the drafting, but his offer was refused.) It is, thus, unclear, how the government went about challenging the many requests it received for the lawful ability to keep secrets. The process it used favoured secrecy over openness.

The proposed new exemptions and exclusions infringe the principle that exceptions to the right of access should (1) be discretionary, (2) require a demonstration that a defined injury, harm or prejudice would probably result from disclosure, and (3) be subject to a public interest override. As well, the proposed addition of two new exclusions is intended to infringe the principle that exceptions to the right of access should be subject to independent review. It is the position of the government of Canada that the Information Commissioner may not examine information which the government claims to fall within an exclusion.

Where do these principles come from? First, they were articulated by the Information Commissioner as principles which guided the content of the *Open Government Act*. Second, these principles were articulated and endorsed by Justice Gomery in his second report *Restoring Accountability*. Third, these principles are endorsed in the Conservative Party's election platform. Finally, these principles reflect the will of Parliament as expressed in the purpose section of the *Access to Information Act*, as follows:

"... 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."

Of the 10 new exemptions proposed to be added to the *Access to Information Act* (there are only 13 exemptions at present!) eight are mandatory exceptions, contain no requirement to demonstrate injury from disclosure, are not time limited and contain no public interest or consent overrides. Only one such exemption now exists in the Act and it has been consistently abused. Two proposed exemptions are discretionary but contain no injury test and one of these two has a 15-year time limit.

Investigative Information

Many of the mandatory, class exemptions having no time limits relate to institutions which carry out investigative or audit functions (Commissioner of Lobbying, Auditor General, Chief Electoral Officer, Commissioner of Official Languages, Privacy Commissioner, Information Commissioner, Public Sector Integrity Commissioner). There is no defensible, intellectually honest reason why these institutions require more secrecy to do their jobs than do the many institutions which perform investigative, law enforcement and audit functions and which have been subject to the *Access to Information Act* since the beginning. For example, the RCMP, CSIS, Military Police and five other police and investigative bodies, perform their duties and live under the *Access to Information Act*, without being under a mandatory blanket of secrecy for all investigative records. These bodies have the benefit of a discretionary, class exemption (no injury test) for their investigative records for 15 years. Thereafter, these police, intelligence and investigative bodies have the protection of sub-paragraph 16(1)(c) of the *Access to Information Act* which is a discretionary, injury test exemption as follows:

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

(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..."

The contention that the newly added institutions require more secrecy for their investigative and audit functions than do our police, security and intelligence agencies, has no merit.

Indeed, the Supreme Court of Canada, considered and rejected such an argument when it was put forward by the Commissioner of Official Languages in a case arising under the *Privacy Act*.

Writing for the court, Justice Gonthier said the following about the Official Languages Commissioner's generalized fear of disclosure of investigative records:

"The appellant (Commissioner of Official Languages) does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier (for the Commissioner) tried to prove, *generally*, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from

which it could reasonably be concluded that disclosure could be expected to be injurious. ... In the case before us, the appellant has not succeeded in showing that it is *reasonable* to maintain confidentiality." (*Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53 at para. 61.)

Although the Supreme Court of Canada did not consider that a blanket claim for confidentiality for investigative information was "reasonable" – the government apparently does when it comes to the Auditor General, Commissioner of Official Languages, Chief Electoral Officer, Privacy Commissioner, Information Commissioner, Public Sector Integrity Commissioner and Commissioner of Lobbying, and all public servants who investigate wrongdoing or who conduct internal audits. Moreover, the government has, in the *Federal Accountability Act* overturned the *Lavigne* decision of the Supreme Court, and removed important privacy rights, by also including in the *Privacy Act* the blanket secrecy exemptions it proposes to include in the *Access to Information Act*.

Crown Corporation Information

By-and-large, the proposed *Federal Accountability Act*, gives a right of access to information about the general administration of the added Crown Corporations; it prohibits access to information about the mandated activities of these institutions. In other words, access as of right is given primarily to information which already appears, or should appear, on websites and in public, corporate reports. There is no sensitive commercial, financial, corporate or client information held by Crown Corporations which cannot be protected by the exemptions proposed in the *Open Government Act* – the difference is that the government does not appear to want these Crown Corporations to have to discharge the burden of proving that the information they want to keep secret is truly sensitive, truly needs to be kept confidential. The broad zone of secrecy authorized by the *Federal Accountability Act* for the newly added Crown Corporations, is unnecessary to protect what truly needs protection and it has the potential to encourage and perpetuate corruption, mismanagement and political interference. This broad zone of secrecy for Crown Corporations and Officers of Parliament, and those who conduct internal audits or investigations of allegations of wrongdoing, does not serve the goal of greater accountability; it does not serve the public interest.

Other Proposed Amendments to the *Access to Information Act*

There are a number of proposed amendments to the *Access to Information Act* which the Information Commissioner endorses. They are:

1. The requirement for consultation with the leaders of all opposition parties prior to nominating a person for the position of Information Commissioner (s. 109).
2. The imposition of a duty on government institutions, without regard to the requesters identity, to assist access requesters and to respond accurately and completely and to provide access in the requested format (s. 145).
3. The consequential amendments to existing exemptions in the *Access to Information Act* to take into account the officers and directors of Crown Corporations (s. 151(1), s. 156, s. 159).

4. The change of the deadline for complaints to the Information Commissioner from one (1) year from the date of request to 60 days from the date of answer (s. 153).
5. The increase of the number (from 4 to 8) of Information Commissioner staff who may be delegated the power to investigate refusals of access under s. 13 (1)(a) or (b) or s. 15 (s.158, s. 163).
6. The obligation on the President of Treasury Board to collect, annually, statistics which will facilitate the assessment of the performance of the access to information program across government. (Although one must question why there is no obligation placed on the President of Treasury Board to report, annually, to Parliament on the health of the access system).

Observations Concerning What Has Been Left Out of the *Federal Accountability Act*

The foregoing has explained the Information Commissioner's concern about the amendments to the *Access to Information Act* which the government has chosen to include in the proposed *Federal Accountability Act*. This section raises concerns about what has been omitted from the *Federal Accountability Act*. Of the approximately 100 amendments proposed in the *Open Government Act*, the government has included (to some degree) in the *Federal Accountability Act* only 10 of them.

The government has explained its decision not to include comprehensive access reform in the *Federal Accountability Act* as follows:

"The *Access to Information Act* is a complex piece of legislation, with a broad constituency across many sectors of society and widely divergent views on its administration. The Information Commissioner's proposed amendments, for example, would require more than 88 changes or additions to 46 provisions of the *Access to Information Act*. When the Information Commissioner appeared before the Standing Committee, he advised them that his recommendations had not had the benefit of consultations with stakeholders.

A separate process will allow the parliamentary committee to engage in a comprehensive debate in consultation with a broad range of stakeholders, and to issue a report when it reaches the end of its deliberations. This approach is necessary to balance the value of transparency with the legitimate interests of individuals, other governments, and third parties in the security and confidentiality of their dealings with government. It will also allow for diverse views to be heard, and for the resulting legislation to find broad support after comprehensive analysis and full debate." [*Federal Accountability Action Plan: Strengthening Access to Information Legislation*, Treasury Board Secretariat, April 4, 2006].

What are we to make of the government's stated purpose for delaying comprehensive access reform? How are we to view the government's decision to propose to add 12 new secrecy provisions to the *Access to Information Act* (without the benefit of any public consultation) while refusing to add even one new openness provision? How are we to view the government's decision not to include in the *Federal Accountability Act*

even those provisions of the proposed *Open Government Act* which are not identified in the government's discussion paper as requiring further discussion?

For example, the government raises no issues in the discussion paper concerning the expanded purpose section proposed in the *Open Government Act*, as follows:

"The purpose of this Act is to make government institutions fully accountable to the public, and to make the records under the control of those institutions fully accessible to the public..." (s. 2)

If the government doesn't support this articulation of the Act's purpose, why doesn't it say so or raise questions about it in its discussion paper? If it does, why wasn't it included in the *Federal Accountability Act*?

Similarly for provisions in the *Open Government Act* providing a legislated role and mandate for access to information coordinators in all government institutions; restricting the disclosure of requester identities within government institutions; modifying the reasons for extending the 30-day response period; providing protection to persons who disclose information or records to the Commissioner; requiring the Commissioner to publicly name institutions which do not fulfill their access obligations; changing the rights of access requesters to seek judicial review; requiring the designated minister to make an annual report to Parliament on the operations and performance of the access law across government and providing for a Parliamentary review of the access law every five years.

The government is not suggesting that any of these proposed changes require further study yet, they too, have been omitted from the *Federal Accountability Act*.

In summary, both what has been included in the *Federal Accountability Act*, with respect to access to information, and what has been left out, is cause for concern. Whatever be the merits of the *Federal Accountability Act* with respect to other accountability initiatives, it fails when it comes to improving accountability through transparency.

PART II: APRIL 11, 2006 DISCUSSION PAPER: "STRENGTHENING THE ACCESS TO INFORMATION ACT"

The content of the government's discussion paper on reform of the *Access to Information Act* repudiates the bulk of the proposals in the *Open Government Act*, the recommendations made by Justice Gomery (see Appendix A) and the promises made in the Conservative Party platform (see appendix B).

This report will address only the major areas of disagreement between Justice Gomery, the *Open Government Act* and the Conservative election platform, on the one hand, and the government on the other. Those major areas are:

1. duty to create records
2. coverage of the PMO and ministers' offices
3. treatment of cabinet confidences
4. exemptions (discretion, injury test, public interest)

Duty to Create and Related Offence

The right of access has no meaning if government institutions, officers and employees, do not create records to document their decisions, actions, advice, recommendations and deliberations.

There is a broad and strong consensus among members of Parliament and government officials, that good, professional information management is an essential ingredient of good, accountable government. There is, too, broad consensus that an essential ingredient of good, professional information management is the creation of records to document what goes on in government. The government has, by policy, imposed a positive obligation on public officials to leave a "paper trail" of what they do. And yet, the government, and all who have inquired into the government's records management practices, conclude that the government's record creation and information management is in crisis. The discussion paper expresses it this way: "There is a consensus that information management in the government of Canada has declined alarmingly over the past three decades." (p. 34)

Why, then, does the government now take the position that "... codifying the duty to document may not be necessary...?" It is unclear from the discussion paper, but it may be that the government fears the consequences of not respecting the duty. Consider this passage from the Discussion Paper:

"Public servants who misunderstand the rules or who inadvertently fail to document an action or decision (perhaps they thought someone else at the meeting was taking minutes, or they were distracted and never returned to document their action) are not engaging in criminal behaviour. Instead, they are failing to meet administrative standards, and should be dealt with accordingly, perhaps through disciplinary measures." (p. 36)

Even this concern is something of a "straw man". The Information Commissioner does not seek to criminalize inadvertent, administrative failures to create records. The offence proposed in 67.1(1)(c.1) of the *Open Government Act* is a failure to create a record "with intent to deny a right of access."

There is no reason to delay in adopting the *Open Government Act*'s provisions requiring the creation of records (s. 2.2) and the related offence for failure so to do with intent to deny a right of access (s. 67.1(1)(c.1)).

Records Held in the PMO and Minister's Offices

The government now objects to extending the reach of the right of access into the PMO and ministers' offices. It has adopted the position taken by the Chrétien and Martin governments that a department of government does not include, as a component part, the office of the member of the Queen's Privy Council who is in charge of the department.

Central to the government's objection to such a reform is that, if adopted, it would entail independent review of decisions made to refuse access to personal or political records which are held in the PMO and ministers' offices. The discussion paper

expresses the concern as follows: "One concern with this option is that the Information Commissioner would have access to review the personal and political records of Ministers to determine whether the *Access to Information Act* would apply." (p. 8)

The government, in this passage, displays a serious lack of understanding of the current powers and practices of the Information Commissioner. The Commissioner now has the power to examine a record held in the office of a minister or the PMO (except a cabinet confidence) for the purpose of determining threshold issues such as whether the record is a departmental record, a personal record or a political record. The Commissioner's power in this regard was confirmed by the Federal Court of Appeal in 2004 when former Prime Minister Chrétien refused to turn over his daily agenda books to the Commissioner to allow the Commissioner to determine the threshold issue of whether or not the agendas were under the control of the Privy Council Office for the purposes of the *Access to Information Act*. The agendas were, then, provided to the Commissioner, reviewed by him and he concluded that they were subject to the right of access.

In a unanimous judgment, the court said:

"Finally, the respondents argued that even if the information sought by the *subpoena* is adequately protected from disclosure, the fact that this information must nevertheless be reviewed by someone within the Office of the Information Commissioner gives rise to irreparable harm.

There is no merit to this argument. Obviously, information must be reviewed by someone to give effect to the scheme set up by Parliament in implementing the Act. It cannot be seriously argued for instance that irreparable harm results when an authorized officer reviews information with a view of ensuring that personal information and other exempt information is exempt from disclosure.

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To the extent that the reasons of the motions Judge can be read as holding that it is arguable that the individual respondent has no relevant evidence to give in response to the *subpoena* issued by the Commissioner because he swore that the information in his possession is not under the control of a government institution, he was in error." (*Canada v. Canada (Information Commissioner)*, 2001 FCA 25 at paras. 20, 21 and 27.)

Whether or not the government chooses to proceed to accept the Commissioner's proposal that the right of access be extended to records held in the PMO and ministers' offices, the Commissioner will have access to review any records held in those offices to determine the threshold issue of whether or not they are records under the control of the department or purely personal or political records.

The government also suggests that, in order to avoid scrutiny of personal and political papers, it might consider "excluding" such records from the Act. The government seems to have the idea that excluding a record from the Act removes independent review. That, however, is not the state of the law: The Commissioner has a right to

review a record claimed to be excluded in order to determine whether or not it is, indeed, an excluded record. This is true even for cabinet confidences unless a certificate is issued pursuant to section 39 of the *Canada Evidence Act* which operates to preclude independent review of the record(s) claimed to be a cabinet confidence.

Moreover, as will be discussed in more detail later, the Commissioner has the authority to review the legality of a certificate issued pursuant to section 39 of the *Canadian Evidence Act*.

It is clear that the government is seeking to find a way to appear to give a right of access to records held in the PMO and ministers' offices, without actually doing so. Its suggestion that ministers will decide, without independent review, what records fall in a secret category – is not a true right of access consistent with the stated purpose of the Act. Neither is the government's suggestion that the departmental access coordinator decide, without independent review, what will remain secret.

Although the discussion paper raises the possibility of extending the access law's reach to the offices of all members of Parliament, this is not one of the Information Commissioner's proposals – it is the offices of members on the government's front benches which, for accountability reasons, need to be the focus of reform.

Treatment of Cabinet Confidences

The government also seems to have backed away from its pre-election pledge to make the cabinet confidence exclusion into an exemption subject to review by the Information Commissioner. Such review poses no threat to cabinet confidentiality any more than independent review of s. 13 and 15 records threatens national security or international relations.

Again, the discussion paper puts forward, in the guise of reform, a "status quo" proposal.

The government proposes to: 1) keep the cabinet confidence exclusion, 2) continue preventing the Commissioner from seeing the confidence to determine whether or not they qualify as a cabinet confidence, and 3) allow the Commissioner to review the legality of a certification by the Clerk of the Privy Council that a withheld record is a cabinet confidence.

This proposal is the status quo. That is what happens now. The government's proposal will not, in any sense, ensure that cabinet secrecy is not abused.

Structure of Exemptions

The government also seems to have backed away from its pre-election promise to make exemptions discretionary and subject to an injury test and a public interest override. Permeating the government's explanations for its "about face", is the fear that a "reasonable expectation of injury" test, sets the bar too high. It fears that keeping secrets will become too hard. It prefers to make generalized, legislated decisions that classes of records require secrecy. The government does not want to

subject itself, or those who provide records to government, to the burden of demonstrating that there is a justifiable reason for secrecy on a case-by-case basis.

The reason that injury-test exemptions are vital to a healthy access law is that the sensitivity of information does change with circumstances, time and perspective. It is important to remember that the most sensitive information held by the government of Canada – national security information, national defence, security and intelligence, international relations, detection and suppression of subversive or hostile activities – all such information is protected by a discretionary, "reasonable expectation of injury" test exemption (s. 15).

With respect to the Information Commissioner's proposed reforms to the exemptions, the government says:

"Since the release of the Commissioner's proposals last autumn, concerns have been raised about the potential impact on relationships between government and its stakeholders, on government's core operations and on third-party stakeholders themselves. In particular, concerns have been raised about the combined effect of the shift to injury-based exemptions, the repeal of s. 24 mandatory exemptions and a general public interest override" (p.13)

However, the government identifies no new concerns that haven't been articulated, studied and debated since the *Access to Information Act* was first reviewed by a Parliamentary Committee in 1986.

Conclusion

This Special Report to Parliament is intended as an early alert to members and senators, as well as the public, of troubling flaws in the government's proposals for reform of the *Access to Information Act*.

This Special Report does not purport to respond in detail to every objection to reform raised by the government in its discussion paper. The Information Commissioner will, of course, provide detailed commentary on the discussion paper whenever he is called upon to do so by the Standing Committee on Access to Information, Privacy and Ethics.

Appendix "A"

Excerpt from the Second Report of the Gomery Commission of Inquiry 2006: "Restoring Accountability"

"Access to Information"

An appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration. A shift in culture can yield significant benefits. The Commission supports the need for effective public access to information about the workings of government. On the basis of the evidence

presented in the first phase of the Inquiry, however, the Commission was given reason to believe that the Government's response to access to information requests does not always respect the spirit and intent of the existing legislation.

Canada's Information Commissioner, John Reid, made a submission to the Commission, and his recommendations merit serious consideration. There are valid arguments for secrecy concerning certain government operations and Cabinet deliberations, for example, where matters of national security are concerned. At the same time, the arguments in favour of secrecy have been over-emphasized since the legislation was first proclaimed into force on July 1, 1983. The Commission believes that, in general, public servants should not fear embarrassment in the event that their advice to their superiors may be disclosed, even in cases where the advice has not been followed. Surely the public understands that there may be more than one opinion on many subjects, and that Ministers are frequently in the position of having to make difficult choices among a variety of options. Even if a Minister chooses a course of action contrary to what is recommended by department officials, neither the officials nor the Minister should be criticized for advice given or a decision made for legitimate reasons. In any event, should not the public, the persons most affected by decisions made by their elected representatives, be entitled to know what options were considered before a decision was made? If a Minister chooses an option that leads to poor outcomes, the public is entitled to be made aware of such errors in judgment, subject, of course, to the exceptions in matters of national security and others of comparable sensitivity.

Mandatory Record-Keeping

The Commission concurs with the Information Commissioner that there should be mandatory record-keeping in government, and that the obligation to create a "paper trail" should be something more than a matter of policy. It should be an explicit part of the law of Canada.

Accordingly, the Commission agrees that the *Access to Information Act* should be amended to include an obligation on the part of every officer and employee of a government institution to create records that document decisions and recommendations, and that it should be an offence to fail to create those records. Going further, the Commission believes that there should also be free-standing record-keeping legislation which would require public servants and persons acting on behalf of the Government to collect, create, receive and capture information in a way that documents decisions and decision-making processes leading to the disbursement of public funds. This would make it possible to reconstruct the evolution of spending policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review. Such record-keeping legislation should state clearly that deliberate destruction of documentation and failure to comply with record-keeping obligations are grounds for dismissal.

The reason for the creation of legal obligations to maintain and not to destroy government records, in addition to similar rules in the access to information regime, is that the rationale for mandatory recordkeeping does more than facilitate public access to information: it ensures good government and accountability, a requirement consistent with the theme of the Commission's overall recommendations.

Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.

Support for Amendments to the Access to Information Act

In general, the Commission endorses many of the Information Commissioner's proposed amendments to the Act, insofar as they would advance the desired principles of transparency and accountability. In particular:

- It endorses an amendment to the access to information legislation that would state that the Act's purpose "is to make government institutions fully accountable to the public and to make the records under the control of those institutions fully accessible to the public."
- It agrees that amendments to the Act should contain provisions that place a good-faith obligation on government institutions to make reasonable efforts to assist information seekers, and to respond to requests in an open, accurate, complete fashion and without unreasonable delay. The Act should state explicitly that records must be disclosed whenever the public interest in disclosure clearly outweighs the need for secrecy.
- It endorses a clause which specifies that each head, deputy head and access to information coordinator must "ensure, to the extent reasonably possible, that the rights and obligations set out in this Act are respected and discharged by the institution." It is particularly important to emphasize the obligations of access to information coordinators in order to ensure their authority within every Government institution.
- It sees little reason for the large number of federal government institutions that are exempted from the provisions of the Act. It supports an amendment to the Act that would require the Government to add virtually all remaining federal government institutions to Schedule I of the Act, which sets out the institutions that are covered. This point was made by Professor Alasdair Roberts in his research study prepared for the Commission. Information Commissioner John Reid's list of federal government institutions that are not currently subject to the Act, but should be, is a very long one indeed. Since changes to Schedule I would be made by government regulation after amendments to the Act are passed by Parliament, the Commission agrees that the amendments to the Act should include the right to make a complaint to the Information Commissioner if the Government fails to add any particular government institution or institutions to the list. Moreover, since the Canadian Broadcasting Corporation would be added to the Act, the Commission agrees that the CBC should be authorized to withhold records if their disclosure would be injurious to the integrity of newsgathering or programming activities.
- It agrees that certain terms used in the Act should be clarified. For example, "government institution" should explicitly include the office of the head of a

government institution (for example, a Minister's office). "Record" should explicitly include any electronic communication. Where a record relating to an "investigation" is protected, it should be understood that an "audit" is included in the term "investigation."

- As a general principle, it endorses a reorientation of the general rules that apply to access to information. At present, the Act gives the Government the discretion to withhold records if they fall within certain categories of documents listed in the Act. The Commission supports a different approach, whereby the first rule would be that records must be disclosed, unless their disclosure would be injurious to some other important and competing interest (in other words, an "injury test" applies). Similarly, the Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as
- the existing section 13 category of records obtained in confidence from international, provincial or municipal government sources, including aboriginal governments;
- the existing section 16 category of records relating to crime detection, prevention, suppression, law enforcement or threats to national security;
- the existing section 18 and 20 categories of trade secrets and other financial, commercial, scientific or technical information belonging to the Government or to third parties; in particular, the test for protecting such government information should be injury and not "substantial value"; "trade secret" should be narrowly defined; and details of a third party's contract or bid for a contract with a government institution *must* be disclosed;
- the section 21 category of records containing advice or recommendations for a government institution or Minister; there should also be a comprehensive list of the records that *must* be disclosed;
- the section 23 category of records where solicitor-client privilege is claimed;
- the section 69 category of records considered to be confidences of the Privy Council; in addition, there should be a list of records that would not be considered confidences of the Privy Council; the 20-year rule should be shortened to no more than 15 years; the definition of "discussion papers" should be considerably broadened (since the shorter four-year rule applies to such records); and the rule of nondisclosure should not apply where the decision to which the confidence relates has been made public.
- The Commission favours the deletion of section 24, which says that if some other federal Act states that certain records/information must not be disclosed, then the *Access to Information Act* adopts that prohibition as part of the access to information regime.
- It endorses the creation of a public register of all documents disclosed under the *Access to Information Act*.

- It endorses limiting the Government's authority to extend the initial 30-day default response period to instances of necessity. Where a government institution fails to respond within the time limits, a provision should state that this delay is deemed to be a refusal of the request, and the Government institution must give notice of the refusal to the applicant and to the Information Commissioner. It also endorses a change whereby the choice of examining the actual record, or receiving a copy, should be shifted from the Government to the applicant. As well, if the person requesting a record specifically asks for it in English or in French, so that the record would have to be translated by the Government institution, the rule should be mandatory translation if the request is in the public interest.
- The Commission agrees that the Act should be changed so that the limitation period for making a complaint begins when the Government institution answers a request, rather than from the making of the request.
- It supports broadening the Information Commissioner's powers to initiate a complaint under the Act and to apply to the Federal Court in relation to any matter investigated by the Office. It also supports allowing the Information Commissioner to grant access to representations made to him in the course of his investigations.

There may well be other desirable amendments to the current access to information regime. Any proposal for change must be considered in light of the critical importance of public access to information on the activities of government. While certain sensitive information must still be protected from public disclosure, the key distinction is the likelihood of injury to critical government interests. The Commission is confident that this difficult balance has been addressed by amendments proposed by the Information Commissioner.

Whistleblower Legislation

In 2005, in the *Merk* decision, the Supreme Court of Canada endorsed the critical importance of laws protecting employees making good-faith disclosures of wrongdoing by their employers. Although the facts of the case were about an employee's disclosure of wrongdoing by her private sector employer, the Court's comments about the purpose of "whistleblower" legislation apply to public sector employees as well:

Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result in an offence." (It is the "offence" requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.

Parliament should be congratulated for passing Bill C-11 before its dissolution on November 28, 2005. This bill marks the first time that federal legislation has included any protection for public service whistleblowers. While the passage of this type of protection is a positive step, the Commission has concerns about whether this new legislation will achieve what parliamentarians wanted. We must wonder if legislation of this nature would have made a difference in how Allan Cutler was treated.

The Commission takes the position that the new Act could be significantly improved if it were amended. It suggests that

- the definition of the class of persons authorized to make disclosures under the Act ("public servants") should be broadened to include anyone who is carrying out work on behalf of the Government;
- the list of "wrongdoings" that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;
- the list of actions that are forbidden "reprisals" should also be an open list;
- in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;
- there should be an explicit deadline for all chief executives¹⁰ to establish internal procedures for managing disclosures; and
- the Act's consequential amendments to the *Access to Information Act* and to the *Privacy Act* should be revoked as unjustified.

The Commission agrees in general with the scheme for disclosure, which has employees disclosing the information to their supervisors or to designated persons in their public service "units." Disclosure to the Public Sector Integrity Commissioner or to the public is permitted only in exceptional (listed) circumstances." (pp. 179-187)

Appendix "B"

Excerpt from the Conservative Party 2006 Election Platform: "Stand Up For Canada"

"Strengthen Access to Information Legislation"

The Liberal government has consistently rejected attempts to provide Canadians with better access to government information. The present Information Commissioner has gone to court several times to force the government to open its windows.

The Plan

A Conservative government will:

- Implement the Information Commissioner's recommendations for reform of the Access to Information Act.
- Give the Information Commissioner the power to order the release of information.
- Expand the coverage of the Act to all Crown Corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions.
- Subject the exclusion of Cabinet confidences to review by the Information Commissioner.
- Oblige public officials to create the records necessary to document their actions and decision.
- Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of government.
- Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.
- Ensure that the disclosure requirements of the *Access to Information Act* cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information." (pp. 12-13)

As well, the Conservative Party Platform, had this promise to make with respect to wrongdoing reported under the whistleblower protection legislation:

"A Conservative government will: ...

- Require the prompt public disclosure of information revealed by whistleblowers, except where national security or the security of individuals is affected." (p. 11)

With respect to disclosure of government polling and advertising, the Conservative Platform states:

"A Conservative government will: ...

- Ensure that all government public opinion research is automatically published within six months of the completion of the project, and prohibit verbal-only reports." (p. 10)