Information Commissioner of Canada
Commissaire à l'information du Canada

STRIKING THE RIGHT BALANCE FOR TRANSPARENCY

Recommendations to modernize the *Access to Information Act*

Respect
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Leadership

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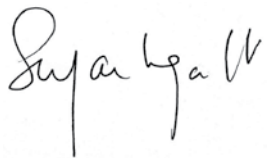
March 2015

The Honourable Pierre Claude Nolin, Senator
Speaker of the Senate
Ottawa ON K1A 0A4

Dear Mr. Speaker:

Pursuant to section 39 of the *Access to Information Act*, I have the honour to submit to Parliament a special report entitled *Striking the Right Balance for Transparency*.

Sincerely,



Suzanne Legault
Information Commissioner of Canada

March 2015

The Honourable Andrew Scheer, M.P.
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Speaker:

Pursuant to section 39 of the *Access to Information Act*, I have the honour to submit to Parliament a special report entitled *Striking the Right Balance for Transparency*.

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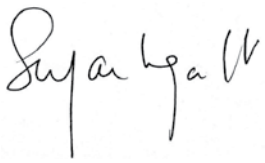

Suzanne Legault
Information Commissioner of Canada

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Message from the Commissioner

Information is one of society's most valuable assets. Access to government information is fundamental to democracy because it ensures that Canadians can hold their government to account.

The *Access to Information Act* was adopted in 1982. Much has changed within government since that time, including how the government is organized, how decisions are made and how information is generated, collected, stored, managed and shared. The Open Government movement has increased Canadians' expectations and demands for transparency.

Persistent calls to reform the Act have been made ever since its adoption. In the 30-plus year history of the Office of the Information Commissioner of Canada, my predecessors and I have documented multiple challenges and deficiencies with the Act. The Act is applied to encourage a culture of delay. The Act is applied to deny disclosure. It acts as a shield against transparency. The interests of the government trump the interests of the public.

To strike the right balance between the public's right to know and the government's need to protect limited and specific information, I am proposing a comprehensive modernization of the *Access to Information Act*. The 85 recommendations in this report are based on my Office's own experience, as well as comparisons to leading access to information models in provincial, territorial and international laws.

My recommendations will address ways to modernize the Act:

- To deal with the current realities and expectations of Canadians;
- To simplify the administration and the application of the Act by focussing only on the interests that legitimately require protection;
- To increase timeliness in the processing of access requests;
- To permanently resolve recurring issues;
- To align the Act with the most progressive and strongest laws in Canada and abroad; and
- To maximize disclosure in line with a culture of openness "by default."

A modern Act will only succeed, however, if there is a concomitant change in institutional culture from secrecy to openness, from delay to timeliness. I believe that implementing these recommendations will support true openness and accountability and allow the Government of Canada to achieve a meaningful "open by default" culture.

I wish to thank all of the former commissioners, all of our employees, past and present, and participants in the open dialogue consultation process, for contributing their ideas and insights to this much-needed modernization process.

Introduction

Canada's access to information law—the *Access to Information Act*— came into force in 1983.[1] The Act provides Canadian citizens, permanent residents, and individuals and corporations who are present in Canada with the right to access government information, subject to certain limitations. The Information Commissioner, with the support of the Office of the Information Commissioner of Canada, conducts efficient, fair and confidential investigations into complaints about institutions' handling of access to information requests. As such, the Information Commissioner brings a unique perspective and expertise on the operation of the Act.

The right of access has quasi-constitutional status in Canada.[2] The Supreme Court of Canada has also held that the overarching purpose of access legislation is to facilitate democracy by helping ensure that citizens have the information they need to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.[3]

The right of access also derives from section 2(b) of the *Canadian Charter of Rights and Freedoms* (the right of free expression), where access to government information is a necessary precondition of meaningful expression on the functioning of government.[4]

The *Access to Information Act* marked its 30th anniversary in 2013. Over the Act's three decades of existence, technology, the administration of government and Canadian society have been transformed in many regards. And yet, despite these changes, the Act remains largely in its original form.

When the Act became law, information was mostly paper-based. Now, virtually all information is in electronic or digital form. The sheer volume of electronic data and the speed and methods of transmission have challenged government's ability to collect, store, manage and share information with the public.

Moreover, the administration of government has undergone a fundamental shift since the early 1980s. Now, partnerships with, and outsourcing to, the private sector have become increasingly common ways for government to deliver services to the public. As well, policy development and decision-making increasingly takes place in ministers' offices, which are not covered by the Act. As a result, accessing records necessary to hold government to account has become more complex, or, in some cases, impossible.

1 RSC, 1985, c A-1.
2 *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40.
3 *Dagg v Canada Minister of Finance*, [1997] 2 SCR 403 at para. 61.
4 See *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para. 30.

Lastly, many governments, including Canada's, have joined the international Open Government Partnership in response to an increasing desire on the part of the public for more transparency and accountability from government.[5] A key component of an effective and open government is a modern access to information law that maximizes timely disclosure of government information in electronic, non-static formats. This influx of information to the public increases accountability and facilitates collaboration between government and the citizenry about how best to deliver programs and services.

In light of these developments, the Commissioner recommends modernizing the *Access to Information Act* by:

- extending coverage to all branches of government;
- improving procedures for making access requests;
- setting tighter timelines;
- maximizing disclosure;
- strengthening oversight;
- disclosing more information proactively;
- adding consequences for non-compliance; and
- ensuring periodic review of the Act.

The Commissioner relied on a variety of sources when developing the recommendations in this report. Key sources are listed at the end of this report. (Other sources are cited in the footnotes.) Generally, the Commissioner focussed on access to information laws of other jurisdictions, model laws and guides, Canadian reports on access reform, government and private members' bills, policy instruments, assessment tools from civil society, consultations with the public and previous reform proposals from information commissioners.

5 Open Government Partnership: <http://www.opengovpartnership.org/>.

Chapter 1

Extending coverage

The *Access to Information Act* applies to about 250 institutions.[1] However, not all entities that spend taxpayers' money or perform public functions are subject to the Act. The House of Commons, the Senate, ministers' offices, the administrative bodies supporting the courts, airport authorities, NAV CANADA and the Canada Health Infoway are a few examples of entities that are not covered by the Act.[2]

The *Access to Information Act* provides a right of access to information in records under the control of a government institution.

Government management and administration have been transformed significantly since the Act came into force in 1983. Successive governments have expanded the type and altered the structures of organizations that perform government functions. Quasi-commercial entities, special operating agencies and public-private sector partnerships have become increasingly common modes for governments to carry out their business. Since many of these bodies are not covered by the Act, information about public functions and services is difficult to obtain or unavailable to the public through access to information requests.

Criteria for adding institutions

Broad coverage of public entities is necessary to ensure Canadians can gain access to as much information about government operations and decisions as possible. Without sufficient coverage, government information may lie outside the reach of the Act and therefore outside the reach of the public.

Currently, institutions may be brought under the Act by Order in Council or through other laws. The Act also allows the Governor in Council to prescribe criteria for adding institutions; however, this has never been done.

A criteria-based approach, found in various model laws, was recommended by a government appointed access to information reform task force and can be found in two access laws that have been highly rated by a civil society organization.[3] Criteria for determining whether an entity should be covered by the Act include whether it was established by statute, whether it receives substantial government funding or whether it carries out public functions or services.

1 The institutions covered by the Act are either listed in Schedule I of the Act or are Crown corporations (and their wholly owned subsidiaries), as defined in the *Financial Administration Act*, RSC, 1985, c F-11. The number of institutions subject to the Act has increased since it was enacted in 1983. For example, the *Federal Accountability Act*, SC 2006, c-9 brought 70 new institutions under the Act, including some Crown corporations and their subsidiaries, agents of Parliament (including the Information Commissioner), foundations and some agencies that spend taxpayers' money or perform public functions.

2 Canada Health Infoway is an example of an institution that receives significant public funding. Through a series of grants, Health Canada has provided this institution with $2.1 billion in funding. See Canada Health Infoway. "What we do." <https://www.infoway-inforoute.ca/index.php/about-infoway/what-we-do>.

3 The Organization of American States and Article 19 model laws and the Tshwane Principles each include such criteria. Criteria for coverage was recommended in *Making it Work for Canadians* and can be found in the access laws of Serbia and India. Organization of American States. "Model Inter-American Law on Access to Public Information and its Implementation Guidelines." 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>; Article 19. "A Model Freedom of Information Law." 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Open Society Foundations, "The Global Principles on National Security and the Right to Information (Tshwane Principles)." 2013. <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>; Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services Canada, 2002 at p. 24).

Under criteria such as these, all public institutions—including the executive, legislative and judicial branches of government, as well as any bodies that are owned or controlled by government—would fall within the scope of the access legislation. Using criteria for coverage would also mean that the law would extend to entities that operate with substantial public funds or carry out public functions or services.[4]

Recommendation 1.1

The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:

- **institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);**
- **institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);**
- **institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);**
- **institutions established by statute (such as airport authorities); and**
- **all institutions covered by the *Financial Administration Act*.**

2014–2015 Budgets

The House of Commons: $413,725,137

The Senate: $91,485,177

The Library of Parliament: $41,970,007

The Office of the Conflict of Interest and Ethics Commissioner: $6,938,405

The Senate Ethics Officer: $1,166,750

The Supreme Court of Canada: $31,389,794

The Courts Administration Service: $68,044,743

The Commissioner for Federal Judicial Affairs: $511,708,846

Substantial Funding

$2.1 billion in funding (to date) to Canada Health Infoway

Up to $500 million for the Toronto 2015 Pan and Parapan American Games

4 In these instances, coverage would extend only to the records that relate to those public functions.

Ministers' offices

Departments exist to carry out the work of their responsible minister. Generally, the powers, duties and functions of an institution are vested by statute in the institution's minister. The minister is ultimately responsible for the department's activities.[5] However, in 2011 the Supreme Court of Canada determined that ministers' offices are not institutions covered by the Act.[6]

Although the Court found that ministers' offices are not part of the institutions over which they preside, it did acknowledge that some records located in ministers' offices are subject to the Act. A two-part test was devised for determining whether records physically located in ministers' offices are "under the control" of an institution and therefore accessible under the Act.[7]

Following this decision, the Treasury Board of Canada Secretariat issued Implementation Report No. 115.[8] In accordance with this implementation report, access to information officials must consider whether there are reasonable grounds to believe that there exist relevant records in the Minister's office that would be considered to be under the institution's control. Such evidence may come from, for example, records already obtained from the institution.[9] This causes delay in processing the request and risks records no longer being available.

The facts underlying the Supreme Court of Canada decision illustrate the accountability deficit resulting from the lack of coverage of ministers' offices. Some of the records at issue were notes taken by the exempt staff of the Minister of National Defence during regular meetings of the Minister, his Deputy Minister and the Chief of the Defence Staff. The subject matter of these meetings was only documented in the notes of the exempt staff and represented the only written record of what transpired during the meetings. The notes were located within the physical confines of the Minister's office and were not taken by departmental employees. The Court held that the records did not meet the two-part test and therefore were not accessible under the Act.

Exempt staff refers to the political and partisan office staff of Cabinet ministers.

Ministers and their parliamentary secretaries, ministers of state and the Prime Minister are public office holders who make decisions that impact Canadians.[10] These decisions also impact how tax dollars are spent. Ministers (and their staff) need to be accountable in disclosing information relating to the administration of their departments or other responsibilities, beyond what they currently release through proactive disclosure.[11]

5 As reflected in the principle of ministerial accountability.
6 *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25.
7 The first step of the two-part control test is to ask whether the record relates to a departmental matter. When it does not, that ends the inquiry. When the record does relate to a departmental matter, the second step is to determine whether, based on all relevant factors, a senior official of the institution should reasonably expect to be able to obtain a copy of the record upon request. Relevant factors include the substantive content of the record, the circumstances in which the record was created and the legal relationship between the institution and the record holder. In *Accountable Government: A Guide for Ministers and Ministers of State*, the Privy Council Office explains that "records kept in the offices of Ministers and Ministers of State must be broken down into four categories: Cabinet documents, institutional records, ministerial records, and personal and political records." Canada, Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State*, (Ottawa: Privy Council Office, 2011) at p. 29. <http://www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2011/docs/ag-gr-eng.pdf>.
8 Treasury Board of Canada Secretariat. "Implementation Report No. 115—Access to Records in a Minister's Office—Prime Minister's Agenda Case." April 22, 2013. <http://www.tbs-sct.gc.ca/atip-aiprp/impl-rep/2013/115-imp-mise-eng.asp>.
9 See section 2 of the Implementation Report.
10 According to the *Accountable Government: A Guide for Ministers and Ministers of State*, "a Minister may delegate to a Parliamentary Secretary specific duties for policy development initiatives" (p. 7).
11 Currently, ministers, ministers of state, parliamentary secretaries, and their exempt staff must proactively disclose all travel and hospitality expenses. Treasury Board of Canada Secretariat. "Policies for Ministers' Offices." January 17, 2011. <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/mg-ldm/2011/pgmo-pldcmpr-eng.asp?format=print>.

In some jurisdictions, including some Canadian provinces, the access law explicitly covers ministers' offices. Model laws also cover ministers' offices.[12] The access laws in Australia and New Zealand apply to ministerial records.[13]

The Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries. Thus, the exemptions in the Act would apply to the records in these offices, such as the exemptions protecting personal information or solicitor-client privilege. However, the Commissioner recognizes that these exemptions would not protect certain records in a minister's office related to the minister's parliamentary functions as a Member of Parliament.[14] It is the Commissioner's recommendation that these records should be protected by a new exemption.

Recommendation 1.2

The Information Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries.

Recommendation 1.3

The Information Commissioner recommends creating an exemption in the Act for information related to the parliamentary functions of ministers and ministers of State, and parliamentary secretaries as members of Parliament.

Parliament

Currently, Parliament is not covered by the Act. The *2014–2015 Estimates* lists the combined budget for the House of Commons, the Senate and the Library of Parliament as $547,180,321. Some information on the finances of Parliament is publicly available, but it is often only in aggregate form and published in a schedule that removes the context. Concerns that arose in 2013 about the expenses of individual senators have shown that Canadians want more, and are entitled to, transparency and accountability from Parliament with respect to how taxpayer dollars are spent.

12 The laws of Alberta, Manitoba and New Brunswick explicitly include the offices of ministers in the definition of "public body." In Mexico the Federal Executive is covered by the law. The Article 19 and Organization of American States model laws, and the Tshwane Principles extend to the Executive. The *Open Government Guide* also explicitly states that the executive should be included under an access to information law. Open Government Guide. "Welcome to the Open Gov Guide." 2013. <http://www.opengovguide.com>. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>.

13 In Australia, the right of access explicitly extends to an official document of a minister. In New Zealand, the definition of "official information" includes any information held by a minister in his or her official capacity.

14 Parliamentary functions in relation to a member of the House of Commons are defined in the *Members By-Law* of the Board of Internal Economy as "the duties and activities that relate to the position of Member, wherever performed and whether or not performed in a partisan manner, namely, participation in activities relating to the proceedings and work of the House of Commons and activities undertaken in representing his or her constituency or constituents." House of Commons, Board of Internal Economy, *Members By-law* (September 2014) at s. 1. <http://www.parl.gc.ca/About/House/BOIE/boie-ByLaw-MembersB-e.html>.

The access legislation in some Canadian provinces, as well as the U.K., covers the legislative branch to a certain degree, with protections for certain interests.[15] Model laws and some top-ranked right to information laws also cover the legislative branch.[16] In addition, numerous reports—issued not only by the Office of the Information Commissioner but also by a parliamentary committee and the task force mandated with reviewing the Act in 2002—have recommended bringing Parliament under the Act.[17]

Given these considerations, the Commissioner recommends that coverage of the Act should be extended to the bodies that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.

However, the Commissioner also recognizes that certain records held by these entities could be subject to parliamentary privilege.[18] At present, the Act provides no protection to prevent an infringement of parliamentary privilege.[19]

Recommendation 1.4

The Information Commissioner recommends extending coverage of the Act to the bodies that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.

Recommendation 1.5

The Information Commissioner recommends creating a provision in the Act to protect against an infringement of parliamentary privilege.

15 The laws of Quebec, Newfoundland and Labrador, and Ontario all apply to the legislative branch. However, the Ontario law only covers records of reviewable expenses of Opposition leaders and the persons employed in their offices and the personal information contained in those records. Examples of the protections that laws might include are those for parliamentary privilege, and constituency and political records.

16 The Organization of American States model law, the Tshwane Principles and the *Open Government Guide* all cover the legislative branch, as do the access laws of India, Mexico and Serbia.

17 Commissioner Grace, *Open and Shut* and *Making it Work for Canadians* recommended extending coverage of the Act to the House of Commons, the Senate and the Library of Parliament. Commissioner Marleau recommended extending coverage of the Act to records related to the general administration of Parliament. See the Office of the Information Commissioner. "Annual Report—Information Commissioner—1993–1994." <http://www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/OIC93_4E.pdf>; Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2nd Sess, 33rd Parl, No 9 (March 1987) (Chair: Blaine A. Thacker); and Strengthening the *Access to Information Act* to Meet Today's Imperatives." March 9, 2009. <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.

18 Parliamentary privilege is the collective and individual rights accorded to parliamentarians to ensure they are able to carry out their functions and perform their duties without obstruction. The privilege is protected by the Constitution and extends to all matters relating to parliamentary proceedings.

19 Such a protection can be found in the access legislation of Newfoundland and Labrador, the U.K. and India.

Courts

The judicial branch and its administrative support bodies are not covered by the Act. The *2014–2015 Estimates* lists the combined budget of the Supreme Court of Canada, the Office of the Registrar of the Supreme Court of Canada, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council as $611,143,383.

The constitutionally enshrined principle of judicial independence has been cited as the reason why these entities are not subject to the Act.[20] However, the access legislation of some provinces, as well as a number of other countries, applies to the courts' administrative records.[21] To allow for administrative records to be disclosed while still protecting judicial independence, some laws exclude certain types of records from their scope. For example, the access laws of Alberta and British Columbia exclude records in court files, the records and personal notes of judges, and communications or draft decisions of persons acting in a judicial or quasi-judicial capacity.

Extending coverage of the Act to court support services would promote accountability and transparency in the spending of public monies. The Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.

Recommendation 1.6

The Information Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.

Recommendation 1.7

The Information Commissioner recommends that the Act exclude records in court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.

20 Judicial independence is a guarantee that judges will make decisions free of influence and based solely on fact and law. The 2002 task force that studied the Act cited the importance of maintaining judicial independence as the reason for not recommending that the courts be covered by the Act (*Making it Work for Canadians* at p. 29).

21 In Canada, these jurisdictions include B.C., Alberta, P.E.I. and Nova Scotia. The access laws of Serbia, India and Mexico similarly apply to courts' administrative records.

Chapter 2

The right of access

The *Access to Information Act* provides a right of access to records under the control of the government. The Act establishes a formal framework for making and processing access requests.

Duty to document

Access to information relies on good recordkeeping and information management practices. When records are not created or appropriately preserved to document decisions, rights under the Act are denied. This, in turn, prevents government accountability and transparency.

Missing records complaints registered

2011–2012: 283
(27% of refusal complaints)
2012–2013: 428 (41%)
2013–2014: 470 (39%)

No federal statute or regulation sets out a comprehensive and enforceable legal duty to create and preserve records documenting decision-making processes, procedures or transactions.[1] Without such a duty, there is a risk that not all information related to the decision-making process is being recorded or appropriately preserved in an institution's information holdings.

According to Shared Services Canada, approximately **98,000** BlackBerrys have been issued to government institutions (as of August 2013).

The adoption across government of new communications technologies, such as instant messaging, has further increased the need for such a duty. The Commissioner has found that there is a real risk that information that should be accessible by requesters could be irremediably deleted or lost when institutions use these technologies as part of decision-making.[2] The 2014 Treasury Board of Canada Secretariat protocol on instant messaging compounds this problem by recommending that departments should not use automatic logging of instant messages.[3]

1 The *Library and Archives of Canada Act*, SC 2004, c 11 does speak to the retention and disposition of records but does not impose an obligation on government officials to document their decisions and how they are made. Other laws, such as the *Financial Administration Act*, RSC, 1985, c F-11 require that only certain types of records be prepared and maintained. Although existing federal policy instruments set out general requirements for ensuring government officials document decisions, these are not codified in law. Moreover, these obligations are enforced through the *Values and Ethics Code for the Public Sector*, which is applicable to employees only (such that they do not apply to ministers and others who create records). An example of a policy on record keeping can be found at Treasury Board of Canada Secretariat. "Policy on Information Management." April 1, 2012. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=12742>; "Directive on Recordkeeping." June 1, 2009 <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16552&section=text>. The Values and Ethics Code for the Public Sector can be found at Treasury Board of Canada Secretariat. "Values and Ethics Code for the Public Sector." <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=25049>.

2 Office of the Information Commissioner. *Access to Information at Risk from Instant Messaging.* November 2013. <http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx>.

3 "Information Management Protocol – Instant Messaging Using a Mobile Device." November 27, 2014. <https://www.tbs-sct.gc.ca/im-gi/imp-pgi/mobile-eng.asp>. In a November 2014 letter to the President of the Treasury Board, the Commissioner recommended the implementation of an electronic information management tool to ensure that emails and instant messages of key officials are preserved. Office of the Information Commissioner. "Letter to the President of the Treasury Board on Action Plan 2.0." November 5, 2014. < http://www.oic-ci.gc.ca/eng/lettre-plan-d-action-2.0_letter-action-plan-2.0.aspx>.

Successive commissioners, as well as joint resolutions of the provincial, territorial and federal information and privacy commissioners, have recommended a legislated duty to create records in support of decisions of government.[4] Further, based on the results of their own investigations, the commissioners in Ontario and British Columbia have also identified a need for such a provision in their access laws.[5]

An obligation to document the decision-making process protects access to information rights by:

- creating official records;
- facilitating better governance;
- increasing accountability; and
- ensuring a historical legacy of government decisions.

To be most effective, the Act would also include appropriate sanctions for non-compliance with the duty to document (see Chapter 7 for further discussion on sanctions for non-compliance).

Recommendation 2.1

The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

Duty to report

Library and Archives Canada (LAC) is charged with preserving the documentary heritage of Canada, including authorising the destruction of records by government institutions.[6] LAC has issued *Multi-Institutional Disposition Authorities* and specific institutional authorities that govern the disposal of records.

Institutions are not generally required to report the unauthorised loss or destruction of records, including data.[7] The Commissioner's investigations have revealed that records have been disposed of without authorization, which effectively denies the right of access.

In 2014, the National Research Council (NRC) experienced a cyber intrusion. In response, NRC shut down parts of its IT infrastructure, resulting in an inability to retrieve electronic records. NRC voluntarily notified the Commissioner of this issue and informed her of its plan to respond to access requests in light of the loss of electronic information. As a result of this notification, the Commissioner was more aware of the circumstances at NRC with respect to processing requests and could more effectively oversee the right of access.

4 See the Information Commissioner's annual reports from 1996–1997, 1998–1999 to 2005–2006, and 2010–2011 <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx>, *Access to Information at Risk from Instant Messaging*, the *Open Government Act* (October 25, 2005) <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf>, *Modernizing Access and Privacy Laws for the 21st Century: Resolution of Canada's Information and Privacy Commissioners and Ombudspersons* (October 9, 2013) <https://www.priv.gc.ca/media/nr-c/2013/res_131009_e.asp> and *Protect and Promote Canadians' Access and Privacy Rights in the Era of Digital Government: Resolution of Canada's Information and Privacy Ombudspersons and Commissioners* (November 14, 2014) <http://www.oic-ci.gc.ca/eng/resolution-fpt-ere-du-gouvernement-numerique_fpt-resolution-era-of-digitalgovernment.aspx>.

5 Ontario: see the Information and Privacy Commissioner's Special Investigative Report, *Deleting Accountability: Records Management Practices of Political Staff*, (June 5, 2013). B.C.: see the Information and Privacy Commissioner's investigation reports F-13-01, *Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia* (March 4, 2013) and F11-02, *Investigation into the Simultaneous Disclosure Practice of BC Ferries* (May 16, 2011).

6 As per section 12 of the *Library and Archives of Canada Act*.

7 There are policies related to the unauthorised treatment of specific information. For example, the Treasury Board of Canada Secretariat's *Directive on Privacy Practices* requires that institutions establish a process for the mandatory reporting of material privacy breaches to the Office of the Privacy Commissioner and the Treasury Board of Canada Secretariat. In addition, the *Directive on Recordkeeping* provides that non-compliance with the directive can result in the Secretary of the Treasury Board recommending that the Librarian and Archivist of Canada review the disposition authorities issued to a department. *Directive on Privacy Practices.* (April 1, 2010). <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18309>.

The Commissioner recommends that the Act (or the *Library and Archives of Canada Act*) include a duty to report to LAC the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner, as an independent oversight body. This will allow the Commissioner to assess whether any action is warranted to determine if information rights have been compromised within the institution and whether remedial action is necessary. There should also be appropriate sanctions for failing to report the unauthorised destruction or loss of information. (See Chapter 7 for further discussion on sanctions for non-compliance.)

In the United States, under the *Federal Records Act* (44 U.S.C. §§ 3106), institutions are required to report to the National Archives and Records Administration (NARA) any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of an institution. Sanctions include a $2,000 fine, a three-year imprisonment, or both.

In 2012, a congressional inquiry was launched into the Internal Revenue Service's (IRS) allegedly inappropriate selection procedures for auditing tax exempt organisations. During the inquiry, it was revealed that IRS emails about the selection process had been lost. This loss was not reported to NARA.

Recommendation 2.2

The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report.

Extending access

The right of access to government-held information is limited under the Act to Canadian citizens, permanent residents, and individuals and corporations present in Canada.

This limit is outdated and unnecessarily complicates the processing of requests, since anyone in the world may make an access request through a Canadian agent (often for a fee). This creates additional costs and delays in the system. A universal right of access is consistent with the free flow of information that is occurring across the increasingly globalized and interconnected world.

Among the provinces and territories, Commonwealth countries, the U.S., in model laws, and those jurisdictions with access legislation ranked in the top 10 on the Global Right to Information Rating, only Canada, New Zealand and India limit who may have access to government information. All of the other jurisdictions reviewed provide a universal right of access and none have indicated that the universal right has resulted in an unmanageable amount of requests. A broadened right of access has also been recommended on numerous occasions in Canada in the past.[8]

Recommendation 2.3

The Information Commissioner recommends extending the right of access to all persons.

8 The jurisdictions reviewed were all the Canadian provinces and territories, along with Australia, Mexico, the U.K., the U.S., Serbia, India, Slovenia, Liberia, Sierra Leone, El Salvador, Antigua, Azerbaijan and Ukraine. This right is also included in the Article 19 and Organization of American States model laws, the Tshwane Principles, and the *Open Government Guide*. *Open and Shut* recommended extending the right of access to any natural or legal person, along with not-for-profits, employee associations and labour unions. *Making it Work for Canadians* and the *Open Government Act* also recommended a universal right of access. Article 19. *A Model Freedom of Information Law.* 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Organization of American States. *Model Inter-American Law on Access to Public Information and its Implementation Guidelines.* 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>; Open Society Foundations, *The Global Principles on National Security and the Right to Information (Tshwane Principles).* 2013. <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>; Open Government Guide. *Welcome to the Open Gov Guide.* 2013. <http://www.opengovguide.com>. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>; Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2nd Sess, 33rd Parl, No 9 (March 1987) (Chair: Blaine A. Thacker); Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services Canada, 2002).

Frivolous and vexatious requests

It is the Commissioner's experience that in rare instances some requesters make requests that are frivolous, vexatious or otherwise abusive. Dealing with these requests can place a strain on public resources, delay delivery of other services and have a negative impact on the rights of other requesters. The Act does not allow institutions to refuse to respond to requests such as these.

Some access laws across Canada and in international jurisdictions allow institutions to refuse to process some requests for a variety of reasons.[9] Model laws are silent on this issue. Various reports have supported amending the Act to include a provision to refuse to process some requests.[10]

The ability to refuse to process some access requests should be strictly circumscribed and limited to only clear instances where the request is frivolous, vexatious or an abuse of the right of access. An institution's decision to refuse to process a request should also be subject to appeal to the Commissioner.[11] This will ensure the limited and appropriate application of this ability.

Allowing institutions to refuse to process requests that are frivolous, vexatious or an abuse of the right of access would:

- ensure more efficient use of limited public resources; and
- protect the access rights of other requesters.

Recommendation 2.4

The Information Commissioner recommends that institutions be allowed to refuse to process requests that are frivolous, vexatious or an abuse of the right of access.

Recommendation 2.5

The Information Commissioner recommends that institutions' decision to refuse to process an access request be subject to appeal to the Information Commissioner.

Confirm or deny the existence of a record

Section 10(2) of the Act states that institutions do not have to tell a requester whether a record exists when they do not intend to disclose it. When notifying a requester that it is invoking this provision, institutions must also indicate the part of the Act on which a refusal could reasonably be expected to be based if the record existed. Section 10(2) was designed to address situations in which the mere confirmation of a record's existence (or non-existence) would reveal information that could be protected under the Act.

9 The laws of B.C., Alberta, Ontario, Quebec, P.E.I., New Brunswick, Manitoba, and Newfoundland and Labrador all allow certain requests to be disregarded, as do those of Mexico, Australia, the U.K., and New Zealand.

10 See the 1993–1994 Annual Report of Commissioner John Grace, Commissioner Reid's special report *Response to the Report of the Access to Information Review Task Force* (Ottawa: Office of the Information Commissioner, 2002), the *Open Government Act*, and both *Open and Shut* and *Making it Work for Canadians*.

11 See Chapter 5 for a discussion of the oversight model found in the Act.

The Commissioner's investigations have found that section 10(2) is overused and inconsistently applied. This is problematic because invoking section 10(2) leads to a complete denial of the right of access. *Open and Shut* acknowledged that "only in rare circumstances can such a denial be justified."[12] Limiting the application of section 10(2) to specific situations was recommended by a former Commissioner and is consistent with the access laws of B.C. and Ontario.[13]

The Commissioner recommends that the Act include a list of the circumstances under which institutions could refuse to confirm or deny the existence of a record. These would relate to possible injury to Canada's foreign relations, the defence of Canada, law enforcement activities and the safety of individuals, and the possible disclosure of personal information.[14]

Recommendation 2.6

The Information Commissioner recommends limiting the application of section 10(2) to situations in which confirming or denying the existence of a record could reasonably be expected to do the following:

- **injure a foreign state or organization's willingness to provide the Government of Canada with information in confidence;**
- **injure the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities;**
- **injure law enforcement activities or the conduct of lawful investigations;**
- **threaten the safety of individuals; or**
- **disclose personal information, as defined in section 3 of the *Privacy Act*.**

12 *Open and Shut*, p. 29.

13 Commissioner Inger Hansen recommended that Parliament consider whether this authority should apply to all or only some clearly specified types of records. Office of the Information Commissioner, *Main Brief to House of Commons Standing Committee on Justice and Legal Affairs from the Office of the Information Commissioner* (Ottawa: Government of Canada, May 7, 1986), s. 14. Section 8(2) of B.C.'s access law provides that institutions may only refuse to confirm or deny the existence of a record when doing so would harm law enforcement activities or would result in an unreasonable invasion of personal privacy. Ontario's law includes similar limitations (see sections 14(3) and 21(5)) and also allows institutions to neither confirm nor deny the existence of a record when disclosure could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Civil Remedies Act, 2001*, SO 2001, c 28 or the *Prohibiting Profiting from Recounting Crimes Act, 2002*, SO 2002, c 2.

14 These harms parallel the interests that sections 13, 15, 16, 17 and 19 of the Act protect. See Chapter 4 for further discussion of these sections.

Format of information

Based on open government principles, information should be provided to the public in open formats that facilitate reuse.[15] The *Directive on Open Government*, recently issued by the Treasury Board of Canada Secretariat, also requires institutions to ensure that open data and open information released through open government initiatives are in accessible and reusable formats.[16, 17]

Section 4(2.1), commonly referred to as the duty to assist, requires that the response to a request must be accurate, complete and provided in a timely manner *in the format requested*.[18] This would include in an open, reusable and accessible format.

There are limitations on the obligation to provide information in the format requested, contained in the *Access to Information Regulations*.[19] Section 8.1 of the Regulations provides that when a record does not exist in the format requested, institutions can decline to convert the record to the requested format if it is unreasonable to do so. The Regulations include the following factors to consider when determining if conversion would be unreasonable:

- the costs to the government institution;
- the potential degradation of the record;
- if the person making the request is to be given access to only a part of a record, the facility with which the record may be severed in the format requested;
- the existence of the record within the government institution in another format that is useful to the person making the request;
- the possibility that the record can be converted to another format that is useful to the person making the request;
- the impact on the operations of the government institution;
- the availability of the required personnel, resources, technology and equipment.

Section 4(3) of the Act also provides that, where records do not exist, institutions are required to produce records from machine-readable records by using the hardware, software and technical expertise they normally use. However, section 3 of the Regulations provides that an institution does not need to do this when it would unreasonably interfere with the operations of the institution.

Open format: The information must be provided in a convenient and modifiable form such that there are no unnecessary technological obstacles to the performance of the licensed rights.

Accessible format: The information must be available as a whole and at no more than a reasonable, one-time reproduction cost, preferably downloadable via the internet without charge.[1]

Reusable format: The information must be provided under terms that permit re-use and redistribution.

As per Open Definition: <http://opendefinition.org/od/>

1. Although the definition of accessible format provided by Open Definition allows for a one-time charge, the Government of Canada has committed to review user fees being charged for accessing Government of Canada data, and work with departments to eliminate these fees where they still exist. See Government of Canada. "G8 Open Data Charter – Canada's Action Plan." February 21, 2014. <http://open.canada.ca/en/g8-open-data-charter-canadas-action-plan>.

15 Open Government Partnership, *Open Government Declaration*, September 2011. <http://www.opengovpartnership.org/about/open-government-declaration>.
16 Treasury Board of Canada Secretariat. *Directive on Open Government*, s. 6.1. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=28108>.
17 The U.K., one of the founding members of the OGP, requires institutions, through its access law, to make electronic datasets available—whether through proactive disclosure or in response to an access request—in a reusable format (as far as is reasonably practicable). (See section 102 of the *Protection of Freedoms Act 2012*, 2012, c 9.) It also has a policy on open information that requires all government bodies to create documents in open document file formats to meet the needs of citizens and government staff when they are viewing or working on documents together.
18 Further, section 12(3) provides that a requester with a sensory disability may ask to receive a record in an alternative format.
19 SOR/83-507

As a result, although the Act requires institutions to provide information in the format requested, the limitations on this obligation allow institutions to refuse to do so in circumstances so broad as to be inconsistent with open government principles.

For example, investigations by the Commissioner, as well as a recent response to a parliamentary written question, indicate that few institutions disclose information in open, reusable and accessible formats by default or at the request of the requester.[20] Instead, responses are provided in PDF or paper printouts, and institutions consider this sufficient to meet their obligations under the Act. The reason for providing records in these formats is often technical; institutions are concerned that some electronic formats may allow information that they have protected under the Act to be revealed.

Technical problems such as these can be fixed in most instances with current technology. Moreover, if institutions are following the *Directive on Open Government*, many of the factors currently found in section 8.1 of the Regulations that limit an institution's obligation to provide records in the format requested will no longer be relevant. For example, the availability of the required personnel, resources, technology and equipment should no longer be an issue because institutions are already required to provide open data and open information.

The Commissioner recommends that the Act include a stand-alone obligation that institutions provide information to requesters in an open, reusable, and accessible format by default. This open by default approach should be limited only where the requester asks for the information in another format (such as paper), where it would cause undue hardship to the institution or it is technologically impossible.[21, 22]

Providing information to requesters in open, reusable and accessible format by default ensures that the information is provided in a format that is useful to the requester.[23]

Recommendation 2.7

The Information Commissioner recommends that institutions be required to provide information to requesters in an open, reusable, and accessible format by default, unless the following circumstances apply:

- **the requester asks otherwise;**
- **it would cause undue hardship to the institution; or**
- **it is technologically impossible.**

Fees

Anyone who makes a request for information under the Act may be required to pay an application fee (section 11(1)(a)). This fee is set at $5 in the Regulations (section 7(1)(a)).

In addition, the Act allows institutions to charge additional fees in a number of circumstances: for every hour after the first five that they reasonably need to search for records and prepare them for release (section 11(2)), for reproducing records (section 11(1)(b)), for producing records in alternative formats (section 11(1)(c)) and for producing

20 In December 2012 Liberal MP Justin Trudeau asked the government a number of questions related to the format of responses to access to information requests. The responses revealed that there is great variation across departments. For example, the Privy Council Office responded that it only provides paper copies, whereas other departments would only release electronic records in PDF or transmit the records on a CD. See Order Paper question 1099 (placed on the Notice Paper on December 5, 2012 and answered on January 28, 2013).

21 The concept of "undue hardship" is established in jurisprudence with respect to an employer's obligations to accommodate. There is no precise legal definition of undue hardship or a standard formula for determining undue hardship; however, under the *Canadian Human Rights Act*, an employer or service provider can claim undue hardship when adjustments to a policy, practice, by-law or building would cost too much, or create risks to health or safety. See the Canadian Human Rights Commission, "Duty to Accommodate". <http://www.chrc-ccdp.ca/eng/content/duty-accommodate>.

22 This will render section 8.1 of the Regulations redundant.

23 The Commissioner made a policy recommendation along these lines in May 2014 in response to consultations by the Treasury Board of Canada Secretariat on proposed updates to the Policy on Access to Information.

"machine-readable" records (section 11(3)). The exact cost and application of each of these fees are set in the Regulations.[24]

The fee structure set out in the Regulations, like the rest of the Act, has not been comprehensively updated since the Act was introduced and has consequently become outdated.[25]

Determining fee amounts and processing fee payments adds complexity to the administration of the access system and results in delays for requesters. Fees are also inconsistently applied across institutions. Fees, especially related to search times, depend on the quality and implementation of information management practices.

As a consequence of these problems, fees lead to complaints to the Commissioner, which add further delays for the requester and administrative costs. The Commissioner's investigations have also revealed that some institutions use fees to deter requests they consider frivolous, to narrow requests, to discourage requesters from following through with requests or as a method of cost recovery.

Fees are also inconsistent with open government principles, which recognize that free access to open data is of significant value to society and the economy.[26] They are also contrary to the concept that government information is a national resource that has been funded by taxpayers.

Many jurisdictions limit what kind of fees institutions may charge. Some do not permit fees for making requests.[27] Others allow fees to be waived in certain specified circumstances.[28] In 2011, New Brunswick abolished all fees associated with making and processing access requests.[29]

In 2011–2012, the Commissioner's investigation into a complaint against the former Foreign Affairs and International Trade Canada (DFAIT) revealed that DFAIT had a practice of automatically charging search and preparation fees for any request with 500 or more responsive pages. The Commissioner found this practice to be inconsistent with the proper use of DFAIT's discretion to charge fees because it failed to appropriately balance and weigh other factors, such as the public interest in disclosure of the information, whether the response was overdue, and any particular circumstance raised by the requester.

In 2013–2014, the Commissioner investigated a complaint against the Privy Council Office (PCO) about a $4,250 fee estimate. She learned that this estimate was not based on the $10 per hour rate set out in the Regulations (which would be equivalent to an annual salary of $19,566), but instead reflected current rates of pay for an employee earning $73,000 per year. As a result of the Commissioner's investigation, PCO provided a new, reasonable fee estimate of $119.80 to the requester.

24 There is no explicit provision in the Act detailing the rationale for the application of fees. However, a historical Parliamentary discussion paper that formed the basis for the Act discussed fees and acknowledged that it is unrealistic that fees would ever be able to achieve total cost recovery. This same paper also discussed fees as a tool for deterring frivolous applications. See Secretary of State, *Green Paper: Legislation on Public Access to Government Documents*, June 1977 (Hon. J. Roberts) at p. 27.

25 See the Commissioner's reference to the Federal Court on fees and electronic records such as emails for an example of how the fee structure has become outdated: *Information Commissioner of Canada v Attorney General of Canada et al*, FC, (T-367-13).

26 See for example the G8 Open Data Charter, Principle 1, Article 13. "G8 Open Data Charter and Technical Annex." June 18, 2013. <https://www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex>. As part of its G8 Open Data Action Plan, the Government of Canada committed to review user fees being charged for accessing Government of Canada data, and work with departments to eliminate these fees where they still exist by December 2015. Government of Canada. "G8 Open Data Charter – Canada's Action Plan." February 21, 2014. <http://open.canada.ca/en/g8-open-data-charter-canadas-action-plan>.

27 For example, in Canada only the Alberta, Ontario, Nova Scotia and P.E.I. laws require payment of an application fee. In contrast, there are no application fees under the laws of Australia, New Zealand and the U.K..

28 The laws of B.C., Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, P.E.I., Newfoundland and Labrador, and the U.S. all allow fees to be waived for a variety of reasons, such as when it would be in the public interest to do so or when the fee would impose an unreasonable financial hardship on a requester.

29 The Office of the Information of Canada stopped charging fees in 2007 and has not received a significant increase in requests as a result of this change.

In light of these considerations, and after contemplating a number of alternatives to update the fee structure, the Commissioner has come to the conclusion that the fees for making and processing access requests should be eliminated in their entirety.[30] This would result in the following benefits:

- the administration of the Act would be simplified;
- there would be more timely access for requesters;
- the Act would be consistent with open government principles; and
- the importance of information as a public asset would be underscored.

Recommendation 2.8

The Information Commissioner recommends eliminating all fees related to access requests.

30 For example, the Commissioner considered updating the structure to reflect new technologies for processing and storing information, increasing the number of free search hours available to requesters, setting out criteria as to when fees may be waived, and preventing institutions from charging fees when they fail to meet statutory deadlines when responding to a request.

Chapter 3

Timeliness

Timely access to information is a pillar of any access to information regime. It ensures that requesters receive responses while the information is still relevant and that they can hold governments to account for their decisions at appropriate times. For this reason, many in the field of access to information use the expression "access delayed is access denied." This expression holds even more meaning in the 21st century, where, in the face of the 24-hour news cycle, social media and instantaneous communications, information's value is to a large degree measured by how current it is.

Parliament recognized the importance of timely responses to requests when it provided that a failure to abide by the legislative timelines is deemed to be a refusal. The importance of timeliness was recognized again in 2006, when Parliament amended the Act to include a legislative duty to assist which, among other things, requires that institutions provide *timely* access to information subject to the requirements of the Act.[1]

Timeliness is a frequent subject of complaint by requesters. Investigations of these complaints have revealed a culture of delay across the access to information system.[2]

Successive commissioners have tracked institutions' compliance with timelines and reported to Parliament on institutions that consistently failed to meet timelines. The Commissioner has also made a number

The issue of delays has been persistently raised by information commissioners since 1983.

Inger Hansen (1983–1990)

Delaying access to information in effect destroys the purpose of the Act.
1984–1985 Annual Report

John Grace (1990–1998)

Most surprising — and dismaying — about the whole delay problem is that the Act already contains one of the most liberal extension-of-time provisions found in any freedom of information statute.
1993–1994 Annual Report

John Reid (1998–2006)

It is my fervent hope that the day will come soon when I will be able to drop the problem of delay as my number one priority.
Remarks at the 1999 Canadian Access and Privacy Association conference

It appears that the problem of delay remains a significant concern.
2005–2006 Annual Report

Robert Marleau (2007–2009)

The most significant and wide-reaching finding attests to the fact that the 30-day period intended by Parliament to be the norm in responding to information requests is the exception.
2007–2008 Special Report: Systemic Issues Affecting Access to Information in Canada

Suzanne Legault (2009–present)

Despite warnings and recommendations, delays continue to be the Achilles' heel of the access to information system and have yet to be appropriately addressed by the government.
2008–2009 Special Report: Out of Time

1 Section 4(2.1). The Federal Court of Appeal in *Information Commissioner of Canada v Minister of National Defence, et al.*, 2015 FCA 56, rev'g 2014 FC 205 at para. 63 has confirmed that timely access is a "constituent part" of the right of access.
2 Requesters may complain about extensions and deemed refusals to the Commissioner. Within 45 days of receiving the Commissioner's report of findings they may proceed to Federal Court.

of recommendations to the Treasury Board of Canada Secretariat to help ease problems associated with timeliness.[3] Although these interventions have led to some improvements in timeliness, these improvements are often short term and institution-specific, and have not resulted in lasting system-wide improvements.[4]

A recent Federal Court of Appeal decision with respect to the time limits set out in the Act is expected to have a positive impact on timeliness and Canadians' access rights (see box at page 28 for a more detailed description of this decision).[5] This decision establishes that an unreasonable extension is not legally valid and amounts to a deemed refusal, giving a right of review to the Federal Court (prior to this decision, it was unclear whether an extension was reviewable by the Court). It also sets standards to institutions in terms of how they must justify the use and length of extensions.

While this decision will serve to improve timeliness under the current legislative framework, the Act remains inconsistent with international standards, which include both specific and limited timelines, as well as timely and effective oversight. Modernizing the current framework will ultimately ensure that Canadians obtain the information they are entitled to within a timeframe that meets their expectations in the context of 21st century information realities.

How to address the culture of delay

Most laws require institutions to respond to requests in approximately 30 working days, which is consistent with the Act. Model laws and access laws from other jurisdictions, however, frequently limit the circumstances in which institutions may take extensions. They also limit the length of extensions.[6] Indeed, in all but one of the provinces, as well as in Australia, the U.S., and in model laws, the length of time for an extension is limited to a precise number of days, ranging from 10 to 40.[7] While many of these jurisdictions allow for longer extensions, institutions must ask for prior approval from the commissioner.[8]

None of these safeguards are found in the Act.

3 For example, the Commissioner has recommended setting targeted performance levels in institutional reports on plans and priorities and amending policies and directives to include more rigour and discipline around timelines See Office of the Information Commissioner. "Letter to the President of the Treasury Board on improving the performance of the access to information system." April 25, 2014. <http://www.oic-ci.gc.ca/eng/autres-documents-other-documents-1.aspx> and Office of the Information Commissioner. Letter to the President of the Treasury Board. May 22, 2014.

4 For example, after the Commissioner issued her 2008–2009 report cards, the Commissioner followed up with the institutions that had performed at risk or below average in 2010–2011. Of those institutions, the use of extensions had decreased by six percent; however, government-wide, the use of extensions had increased by 24 percent. Office of the Information Commissioner, *Out of Time: 2008–2009 Report Cards and Systemic Issues Affecting Access to Information in Canada*. April 13, 2010. <http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009.aspx>.

5 See *Information Commissioner of Canada v Minister of National Defence* at n. 1. This decision was delivered on March 3, 2015 and the government has 60 days to appeal to the Supreme Court of Canada.

6 Thirty calendar days is the equivalent of 20 working days. All provinces except Quebec give 30 calendar days for the initial response. Such a timeframe also appears in the laws of Australia, New Zealand and the U.K., as well as in the Article 19 and Organization of American States model laws. Article 19. *A Model Freedom of Information Law.* 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Organization of American States. *Model Inter-American Law on Access to Public Information and its Implementation Guidelines*. 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>.

7 Australia: 30 days; the U.S.: 10 days, unless the institution has arranged an alternative timeline with the requester; and all but one province; 30 days (Quebec allows for extensions up to 10 days). In contrast, Ontario's law allows for "reasonable" extensions. The Organization of American States model law allows extensions of 20 days, while the Article 19 model law permits 40-day extensions.

8 The laws of B.C., Alberta, Manitoba, New Brunswick, Nova Scotia, P.E.I., and Newfoundland and Labrador, as well as the Organization of American States model law (article 35(3)) contain such a process.

Time limits in the Act

Initial response time

The Act requires institutions to respond to an access request within 30 calendar days of receipt. Responses can contain the records requested, a notification that the institution does not hold any responsive records or a notification that the institution is taking an extension to allow more time to respond completely and accurately to the request (section 7).

Extensions

The Act allows extensions for a reasonable period of time, having regard to the circumstances. There are three circumstances in which an institution may take an extension:

1. When 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 institution (section 9(1)(a)).
2. When the institution does not expect to be able to complete necessary consultations on the records associated with the request within the original 30 days (section 9(1)(b)).
3. To consult third parties when they intend to disclose a record that contains (or may contain) third-party information (such as trade secrets and confidential financial, commercial, scientific and technical information, as identified in section 20(1) of the Act) (section 9(1)(c)). Section 27 of the Act sets out a formal process that institutions must follow for notifying third parties that they intend to disclose records that may contain third-party information.

The Act requires institutions to notify the Commissioner of all extensions they take beyond 30 days.

Delays by the numbers

The original intent of the Act was that government institutions respond to access requests within 30 days of receipt, unless this period is extended in specific and limited cases (section 9).

A key indicator of timeliness is the proportion of requests responded to within 30 days. The Treasury Board of Canada Secretariat collects this information annually and publishes it on an aggregated basis.[1] In 2002–2003, the proportion of requests responded to within 30 days was at 69 percent. This number has steadily declined over the years, to 61 percent in 2013–2014, with a low of 55 percent in 2011–2012.

This indicator can be broken down to get a clearer picture of the spectrum of performance across the access to information system.

For instance, the Commissioner looks at statistics with and without the figures for Citizenship and Immigration Canada (CIC). CIC receives by far the most requests in the entire federal access system—49 percent of the total in 2013–2014. Nearly all of the requests it receives are from consultants and lawyers representing non-citizens who deal with CIC on matters related to immigration and citizenship. Typically, these requests involve a small number of pages and CIC is generally able to complete these requests within 30 days. The performance of CIC thus significantly impacts on government-wide statistics. When looking at statistics without CIC, the proportion of requests responded to within 30 days was 61 percent in 2002–2003 and 55 percent in 2013–2014.

continued on next page

1. All aggregate statistics provided in this chapter are based on those published by Treasury Board of Canada Secretariat on the Info Source website. The Commissioner has noted inconsistencies in the 2013–2014 statistics. At the time of printing, these statistics had not been corrected. See Info Source. *Info Source Bulletin Number 37B – Statistical Reporting*, 2013–2014. <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37btb-eng.asp>.

The Commissioner also looks at institutions' specific statistics. These numbers show important variations across the government. For example, in 2013–2014, about 77 percent of requests made to the Canada Border Service Agency were responded to within 30 days. In contrast, only 29 percent of requests were responded to within that timeline at the Royal Canadian Mounted Police.

Another interesting indicator of timeliness is the average response time for requests.[2] On average, a request made to the Canadian Security Intelligence Service in 2013–2014 was responded to within 26 days. The average response time at Transport Canada was 179 days that same year.

Extensions

Since 2002–2003, the frequency in the use of time extensions has been relatively stable, representing between 25 to 30 percent of completed requests. The length of extensions, however, has increased significantly across all categories. In 2002–2003, 55 percent of extensions were for more than 30 days. This number stood at 79 percent in 2013–2014.

In 2002–2003, 40 percent of extensions claimed for consultations under section 9(1)(b) were for more than 30 days. This number jumped to 88 percent in 2013–2014.[3] Within this category, 97 percent of extensions to consult on Cabinet confidences were for more than 30 days in 2013–2014.[4]

Deemed refusals

The Treasury Board of Canada Secretariat began collecting statistics in 2011–2012 on the proportion of requests closed past their statutory or extended timelines. In the last three years, at least 1 in 10 requests was late (15% in 2011–2012; 11% in 2012–2013; 14% in 2013–2014). The primary reason cited for not responding within deadlines was workload.

Even where a request has not been responded to within the time limits allowed in the Act, the requirement to respond persists. However, in 2012–2013, only 40 percent of these requests were responded to within 30 days beyond the time limits allowed in the Act. In 10 percent of these cases, the institutions took an additional year to respond.

Complaints

The Office of the Information Commissioner of Canada has dedicated a significant amount of time and resources to resolving complaints about timeliness. Annual reports contain multiple examples of investigations related to long extensions and deemed refusals. In the last 10 years alone, a large proportion of all complaints registered annually related to time extensions and deemed refusals. The Commissioner's experience is that the vast majority of these complaints are well founded (in 2011–2012: 48 percent for extensions and 74 percent for deemed refusals; in 2012–2013: 68 percent for extensions and 73 percent for deemed refusals; in 2013–2014: 63 percent for extensions and 75 percent for deemed refusals).

2. This information was not collected by the Treasury Board of Canada Secretariat. It was made available as a result of a parliamentary question (Q-485).
3. These proportions contrast with the completion time for consultation requests, which shows that the majority of them are completed within 30 days (74 percent in 2011–2012; 65 percent in 2012–2013 and 68 percent in 2013–2014).
4. Data on consultations for Cabinet confidences was not collected in 2002–2003.

Examples of the culture of delay

Since 1983, thousands of complaints about delays have been investigated. As a result, persistent and recurring practices by institutions have been identified that delay responding to access requests.

Statutory deadlines

- Putting requests "on hold" to seek clarification from requesters and then restarting timelines upon receiving clarification. This occurs even when clarification is not necessary or does not change the request substantially.
- Putting requests "on hold" during holidays.
- Employees within institutions failing to meet the timelines established by the ATIP Office to provide relevant records.
- Fee assessments which allow the institution to place a request on hold until payment.

Extensions

- Claiming an extension after the initial response time has expired.
- Claiming an extension to retrieve records from regional or international offices.
- Taking standard length extensions without considering the volume and complexity of the information at issue.
- Using extensions to compensate for
    - lack of resources
    - high workloads
    - extended staff absences or unavailability of key officials
    - poor information management practices within the institution
    - protracted approval processes
- Not initiating a consultation at the earliest opportunity in the processing of a request.
- Not responding to a consultation request in a timely manner.
- Not following up on a consultation request in a timely manner
- Taking extensions of longer than 60 days for consultations with third parties or taking two extensions (one under section 9(1)(b) to consult informally and another under section 9(1)(c).

Limit extensions to the extent strictly necessary, with legislated timelines

Although institutions must ensure any extension they take meets the criteria set out in section 9 and, according to the *Access to Information Manual*, be for as short a time as possible, it is the Commissioner's experience that this is not always the case.[9] In a special report on time limits, the Commissioner found that institutions do not always meet these requirements and that unjustified use of time extensions is a leading and well-recognized cause of delays.[10]

Over the last three years, based on government-wide statistics, the majority of extensions were for 60 or fewer days:

In 2011–2012: 65%
In 2012–2013: 65%
In 2013–2014: 54%

According to Treasury Board of Canada Secretariat statistics, the majority of extensions taken by institutions are for less than 60 days. Accordingly, the Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days.[11] All extensions should be reasonable or justified in the circumstances and calculated with sufficient rigour, logic and support to meet a reasonableness review, as was enunciated by the Federal Court of Appeal. An effort will be required to demonstrate the link between the justification advanced and the length of the extension taken.[12]

9 As per the Treasury Board of Canada Secretariat. *Access to Information Manual*. <http://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp>, Section 7.3.2.
10 See *Out of Time*, ch. 1.
11 Commissioner Marleau suggested that the Commissioner should approve any extensions of more than 60 days. Office of the Information Commissioner. "Strengthening the Access to Information Act to Meet Today's Imperatives." March 9, 2009. <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
12 As per *Information Commissioner of Canada v Minister of National Defence, et al* at paras. 76–79 (see n. 1).

On March 3, 2015, the Federal Court of Appeal allowed an appeal brought by the Commissioner from a decision in which the Federal Court had dismissed an Application for judicial review that the Commissioner had initiated, with the requester's consent, under section 42 of the Act.

The case relates to a request that was made to National Defence on February 3, 2011 for records relating to the sale of certain military assets. National Defence advised the requester that it would extend the time limit to respond to the request by 1,110 days.

As a result of a complaint from the requester, the Commissioner conducted an investigation and determined that the requirements of section 9 for the time extension had not been met.

The Commissioner applied for a declaration from the Federal Court that National Defence had failed to give access to the records requested under the Act within the time limits set out in the Act and was, therefore, deemed to have refused to give access to the requested information.

About one month before the hearing of the application, National Defence gave the requester access to the requested records. Despite this disclosure, the Federal Court agreed to hear the matter, but ultimately dismissed the Commissioner's application.

The Information Commissioner appealed the decision. The Federal Court of Appeal granted leave to intervene to the Information and Privacy Commissioner of Ontario.

The first issue on appeal was whether the Federal Court had jurisdiction under section 42 of the Act to review a decision by an institution under section 9(1) to extend the limit set out in section 7 to respond to a request under the Act.

The Federal Court of Appeal held that the Federal Court's interpretation had been incorrect and that the correct interpretation was the one offered by the Commissioner. An institution may avail itself of the power to extend the time to respond to an access request, as provided by section 9 of the Act, but only when the required conditions are met. The Court added: "One such condition is that the period taken be reasonable when regard is had to the circumstances set out in paragraph 9(1)(a) and/or 9(1)(b). If this condition is not satisfied, the time is not validly extended with the result that the 30-day time limit imposed by operation of section 7 remains the applicable limit." The Court concluded that "a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken."

The second issue on appeal was whether the time extension asserted by National Defence had been valid. The Court found that it had not been. National Defence's treatment of the extension fell short of establishing that a serious effort was made to assess the duration of the extension. It further noted that National Defence's treatment of the matter had been "perfunctory" and showed that National Defence had "acted as though it was accountable to no one but itself in asserting its extension." The Federal Court of Appeal required that an effort be made to demonstrate the link between the justification advanced and the length of the extension taken. Government institutions "must make a serious effort to assess the required duration, and that the estimated calculation be sufficiently rigorous, logic[al] and supportable to pass muster under reasonableness review."

See *Information Commissioner of Canada v Minister of National Defence, et al.*, 2015 FCA 56, rev'g 2014 FC 205.

Recommendation 3.1

The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.

Permission to extend

In some limited circumstances, an extension of 60 days may not be sufficient. The Commissioner recommends aligning the Act with provincial and model laws by allowing institutions to take longer extensions with the prior permission of the Commissioner.[13] To obtain this permission, institutions will be required to show the Commissioner that the proposed extension is reasonable or justified in the circumstances and that a serious effort has been made to assess the required duration of the extension. As above, the extension must be calculated with sufficient rigour, logic and support to meet a reasonableness review.

Seeking permission will allow for effective oversight by the Commissioner where lengthy extensions are requested.

Recommendation 3.2

The Information Commissioner recommends that extensions longer than 60 days be available with the permission of the Information Commissioner where reasonable or justified in the circumstances and where the requested extension is calculated with sufficient rigour, logic and support to meet a reasonableness review.

Allow extensions for multiple and simultaneous requests

Section 9(1)(a) allows an extension when the request is for a large number of records or involves 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 institution.

However, there are factors other than the number of records or the nature of the search required that can interfere with the core functions of an institution when processing a request. This is seen where a requester makes multiple requests to the same institution within a short period of time.

An example that demonstrates the issue of multiple and simultaneous requests was reported in the Commissioner's 2009–2010 Annual Report.[1]

A requester submitted hundreds of access requests to the Canadian Broadcasting Corporation (CBC) in the first few months that it became subject to the Act. He then made hundreds of complaints to the Commissioner when the CBC failed to respond on time.

The Commissioner's investigations revealed that the CBC was unable to process the requests within the 30 days allowed under the Act, but could not take an extension.

1. The investigations related to these complaints were also discussed in the annual reports from 2007–2008 and 2008–2009.

13 Commissioners in B.C. and Newfoundland and Labrador may grant an extension for longer than the statutory limit when it is fair and reasonable to do so.

The Commissioner recommends that institutions should be allowed to take an extension when an institution receives multiple requests from one requester within a period of 30 days and the processing of these requests would unreasonably interfere with the operations of the institution.[14] This extension should not be available at the institution's discretion. Institutions should be required to seek the permission of the Commissioner in these circumstances. This will allow her to assess whether the extension is warranted and does not unduly impede the requester's right of access. Such a provision would be in line with several access laws in Canada.[15]

Recommendation 3.3

The Information Commissioner recommends allowing institutions, with the Information Commissioner's permission, to take an extension when they receive multiple requests from one requester within a period of 30 days, and when processing these requests would unreasonably interfere with the operations of the institution.

Consultations with other institutions and affected parties

Section 9(1)(b) allows extensions when consultations are necessary to comply with a request that cannot reasonably be completed within the original 30 days. This language is broad and has led to different interpretations.

For instance, it is not clear whether consultations within an institution fall within the scope of section 9(1)(b).

Over the past 20 years there has been a shift in the guidance provided to institutions from Treasury Board of Canada Secretariat.

A number of provincial laws, as well as the Organization of American States' model law, specifically provide that an extension to consult is only available where the consultation is external.[16]

Consultations under section 9(1)(b)

The frequency of use of extensions for consultations has not significantly changed in the last three years (based on the total number of extensions):

In 2011–2012: 37%
In 2012–2013: 36%
In 2013–2014: 40%

A large proportion, however, are for more than 60 days. That proportion has increased in the last three years:

In 2011–2012: 52%
In 2012–2013: 61%
In 2013–2014: 68%

Shift in Guidance

In 1993, Treasury Board of Canada Secretariat took the view that section 9(1)(b) could not be used for extensions in relation to internal consultations.

In 1999, Treasury Board of Canada Secretariat issued Implementation Report No. 67 which stated that an extension under 9(1)(b) could occasionally be justified when the need to seek legal advice arises during the processing of a request.

More recently, Treasury Board of Canada Secretariat has revised its guidance. It now takes the position that section 9(1)(b) may be used for any internal consultation, with the exception of the approval process.

Treasury Board of Canada Secretariat, Access to Information Manual, "Extension" (1993), s. 2-4-14; Treasury Board of Canada Secretariat, Implementation Report No. 67, (1999); and Treasury Board of Canada Secretariat, Access to Information Manual. "Reasons for extension", s. 7.3.1. <http://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp#cha7_3>.

14 The *Open Government Act* contains such a provision. "Strengthening the *Access to Information Act* to Meet Today's Imperatives" features a similar recommendation. Office of the Information Commissioner. *Open Government Act*. October 25, 2005. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf>.

15 The access laws of Alberta, P.E.I., and Newfoundland and Labrador allow extensions, with the permission of the Commissioner for multiple concurrent requests that have been made by the same requester.

16 The access laws in B.C., Alberta, Manitoba, New Brunswick, P.E.I., Nova Scotia, and Newfoundland and Labrador allow extensions to consult with a third party or another public body. Ontario allows extensions for consultations with persons outside of the institution.

In light of this, the Commissioner recommends that extensions taken under section 9(1)(b) should be limited to external consultations with other government institutions or affected parties.

The amendment should make clear that extensions under this section may only be taken, where necessary, to consult affected parties outside of the institution who do not have consultation rights under section 9(1)(c).

Recommendation 3.4

The Information Commissioner recommends the Act make explicit that extensions for consultations as per section 9(1)(b) may only be taken to consult other government institutions or affected parties, other than third parties who already have consultation rights under section 9(1)(c), and only where it is necessary to process the request.

Failing to respond to a consultation request

Section 9(1)(b) does not require consulted parties to respond to requests for consultations by a particular deadline. Institutions have identified this as a factor causing significant delay.[17]

Statistics do not support this assertion. It appears that consulted institutions have largely been responding to requests for consultations in a timely fashion. [18]

Completion time for consultations received from other government institutions

2011–2012: 74% within 30 days; 89% within 60 days
2012–2013: 65% within 30 days; 82% within 60 days
2013–2014: 67% within 30 days; 87% within 60 days

The Commissioner has, however, in the course of her investigations found instances where there are lengthy delays in responding to requests because the response to a consultation is not returned in a timely manner.

In 2010–2011, the Commissioner investigated a complaint against Indian and Northern Affairs Canada (INAC), as it was formerly known, which had gone into deemed refusal on 13 requests made by the same requester.

During the Commissioner's investigation, it became clear that the delays arose from the failure of the Canada Post Corporation (CPC), the consulted institution, to respond to INAC's requests for consultation in a timely manner. As a result, INAC refused to provide commitment dates to the Commissioner for responding to the requests without first knowing the dates by which CPC would respond to the consultations. It was also discovered that while INAC had extended the time limit under the Act for most of the requests in order to consult with CPC, it undertook consultations for some of the relevant records only after the extended time period had expired.

17 See Information Commissioner of Canada, *Systemic Issues Affecting Access to Information in Canada: 2007–2008*. "Consultations." <http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2007-2008_7.aspx> and Out of Time.

18 As a result of her investigations, the Commissioner has noted that in many instances, institutions take standard length extensions to effect consultations without regard to the complexity or volume of the consultation request. They then delay undertaking the consultation for lengthy periods of time. This appears to be done to manage the institution's workload and not the consultation process. This supports limiting such extensions to a maximum of 60 days.

To insert some discipline into the consultation process, the Commissioner recommends that institutions be required to respond to requests without the input of the consulted party should the consulted party not respond to the consultation within the notified time period. This is consistent with the understanding that the institution who received the access request bears the responsibility to respond to the request and cannot avoid this responsibility due to the inaction of another institution.[19]

Recommendation 3.5

The Information Commissioner recommends that, in cases where a consulted party fails to respond to a consultation request, the consulting institution must respond to the request within the time limits in the Act.

Consultations with third parties

Institutions may take extensions under section 9(1)(c) for consultations with third parties when the institution intends to disclose a record that contains (or may contain) confidential third-party information, usually of a commercial or financial nature.

Sections 27 and 28 of the Act establish a clear, time-limited legislative framework for notifying third parties about the potential release of their information. Moreover, section 44 gives third parties the right to apply for a judicial review of an institution's decision if it decides to disclose their information.

The following table sets out the time limits provided in the Act.

Time limits for notification and representations under section 27				
The institution notifies the third party of the request and its intention to release the third party's information. The institution takes an extension under section 9(1)(c)	The deadline for the third party to send representations to the institution	The institution decides whether to release information	The deadline for the third party to file an application for judicial review. If no application is filed, the institution releases information.	Transmittal time
First 30 days	20 days after notice is given	10 days later	20 days later	10 days
	60-day time extension under 9(1)(c)			

19 This recommendation is consistent with a policy recommendation the Commissioner made in May 2014 to the President of the Treasury Board of Canada. At that time, she recommended that the *Directive on the Administration of the* Access to Information Act be amended to make it clear that consulting institutions must fully and accurately respond to a request by the deadline, even when they have yet to receive a response to a request for consultation. This recommendation was not implemented.

Based on these legislated timelines, the Commissioner is of the view that extensions to consult third-parties should never take more than 60 days and has issued an advisory notice to this effect.[20]

Despite this clear legislative framework, the Commissioner has investigated complaints where institutions have not respected these legislated time limits and have granted extensions to third parties which are not allowed for by the Act. This results in delays in responding to requests.

Even when a third party fails to respond to a notification, the institution must still wait for 20 days before it can release the information. During this time, the third party may apply to the Court for a judicial review of the institution's decision to disclose the information, which delays responding to requests even further.

Thus, there is little incentive for third parties to respond to a notification in a timely manner or at all.

To instill discipline in the notification process and place the burden on the party resisting disclosure to provide timely representations to the institution, the Commissioner recommends that a third party be deemed to have consented to releasing its information if it does not respond to the notification within the legislative timelines.[21] This will reduce delay by ensuring prompt and complete responses by third parties or disclosure in the absence of a response. Finally, it resolves questions relating to disclosure that arise where a third party has ceased to exist.[22]

Recommendation 3.6

The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

Consultations under section 9(1)(c)

The frequency of use of extensions for consultations under section 9(1)(c) has not significantly changed in the last three years (based on the total number of extensions):

In 2011–2012: 14%
In 2012–2013: 14%
In 2013–2014: 12%

A large proportion of consultations under section 9(1)(c) are responded to within 60 days. This number is increasing.

2011–2012: 58%
2012–2013: 69%
2013–2014: 70%

In 2011–2012, a requester complained to the Commissioner about a 210-day extension taken by Industry Canada to respond to a request, and that Industry Canada had missed that deadline. The Commissioner's investigation focused on Industry Canada's practices associated with consultations, and its overall lack of a timely response.

During the investigation, the Commissioner learned that Industry Canada had failed to complete consultations with third parties within the time frame set out in the Act (sections 27 and 28). In addition, officials gave extensions to third parties to provide a response to the notice and entered into negotiations with them about the terms of the proposed disclosure. Neither of these ways of proceeding is consistent with the obligations set out in section 28. In this investigation the Commissioner found that Industry Canada gave third parties extensions when they did not hear back from them with their representations, which resulted in further delays in responding to the requester.

20 Office of the Information Commissioner of Canada. "Advisory Notice: Time Extensions under Paragraph 9(1)(c) of the *Access to Information Act*." 2014. <http://www.oic-ci.gc.ca/eng/inv-inv_advisory-notices-avis-information_extensions-prorogation.aspx>.
21 This is the approach found at section 49 of Quebec's access law.
22 This was the case in an investigation reported in the 2013–2014 Annual Report. See Office of the Information Commissioner, *Annual Report 2013–2014*, "Who is a proper third party." <http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_4.aspx>.

Allow extensions when information is to be published

Currently, institutions may withhold information when it will be published within 90 days or within such a time as may be necessary for printing or translation (section 26). When institutions apply this exemption and respond to the requester, they then consider the request complete, although many continue to monitor the publication of the information and send a follow-up response to the requester when the information is published.

While there may be reasons to delay the disclosure of information that is soon to be published, an exemption is not necessary to achieve this purpose.[23]

The availability of an extension for publishing information may help reduce complaints like one received in 2008–2009 against Human Resources and Skills Development Canada (as it was formerly known), which, after withholding information in response to an access request because it was soon to be published, failed to follow up with the requester once the information was published. The requester's complaint and the Commissioner's subsequent investigation could have been avoided if the institution had been required to take an extension and, therefore, keep the request active.

Instead, the Commissioner recommends allowing institutions to take an extension if the information is soon to be made available to the public. This extension would be limited to 60 days, with longer extensions available with the approval of the Commissioner (as per recommendations 3.1 and 3.2). In combination with the original 30 days, this extension would result in 90 days in total to respond to the request.[24] In the event the information is not published when the extension expires, the institution would have to disclose the unpublished information to the requester.

Allowing an extension under these circumstances would:

- give requesters more certainty as to when the information would be available because institutions would have to set a date upon which the extension would expire; and
- ensure that the request would remain active until the information is disclosed.

The availability of this extension under the Act makes the exemption for information to be published (section 26) redundant.

Recommendation 3.7

The Information Commissioner recommends allowing an extension when the requested information is to be made available to the public, rather than claiming an exemption.

Recommendation 3.8

The Information Commissioner recommends that if an extension is taken because the information is to be made available to the public, the institution should be required to disclose the information if it is not published by the time the extension expires.

Recommendation 3.9

The Information Commissioner recommends repealing the exemption for information to be published (section 26).

23 Treasury Board of Canada Secretariat's *Access to Information Manual* explains that institutions may wish to withhold information that is soon to be published in order to retain control over the material, ensure all members of the public are given the opportunity to review the information at the same time, protect Parliament's right to be made aware of certain matters first, and to ensure the information is available in both official languages. *Access to Information Manual* at section 11.23.

24 This length of time is consistent with the current exemption under section 26.

Extension notices

If an extension is being taken, section 9(1) of the Act requires institutions to give written notice of the extension to the requester within 30 days of receipt of the request.

In order to insert more discipline around the use of extensions and to ensure that requesters are given adequate information about the extension and their rights, the Commissioner recommends that extension notices should contain the following:

- the section being relied on for the extension and the reasons why that section is applicable;
- the length of the extension (regardless of what section the extension was taken under);
- the date upon which the institution will be in deemed refusal if it fails to respond;
- a statement that the requester has the right to file a complaint to the Commissioner about the extension within 60 days following receipt of the extension notice; and
- a statement that the requester has the right to file a complaint with the Commissioner within 60 days of the date of deemed refusal if the institution does not respond to the request by the date of the expiry of the extension.

Recommendation 3.10

The Information Commissioner recommends that extension notices should contain the following information:

- **the section being relied on for the extension and the reasons why that section is applicable;**
- **the length of the extension (regardless of what section the extension was taken under);**
- **the date upon which the institution will be in deemed refusal if it fails to respond;**
- **a statement that the requester has the right to file a complaint to the Information Commissioner about the extension within 60 days following receipt of the extension notice; and**
- **a statement that the requester has the right to file a complaint to the Information Commissioner within 60 days of the date of deemed refusal if the institution does not respond to the request by the date of the expiry of the extension.**

Chapter 4

Maximizing disclosure

The purpose of the *Access to Information Act* is to provide a right of access to all records under the control of institutions that are subject to the Act.

The Act says that the general right of access may be restricted when necessary by limited and specific exceptions. There is also a presumption in favour of disclosure imposed on institutions.[1] Balancing the right of access against claims to protect certain information is at the core of the access to information regime.

The Act also requires that decisions on disclosure should be reviewed independently of government. The Commissioner and the courts provide this independent oversight.

Under the Act, many exemptions are not sufficiently limited and specific, nor are some subject to independent review. In addition, they are not generally in line with national and international norms. Moreover, the number of exemptions to the right of access has increased since the Act came into force.[2]

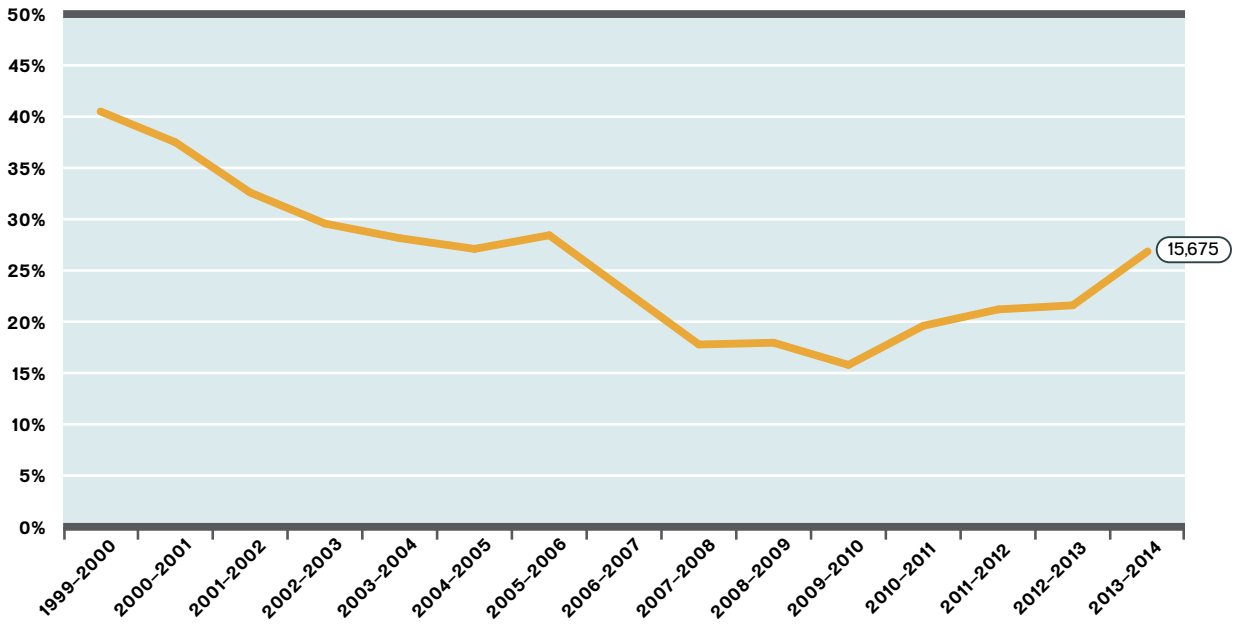
The purpose of the *Access to Information Act*

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**.

Although more requests are being made and more pages are being released in response to access to information requests, the percentage of requests resulting in all information being disclosed has declined.

1 *Dagg v Canada Minister of Finance*, [1997] 2 SCR 403 at para. 51.
2 For example, when the Act was passed 30 years ago, there were 40 provisions in 33 statutes listed in Schedule II. Today, it contains more than 50 statutes.

Figure 1: Proportion of requests completed in which all information was disclosed (1999–2000 to 2013–2014)[3]



In 1999–2000, 40.5 percent of all requests resulted in all information being disclosed. In 2013–2014, this number stood at 26.9 percent.

A modern access law must be developed in the context of the Open Government initiative and the government's commitment to be open by default.[4] The exemptions in the Act need to be comprehensively reviewed to maximize disclosure of information. This will result in:

- a meaningful open by default culture in the government;
- an Act that is aligned with the most progressive national and international norms; and
- an effective access to information regime that fosters transparency, accountability and citizen engagement.[5]

3 In 2013–2014, 54.6% of the Canadian Border Service Agency's and 33.4% of Citizenship and Immigration Canada's completed requests were disclosed entirely. These proportions are significantly higher than the government-wide statistic of 26.9%. This seems to be related to the nature of the requests these institutions receive. When these two institutions are excluded, the proportion of requests for which information was disclosed entirely in 2013–2014 decreases from 26.9% to 16%.
Please note that all aggregate statistics provided in this chapter are based on those published by Treasury Board of Canada Secretariat on the Info Source website. The Commissioner has noted inconsistencies in the 2013–2014 statistics. At the time of printing, these statistics had not been corrected. See Info Source. *Info Source Bulletin Number 37B – Statistical Reporting,* 2013–2014. <http://www.infosource.gc.ca/bulletin/2014/b/bulletin37btb-eng.asp>.

4 As found in *Canada's Action Plan on Open Government 2014–2016*. Open Government (Canada). *Canada's Action Plan on Open Government 2014–2016*. <http://open.canada.ca/en/content/canadas-action-plan-open-government-2014-16>.

5 The Commissioner has previously recommended to the President of the Treasury Board that the *Access to Information Act* be modernized in line with the principle of "open by default" and the most progressive national and international standards. See Information Commissioner of Canada. "Letter to the President of the Treasury Board on Action Plan 2.0" (November 5, 2014). <http://www.oic-ci.gc.ca/eng/lettre-plan-d-action-2.0_letter-action-plan-2.0.aspx>.

How the Act currently protects information

The Act protects information through the use of exemptions and exclusions.

Exemptions

Exemptions permit or require institutions to withhold a range of records and information from disclosure.

The Act contains the following categories of exemptions:

- **Class-based or injury-based exemptions**: *Class-based exemptions* prevent disclosure of information based solely on whether it falls within a specified class of information. The exemption for personal information is an example of a class-based exemption. *Injury-based exemptions* require that a harms test be applied in order to determine whether disclosure would prejudice the interest the exemption protects.
- **Mandatory or discretionary exemptions**: Mandatory exemptions prohibit disclosure of information once it has been determined that the exemption applies. As a result, the institution in control of the information is under a legal obligation to refuse access. The mandatory exemptions in the Act usually apply to information that was obtained by an institution and does not belong to it. *Discretionary exemptions* permit an institution to refuse disclosure based on a two-step process. First, the institution must determine whether the exemption applies. Second, when it does, the institution must determine whether the information should nevertheless be disclosed based on all relevant factors.

In some cases, information covered by an exemption may still be disclosed when a condition is met, for example, if consent is obtained or where the information is publicly available.

In other instances, the exemption includes express permission to disclose the information when the public interest in disclosure clearly outweighs the importance of protecting the information.

Exclusions

Exclusions provide that the Act does not apply to certain records or information. In some cases this removes independent oversight.

Exemptions

To protect only what requires protection, the exemptions in the Act must be limited and specific. Exemptions that are overly broad result in information being withheld when it should be disclosed. Overly broad exemptions also make the application of the Act more complex and lead to institutions applying multiple and overlapping exemptions to the same information at the same time.

To maximize disclosure, model laws promote exemptions that are:[6]

- injury-based;
- discretionary;
- time-limited;
- subject to a public interest override; and
- subject to independent oversight.[7]

Injury-based

Injury-based exemptions take into account the fact that the level of sensitivity attached to information changes as circumstances, time and perspective change. In contrast, for class-based exemptions, all that must be demonstrated is that the information falls within that class.[8]

Discretionary

Discretionary exemptions allow for a case-by-case assessment on disclosure. Case law in Canada has established that discretion must be exercised in a reasonable manner, taking into account all relevant factors.[9] For discretion to be reasonably exercised, the institution must provide evidence that it considered whether information falling within the exemption claimed could nonetheless be disclosed, depending on the specific facts of the particular request and the interests involved.[10] In comparison, a mandatory exemption prohibits disclosure of information once it has been determined that the exemption applies.

Time-limited

Exemptions that are time-limited create greater certainty in access laws. As soon as the time limit is reached or the specified event (such as publication) takes place, institutions may no longer invoke the exemption to withhold the information.

6 In some instances, it may not be appropriate to construct an exemption in this manner. Sometimes, the interest that merits protection needs an exemption that provides more certainty as to when information will be disclosed. In other instances, the exemption must be written in such a way to simplify its application. In these instances, a mandatory and/or class-based exemption may be appropriate. However, variations from a discretionary, injury-based exemption should be the exception to the rule.

7 The Article 19 and Organization of American States model laws, as well as the Tshwane Principles all take such an approach. The *Open Government Guide* endorses "a limited regime of exemption based on preventing harm to protected interests." Article 19. "A Model Freedom of Information Law." 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Organization of American States. "Model Inter-American Law on Access to Public Information and its Implementation Guidelines." 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>; Society Foundations, "The Global Principles on National Security and the Right to Information (Tshwane Principles)." 2013. <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>; and Open Government Guide. "Welcome to the Open Gov Guide." 2013. <http://www.opengovguide.com>. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>.

8 Unless the exemption is discretionary or is a class-based exemption that allows information to be disclosed in certain instances, such as when consent has been obtained or the information is already available to the public.

9 Relevant factors include the purpose of the Act, the purpose of the exemption and the public interest in disclosure of the information. Institutions may not take into account irrelevant factors.

10 *Attaran v Minister of Foreign Affairs* 2011 FCA 182 at paras. 14, 17 and 29; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras. 45–48.

Public interest override

A public interest override in an access law allows for the competing interest of the public's right to know to be balanced against the interest the exemption protects.[11] The decision-maker must determine if non-disclosure is necessary and proportionate as compared to the public's interest in the information.

In making that determination, a number of factors related to the public interest in the information must be taken into account. Examples of relevant factors to consider include:

- open government objectives, such as whether the disclosure would support accountability of decision-makers, citizens' engagement in public policy processes and decision-making, or openness in the expenditure of public funds;
- whether there are environmental, health or public safety implications; and
- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.

Former Information Commissioner John Grace:

The lack of a general public interest override in the Act has been called "a serious omission which should be corrected."

Office of the Information Commissioner, 1993–1994 Annual Report.

Public interest overrides can be found in model laws, most of the national access to information laws that are among the top-10 of the Global Right to Information Rating and some provincial laws.[12] In addition, both the Tshwane Principles and the Organization of American States model law include a higher presumption in favour of disclosure for information related to human rights or crimes against humanity.[13]

Currently, the Act contains only limited public interest overrides, and these are only applicable to a few sections.[14]

A general public interest override must be added to the Act to ensure that the public interest in disclosure is taken into account while considering whether to apply any of the exemptions within the Act.

This override should include a non-exhaustive list of factors to be considered.

Recommendation 4.1

The Information Commissioner recommends that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider the following, non-exhaustive list of factors:

- **open government objectives;**
- **environmental, health or public safety implications; and**
- **whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.**

11 General public interest overrides applicable to all exceptions (as opposed to exemption-specific overrides), are necessary because it is not possible to frame all exceptions sufficiently narrowly to cover only information which may legitimately be withheld. See Mendel, Toby. "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles." *National Security and Open Government: Striking the Right Balance*. New York: Campbell Public Affairs Institute, 2003 at p. 18.

12 The Article 19 and Organization of American States model laws, the Tshwane Principles, and the access laws of Serbia, India, Liberia, El Salvador, Sierra Leone, Ukraine, Alberta and B.C. all contain mandatory public interest overrides. Ontario's law does as well; however, it does not apply to all exemptions (as confirmed by the Criminal Lawyers' Association decision. See n. 10 above). Nova Scotia's law includes a discretionary, general public interest override.

13 The Tshwane Principles contain a high presumption in favour of disclosure for certain classes of information, such as that which reveals gross violations of human rights or serious violations of international humanitarian law, or information that would safeguard the right to life, liberty or security of the person. Article 44 of the Organization for American States model law provides that some of the law's exceptions do not apply in cases of serious violations of human rights or crimes against humanity.

14 Section 19 and sections 20(1)(b)–(d) contain such an override. In addition, in the Criminal Lawyers' Association decision (see n. 10, above) the Supreme Court of Canada held that the exercise of discretion necessarily involves consideration of the public interest.

Independent oversight

Exemptions to the right of access in the Act are independently reviewable. However, this oversight can be limited when information is protected by an exclusion from the coverage of the Act.

For example, it is clear that when an exemption is invoked, the Commissioner has access to all records during her investigation so that she may independently review the decision on disclosure. This is not always the case with exclusions. The exclusions in the Act differ from one to another. No two exclusions have the same wording or produce the same effects. Determining what records the Commissioner may obtain in the conduct of her investigations is assessed on a case-by-case basis.

An exclusion that limits oversight results in a weakened right of access. For this reason, model access laws recommend that all information controlled by an institution should be subject to the access law, with no exclusions for certain kinds of information.[15]

In light of these considerations, the Commissioner recommends removing all exclusions from the Act and replacing them with exemptions, unless an exemption already exists to protect the interest at issue.

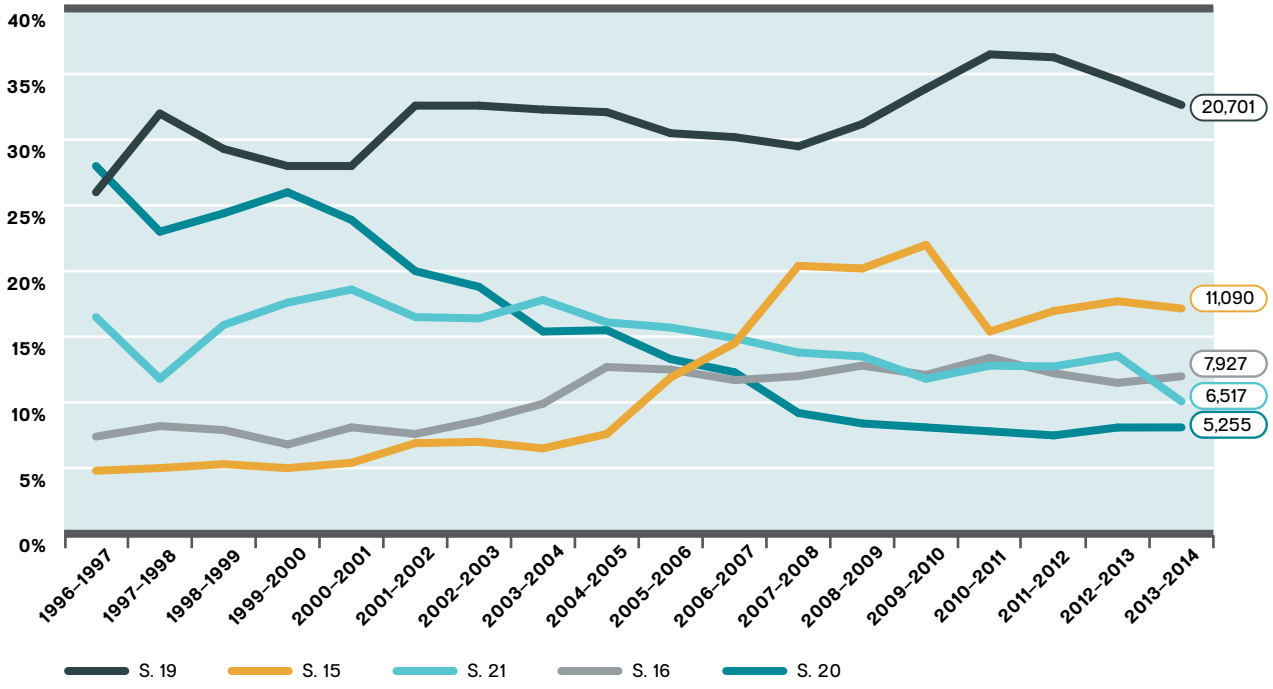
Recommendation 4.2

The Information Commissioner recommends that all exclusions from the Act should be repealed and replaced with exemptions where necessary.

15 For example, the Article 19 and Organization of American States model laws both provide that any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the public authority that holds it, and whether or not it is classified, should be subject to the law.

The graphic below presents the five most commonly applied exemptions between 1996–1997 and 2013–2014. They are: personal information (section 19), international affairs and defence (section 15), operations of government (section 21), law enforcement and investigations (section 16) and third party information (section 20).

Figure 2: Top 5 exemptions (1996–1997 to 2013–2014)



The proportion of exemptions applied under section 19 has increased from 26% in 1996–1997 to 32% in 2013–2014, with a peak of 36.5% in 2010–2011. Use of section 15 has also increased. Exemptions under this section represented 5% of all exemptions applied in 1996–1997, the proportion was 22% in 2009–2010 (with a slight decrease to 17% by 2013–2014). Use of section 16 has fluctuated by about five percentage points during this same period (from 7% in 1996–1997 to 12% in 2013–2014). There was a general downward trend in the use of section 21 between 1996–1997 and 2013–2014. However, it is believed that the decrease in 2013-2014 is due to a statistical error in the *Info Source Bulletin*. Finally, the proportion of exemptions applied under section 20 decreased significantly, from 28% in 1996–1997 to 8% in 2013–2014.

Information related to other governments (sections 13, 14 and 15)

The Government of Canada holds information related to its dealings with other governments. This information falls into two main categories: The government may hold information that has been obtained in confidence from another government, or it may hold information related to its positions, plans and strategies in intergovernmental negotiations and relations.

There is a public interest in protecting both kinds of information. Other governments must be able to rest assured that information communicated to the Government of Canada in confidence will indeed be kept confidential.[16] Without this assurance, they would be far less likely to share this kind of information.[17] There is also a need to protect relationships between governments. The disclosure of certain information could injure relationships.

Exemptions and exclusions reviewed in this chapter

- Information obtained from other governments (sections 13, 14 and 15)
- National defence (sections 15 and 69.1)
- Law enforcement and investigations (section 16)
- Personal information (section 19)
- Third party information (section 20)
- Advice (section 21)
- Solicitor-client privileged information (section 23)
- Cabinet confidences (section 69)
- Exemptions for information protected by other laws or for specific agencies (sections 24, 16.1–16.4, 18.1, 20.1, 20.2, 20.4, 68.1 and 68.2)

To protect these interests, the Act currently contains the following exemptions:

- Section 13 provides a **mandatory, class-based** exemption for information obtained in confidence from foreign governments, international organizations of states, governments of the provinces, municipal or regional governments and certain specific Aboriginal governments.
- Section 14 provides a **discretionary, injury-based** exemption for information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs.
- Section 15 provides a **discretionary, injury-based** exemption for information which, if disclosed, could reasonably be expected to be injurious to the conduct of international affairs.[18]

16 During the legislative committee hearings of Bill C-43, MP Baker stated that the "that government ought to be able to correspond and communicate with the federal government with some assurance about information received under certain circumstances, information received in confidence." Bill C-43, June 17, 1981 (Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 1st Sess, 32nd Parl at 42:29).
17 *Ruby v Canada (Solicitor General)*, [1996] 3 FCR 134. See also Bill C-43, Committee Hearings, June 17, 1981 at 42:34.
18 Section 15 also contains the "national security" exemption, discussed below.

Information obtained in confidence (section 13)

This section protects confidential information belonging to other governments or international organizations of states. This information was not created by the Government of Canada and was transmitted to the Government of Canada by another government in confidence.

There is a public interest in the sharing of confidential information between governments: It fosters intergovernmental collaboration and cooperation. Other governments and organizations would be less likely to share information with Canada if they lost confidence in the ability of the Government of Canada to protect their confidences. Accordingly, the mandatory exemption found in the Act is justified.[19, 20]

Section 13 provides a **mandatory, class-based** exemption for information obtained in confidence from a foreign government, international organizations of states, governments of the provinces, municipal or regional governments and certain specific Aboriginal governments.

Section 13 was invoked 2,470 times in 2013–2014.

The Act provides two limitations on this strict prohibition. Information obtained in confidence from another government or international organization of states may be disclosed if consent is obtained, or if the originating government or organization makes the information publicly available. However, there is no incentive to respond to consultation requests for consent to disclose, and in fact other governments rarely do. This leads to overuse of this exemption, particularly for historical records.

Consulting with other levels of government within Canada is generally a straightforward exercise, as the heads of these governments or institutions are easily identified and located, and most are subject to similar access regimes within their own jurisdictions. Consultations should be mandatory in these circumstances.

Recommendation 4.3

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information from the provincial, municipal, regional or Aboriginal government to whom the confidential information at issue belongs.

There are different considerations at the international level that make a mandatory obligation to consult inappropriate. International consultations can be complicated by protocols of formal diplomatic channels of correspondence, language issues or government instability. Given these considerations, at the international level, consultation should always be undertaken when it is reasonable to do so.[21]

Recommendation 4.4

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information of the foreign government or international organization of states to which the confidential information at issue belongs, when it is reasonable to do so.

19 This is similar to the protection afforded to third-party confidential information under section 20 of the Act.

20 It is important to note that the interest protected in this section is not the ongoing relationship between Canada and other governments. That interest is protected under the international affairs exemption found at section 15 of the Act or the federal-provincial affairs exemption found at section 14, discussed below. In *Canada (Attorney General)* v *Khawaja* 2007 FC 490, Mosley J. concluded, at para. 141 that the "third party rule" (codified in section 13 of the Act) cannot be applied to protect the existence of a working relationship between Canada and a foreign government or agency; it must be applied in the context of an exchange of confidential information. In *Khadr v Canada* 2008 FC 549, Mosley J. observed at para. 98 that: "too much of the routine communication between foreign and Canadian agencies is protected by the Attorney General in application of the third party principle."

21 The Federal Court of Appeal has stated in the context of a request for personal information under the *Privacy Act* that a request by an applicant for information subject to section 19 of the *Privacy Act* (the parallel to section 13 of the *Access to Information Act*) "*includes* a request to the head of a government institution to make reasonable efforts to seek the consent of the third party [other government or international organization of states] which provided the information. (*Ruby v Canada (Solicitor General),* [2000] 3 FC 589 (FCA)).

To address the observed lack of response from other governments to requests for consent, it is necessary to require that, where consultation has been undertaken, consent is deemed to have been given if the consulted government does not respond within 60 days. It would therefore be incumbent on the government or organization whose interest is being protected to indicate that it does not wish the information to be disclosed.[22, 23]

Recommendation 4.5

The Information Commissioner recommends that, where consultation has been undertaken, consent be deemed to have been given if the consulted government does not respond to a request for consent within 60 days.

The current Act provides that in circumstances where consent to disclose is given, or the information is made public, institutions *may* disclose the information. This exemption should be directive rather than discretionary: An institution *shall not* refuse to disclose information on the basis of section 13 where consent has been obtained, or where the information has been made publicly available by the originating government or organization.

Recommendation 4.6

The Information Commissioner recommends requiring institutions to disclose information when the originating government consents to disclosure, or where the originating government makes the information publicly available.

Harm to inter-governmental affairs (sections 14 and 15)

The Government of Canada holds information related to its positions, plans and strategies in negotiations and relations between itself and other governments, at both the provincial and international levels.

The interest that requires protection in this case is the government's ability to conduct business, cooperate and negotiate across jurisdictions. This interest is protected in the Act on a discretionary basis, where the government can show that disclosure could reasonably be expected to be injurious to the conduct of international affairs (in section 15) or federal-provincial affairs (in section 14).[24]

Section 14 provides a **discretionary**, **injury-based** exemption for information which, if disclosed, could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs.

Section 15 includes a **discretionary**, **injury-based** exemption for information which, if disclosed, could reasonably be expected to be injurious to the conduct of international affairs.

Section 14 was invoked 990 times in 2013–2014.

Section 15 as it relates to international affairs was invoked 2,346 times in 2013–2014.

22 Based on a 2010 comparative study, the vast majority of consultations are with the United States. Comeau, Paul-Andre. *Comparative Study Prepared for the Information Commissioner of Canada. Foreign Consultations by the Department of Foreign Affairs and International Trade in Conjunction with the Access to Information Act* (September 2010). <http://www.oic-ci.gc.ca/eng/rapports-consultations-reports.aspx>.

23 By way of analogy, there are strict notification and consultation timelines in the Act for non-governmental third-party information obtained in confidence by the Government of Canada (section 20). Third party consultations require the third party entity that is to benefit from the protection of the section justify non-disclosure. They must provide their representations on the disclosure or non-disclosure of the information or risk having this information disclosed.

24 Section 15 also contains the "national security" exemption, discussed below.

In drafting the Act, the word "affairs" was selected by the government to ensure that the protection in this exemption would extend beyond actual negotiations to also encompass positions leading up to negotiations, as well as negotiation strategies.[25] However, the term "affairs" is too broad to protect this interest. The word should therefore be replaced with more specific terms, such as "negotiations" and "relations."[26] This is consistent with other access laws and clearly circumscribes the protection to the interests to be protected: positions taken during the course of inter-governmental deliberations, and the diplomatic conduct of relationships between governments.[27]

Recommendation 4.7

The Information Commissioner recommends replacing international and federal-provincial "affairs" with international and federal-provincial "negotiations" and "relations."

To further clarify that these provisions contain a similar interest, the Commissioner recommends combining these provisions into a single exemption that protects inter-governmental negotiations and relations. This would leave a single interest protected under section 15: national security.

Recommendation 4.8

The Information Commissioner recommends combining the intergovernmental relations exemptions currently found in sections 14 and 15 into a single exemption.

National security (sections 15 and 69.1)

Section 15 provides a **discretionary, injury-based** exemption for information the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.

Section 15 as it relates to national security was invoked 8,744 times in 2013–2014.

The Government of Canada holds a wide range of information relating to national security, from plans related to military operations to human source reports.

Recent disclosures about the surveillance activities of national security bodies have raised citizens' concerns and resulted in calls for greater transparency. The Tshwane Principles, which offer guidance to countries on how to balance access to information with national security interests, underscore that legitimate national security interests are, in practice, best protected when the public is well informed about the state's activities, including those undertaken to protect national security.[28] Making this type of information available to the public contributes to informed debate on important issues or matters of serious interest and enhances government accountability.

National security is protected in the Act by a discretionary exemption that allows institutions to refuse to disclose this information only where potential injury can be shown to defence, or the detection, prevention or suppression of subversive or hostile activities. Although the Act contains no specific reference to "national security," these two interests are sufficiently defined at section 15(2) so that the scope of protection for national defence is limited and specific.

25 Bill C-43, Committee Hearings, June 18, 1981 at 43:22.
26 This was also recommended in Forcese, Craig. "Canada's National Security "Complex": Assessing the Secrecy Rules." *IRPP Choices* 15, 5 (June 2009) at p. 28.
27 The following laws use one or both of the terms "relations" and "negotiations": B.C., Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, P.E.I., Newfoundland and Labrador, Australia, Mexico and the U.K.
28 at p. 6.

However, the Commissioner's investigations have revealed an overuse of section 15 for historical information, particularly documents that have been transferred to Library and Archives Canada (LAC). Although the Federal Court noted in the *Bronskill* decision that "the passage of time can assuage national security concerns",[29] some of this information continues to be classified at a confidential, secret, or even top secret level, a fact that complicates the assessment of injury in the disclosure of these documents.[30]

The Treasury Board of Canada Secretariat's *Security Organization and Administration Standard* requires that information be "classified or designated only for the time it requires protection, after which it is to be declassified or downgraded." The Standard also indicates that departments should provide for automatic declassification when the information is created or collected.[31] Departments must develop with LAC agreements to declassify or downgrade sensitive information transferred to the control of LAC. The Standard also recommends that an automatic expiry date of 10 years should apply to secret, confidential and low-sensitive designated information. The Commissioner's investigations have revealed that this Standard does not appear to have been implemented by institutions.

The Government's *Directive on Open Government* and Action Plan speak to the removal of access restrictions or the declassification of departmental information resources of enduring value prior to transfer to LAC or as it occurs within LAC. However, the Directive and the Plan do not speak of a systematic review, nor do they talk of the implementation of a declassification process for its government records of enduring value. To provide the flexibility needed to adequately protect national security interests while maximizing disclosure, the Commissioner recommends a mandatory obligation on the part of institutions to declassify information on a routine basis.[32, 33]

To be clear, declassified documents could still be legitimately withheld under the national security exemption if the injury test is met. However, a routine review of documents with a view to declassification would greatly help those tasked with determining injury or non-injury and could result in more timely access to information, particularly in historical records.[34]

Recommendation 4.9

The Information Commissioner recommends a statutory obligation to declassify information on a routine basis.

Certificates issued by the Attorney General (section 69.1)

In addition to section 15, the Act also includes another protection for information related to national security. Section 69.1 is a mandatory exclusion for information that has been certified as confidential under section 38.13 of the *Canada Evidence Act* (CEA).[35]

Section 38.13 of the CEA empowers the Attorney General to personally issue a certificate in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity or for the purpose of protecting national defence or national security. The expressions "national defence" or "national security" are not defined.

29 *Bronskill v Minister of Canadian Heritage*, 2011 FC 983 at para. 227.
30 Indeed, the very fact of having been transferred to archives indicates that they are of historical importance, no longer of operational value to the institution, and very likely no longer require protection at their original classification level.
31 The purpose of this policy is to establish "the operational standard for the organization and administration of security as required by the Security policy." Treasury Board of Canada Secretariat. *Security Organization and Administration Standard*. June 1, 1995. <http://tbs-sct.gc.ca/pol/doc-eng.aspx?id=12333&section=text>.
32 See Information Commissioner of Canada, "Letter to the President of the Treasury Board on Action Plan 2.0." November 5, 2014. <http://www.oic-ci.gc.ca/eng/lettre-plan-d-action-2.0_letter-action-plan-2.0.aspx>.
33 Section 552(b)(1) of the U.S.' access law permits a government agency to deny access to information that is "national defense or foreign policy information properly classified pursuant to an Executive Order." Executive Order 13526 (December 29, 2009) created the National Declassification Center and required all agencies to review their classification guidelines. The Order defines classification levels, sets limits on the kinds of information that can be classified, and sets a time limit of 10 years (or 25 for sensitive information, with a possibility of renewal should injury remain).
34 The usefulness of a declassification process was mentioned most recently by the Federal Court in *Bronskill* at para. 108.
35 RSC, 1985, c C-5.

When a certificate under this section is issued, it terminates all proceedings under the Act related to a complaint, including an investigation by the Commissioner, an appeal or a judicial review. After this point, the Information Commissioner has no authority to review the information in dispute or the application of the exclusion.[36]

This section was added to the Act in 2001 under the *Anti-terrorism Act*.[37] To the Commissioner's knowledge, the certification process has never been used to prevent disclosure under the Act.

There are a number of significant issues with section 69.1 when it is assessed in light of the purpose of the Act.[38]

- It is not subject to independent oversight, which hinders the ability to strike the right balance between the right of access and non-disclosure.
- The lack of definition for "national defence" or "national security", as well as other ambiguities that have been identified with section 38.13 of the CEA, result in an overly broad scope to the exclusion.[39]
- It is unnecessary, as section 15 is adequate to protect national security.

Recommendation 4.10

The Information Commissioner recommends repealing the exemption for information certified by the Attorney General (section 69.1).

Law enforcement and investigations (section 16)

The Government of Canada holds a wide range of information related to law enforcement, including RCMP investigation files, penitentiary records, parole board files, citizenship and immigration files, and tax audit files.

Generally, the interest that section 16 protects is the enforcement of laws. While it is of public importance that law enforcement authorities' work not be impeded by the disclosure of information, there is also an important public interest in the ability to scrutinize the activities of law enforcement bodies.

Section 16 contains two **discretionary, class-based** exemptions for:

- Information of listed investigative bodies that pertains to the detection, suppression or prevention of crime, the enforcement of a law, or threats to the security of Canada, if the record is less than 20 years old (Section 16(1)(a));
- Information relating to investigative techniques or plans for specific lawful investigations (Section 16(1)(b)).

Section 16 contains two **discretionary, injury-based** exemptions for:

- Information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law, or the conduct of lawful investigations (Section 16(1)(c));
- Information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions (Section 16(1)(d));
- Information that could reasonably be expected to facilitate the commission of an offence (Section 16(2)).

Further, section 16(3) provides a mandatory exemption prohibiting the disclosure of information that was obtained or prepared by the RCMP while performing policing services for a province or municipality, if the Government of Canada has agreed not to release this information.

Section 16 was invoked 7,758 times in 2013–2014.

36 Once such a certificate has been issued and proceedings are terminated, the Commissioner is required to take all necessary precautions to ensure the information at issue is not disclosed and must return the information to the institution within 10 days of the publication of the certificate.
37 SC 2001, c 41.
38 The problems with section 69.1 were first articulated by Commissioner Reid during his parliamentary appearances on Bill C-36. See his appearance before the Standing Committee on Justice and Human Rights on Bill C-36 on October 23, 2001 (Parliament. House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 1st Sess, 37th Parl) and his appearance before the Special Senate Committee on the Subject Matter of Bill C-36, also on October 23, 2001 (Parliament. Senate, Special Committee on the Subject Matter of Bill C-36, *Minutes of Proceedings and Evidence*, 1st Sess, 37th Parl). See also Commissioner Reid's subsequent appearance before the Senate Special Committee on Anti-Terrorism (Review of the Anti-Terrorism Act) on May 30, 2005 (Parliament. Senate, Special Committee on Anti-Terrorism, *Minutes of Proceedings and Evidence*, 1st Sess, 38th Parl).
39 See Forcese, Craig. "Clouding Accountability: Canada's Government Secrecy and National Security Law 'Complex.'" *Ottawa Law Review* 36 (2005) at p. 79 for a complete discussion of the ambiguities in section 38.13 of the CEA.

A discretionary exemption that requires evidence of a reasonable expectation of injury strikes the appropriate balance between these interests.

The scope of this exemption must be narrowed so that it protects only what is legitimately necessary. After 30 years of experience, it is clear that section 16(1)(c), which protects information which if disclosed could reasonably be expected to be injurious to the enforcement of any law, or the conduct of lawful investigations, sufficiently covers and adequately protects the law enforcement interest.

Sections 16(1)(a), 16(1)(b), and 16(3) are unnecessary and should therefore be repealed. This simpler structure would also streamline the application of this exemption by institutions and reduce the concurrent application of multiple exemptions.

The two other interests protected in this section, namely the security of penal institutions and the avoidance of illegal activity, are appropriately circumscribed by the protections in sections 16(1)(d) and 16(2) and do not require amendment.

Recommendation 4.11

The Information Commissioner recommends repealing the exemptions for information obtained or prepared for specified investigative bodies (section 16(1)(a)), information relating to various components of investigations, investigative techniques or plans for specific lawful investigations (section 16(1)(b)) and confidentiality agreements applicable to the RCMP while performing policing services for a province or municipality (section 16(3)).

Personal information (section 19)

The Government of Canada holds a significant amount of personal information. This information can be transmitted to the government voluntarily, as when a person submits comments regarding a local development project, or it can be required to be submitted, as is tax information. This information could be very sensitive, such as medical information, or fairly innocuous, such as the business contact information normally found on a business card or email signature.

The interest that requires protection here is personal privacy, which, in turn, connotes "concepts of intimacy, identity, dignity and integrity of the individual."[40] This information belongs to identifiable individuals, and the risks of inappropriate disclosure may be quite serious to the individual. Therefore, protection of personal privacy warrants a mandatory prohibition on disclosure.

Section 19 is a **mandatory**, **class-based** exemption prohibiting the disclosure of "personal information," subject to certain exceptions.

The term "personal information" is defined by reference to the *Privacy Act* as, "information about an identifiable individual that is recorded in any form." The definition also provides examples of what is and is not included within the meaning of personal information.

Institutions may disclose any record that contains personal information if:

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

Section 19 was invoked 20,701 times in 2013–2014.

40 *Canada (Information Commissioner) v Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157.

Not all disclosures of personal information result in an unjustified invasion of a person's personal privacy. A balancing test that considers all of the relevant circumstances is needed in order to ensure that only information that merits protection is withheld.

Under the Act, personal information may only be disclosed where there is consent from the individual, the information is publicly available, or the disclosure is in accordance with section 8 of the *Privacy Act*, which sets out a list of circumstances in which a government institution may disclose personal information.[41] There is one circumstance that provides for an injury-based assessment. This is where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any resulting invasion of privacy. However, this rarely-used provision requires a public interest to be identified and weighed to justify disclosure, regardless of the kind or sensitivity of the personal information at issue.[42]

Almost all provincial and territorial access laws contain an exception to the personal information exemption where the disclosure would not constitute an "unjustified invasion of privacy."[43] The decision-maker must consider all relevant circumstances. These include, but are not limited to, criteria listed in the statute. Examples include whether the disclosure is desirable for the purpose of subjecting the activities of government to public scrutiny; whether the information is highly sensitive; and whether disclosure may unfairly damage the reputation of any person referred to in the record.

In addition, most statutes list circumstances in which disclosure of personal information is presumed to be an unjustified invasion of personal privacy. This includes, for example, personal information relating to medical history. Most statutes also list circumstances in which disclosure is presumed not to be an unjustified invasion of personal privacy. This includes, for example, personal information that discloses financial or other details of a contract for personal services between the individual and an institution.

An injury-based approach to the disclosure of personal information strikes the appropriate balance between access and privacy.[44] It creates a spectrum of protection, using presumptions of injury or non-injury depending on the kind of information at issue, while also allowing for these presumptions to be rebutted, based on the particular circumstances and context of the information. This spectrum ensures the protection of sensitive personal information, and maximum disclosure of non-sensitive personal information.[45]

41 RSC, 1985, c P-21.
42 *Privacy Act*, section 8(2)(m). It is to be noted that notification to the Privacy Commissioner is required before disclosing information under this section. Further, the Treasury Board Manual cautions that this section does not imply a right of access, but rather only permits disclosure at the discretion of the head of the institution, and should be used "with a great deal of restraint."
43 Except for the laws of Saskatchewan and Quebec.
44 An "invasion of privacy" test can be found in Canadian jurisdictions with a "dual mandate," where access to information and protection of privacy can be found in the same statute and are overseen by one oversight body.
45 In her submission to the Commissioner's Fall 2012 consultations with the public on the modernization of the Act, former Privacy Commissioner Jennifer Stoddart stated that she could "not agree with the idea of narrowing the definition of 'personal information' or submitting it to an invasion of privacy test, which might result in a subjective application of the law." Office of the Information Commissioner of Canada. "Submission of the Privacy Commissioner of Canada." *Modernization of the ATIA*. January 11, 2013 at p. 1. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=be9c1298-43aa-4ba8-9869-a67fb3fc1e77&section=596721a2-8a78-4147-af09-4144e4556163&file=OD_DO_Privacy_Commissioner_of_Canada_Jan_11_2013s.pdf>.

Recommendation 4.12

The Information Commissioner recommends amending the exemption for personal information to allow disclosure of personal information in circumstances in which there would be no unjustified invasion of privacy.

In addition, the Commissioner's investigations have revealed two specific instances in which the section 19 exemption for personal information requires modification: business contact information and compassionate disclosure.

Some laws that protect personal privacy specifically exclude from the definition of personal information business contact information. For example, the *Personal Information and Protection of Electronic Documents Act*, which establishes the rules to govern the collection, use and disclosure of personal information by the private sector, excludes from its definition of "personal information" the names, titles, business addresses and telephone numbers of an employee of an organization.[46] The access and privacy laws of Alberta, Ontario, and New Brunswick also exclude business contact information from the definition of personal information. This information should similarly be excluded from the definition of "personal information."

At issue in *Information Commissioner v Minister of Natural Resources Canada*, 2014 FC 917, was whether basic professional information, consisting of the names, titles and workplace contact information of private sector employees appearing in records responsive to a request under the Act is "personal information" warranting exemption under section 19(1).

The Commissioner argued that the meaning and scope of "personal information" should be informed by individuals' rights of privacy (which, in turn, connote "concepts of intimacy, identity, dignity and integrity of the individual") and that, as a result, information that would generally appear on an individual's business card cannot be considered "personal information."

The Federal Court rejected this argument, concluding instead that all information "about" an identifiable individual is "personal information" unless it falls within one of the exceptions to the definition of "personal information" set out in section 3 of the *Privacy Act*.

Recommendation 4.13

The Information Commissioner recommends that the definition of personal information should exclude workplace contact information of non-government employees.

In addition, many of the provincial access laws allow disclosure to the spouse or close relatives of a deceased person, as long as it would not result in an unreasonable invasion of the deceased's privacy.[47] The Commissioner has encountered investigations where this information is not disclosed because a "public interest" could not be identified. It is the Commissioner's view that the Act should explicitly allow for compassionate disclosure, as long as the disclosure is not an unreasonable invasion of the deceased's privacy.

Recommendation 4.14

The Information Commissioner recommends including a provision in the Act that allows institutions to disclose personal information to the spouses or relatives of deceased individuals on compassionate grounds as long as the disclosure is not an unreasonable invasion of the deceased's privacy.

Finally, the Act currently provides that in circumstances in which consent to disclose is given, institutions *may* disclose the information. This is problematic in two respects. First, the Act is silent as to when an institution should seek the consent of an individual. Second, this provision has, in some instances, been interpreted to refuse disclosure even in circumstances in which the individual has consented. To ensure that the interest protected is the personal privacy of the individual, institutions should be explicitly required to seek consent whenever it is reasonable to do so. Further,

46 SC 2000, c 5 at section 2.
47 Provisions that allow disclosure of personal information to the spouse or close relatives of a deceased individual can be found in the access laws of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, P.E.I., and Newfoundland and Labrador.

institutions should be obligated to disclose personal information where the individual to whom the information relates has consented to its disclosure.

Recommendation 4.15

The Information Commissioner recommends requiring institutions to seek the consent of the individual to whom the personal information relates, wherever it is reasonable to do so.

Recommendation 4.16

The Information Commissioner recommends requiring institutions to disclose personal information where the individual to whom the information relates has consented to its disclosure.

Third party information (section 20)

The Government of Canada collects a wide range of information from third parties,[48] including trade secrets and other confidential commercial information, market research, business plans and strategies, and internal inspection and testing results. This information may be submitted voluntarily, such as in a bid for a government contract, or submitted as required by law, for example as proof of regulatory compliance.

There is a compelling need to protect information that is provided to the government by third parties. According to the Supreme Court of Canada, "such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation."[49]

Given the public interest in encouraging business development and innovation, the potentially serious economic consequences of disclosure, and the fact that third party information is not owned by the government, this is an instance in which a mandatory exemption is justified.

Section 20 contains three **mandatory**, **class-based** exemptions for:

- a third party's trade secrets (section 20(1)(a));
- 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 (section 20(1)(b));
- information supplied in confidence by a third party when it relates to preparation, maintenance, testing or implementation by a government institution of emergency management plans that concern the vulnerability of the third party's buildings or other structures, its networks or systems or the methods used to protect any of those buildings, structures, networks or systems (section 20(1)(b.1)).

It also contains two **mandatory**, **injury-based** exemptions for:

- information which, if disclosed, could reasonably be expected to result in financial loss or gain to a third party or could reasonably be expected to cause prejudice to a third party's competitive position (section 20(1)(c));
- information whose disclosure could reasonably be expected to interfere with a third party's contractual or other negotiations (section 20(1)(d)).

Institutions may disclose information with a third party's consent. Further, institutions have the discretion to disclose third party information (with the exception of a third party's trade secrets) when such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment, and provided the public interest in disclosure clearly outweighs any loss or gain to the third party.

This section was invoked 5,255 times in 2013–2014.

48 Section 3 of the Act defines "third party" as any person, group of persons or organizations other than the government institution or the person making the access request. The term includes, but is not limited to, corporations and other business entities.
49 As per *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para. 2.

However, the protection offered in section 20 must also be balanced against the need for transparency regarding public-private partnerships and the need for accountability in both government contracting practices and awards. It must also take into account the government's regulatory function of the private sector.

Therefore, the mandatory exemption should be limited by an injury test. It should only apply to specific types of third party information where disclosure could reasonably be expected to cause significant harm to a third party's competitive or financial position, or where disclosure could result in similar information no longer being supplied voluntarily to the institution.

The Commissioner therefore recommends a mandatory exemption for trade secrets or scientific, technical, commercial or financial information, supplied in confidence, when the disclosure could reasonably be expected to:

- significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- result in similar information no longer being supplied voluntarily to the institution when it is in the public interest that this kind of information continue to be supplied;
- result in undue loss or gain to any person, group, committee or financial institution or agency.

In 2008, Canada Post Corporation (CPC) received a request for "contracts given to Wallding International" dating from 1997 to 2000. In response, CPC withheld details about a contract that awarded a monthly $15,000 retainer to Wallding for general advice on broadly worded subject areas. In part, the justification for non-disclosure was based on some of the exemptions found in section 20.

The Commissioner was not convinced that CPC had properly applied the exemptions found in section 20.

As required by the Act, the Commissioner sought representations from the former president of Wallding. She was not persuaded by his representations, which focused entirely on the potential damage to him in his personal capacity. The Commissioner therefore recommended that the information be disclosed.

In the end, CPC disclosed all the details of the contract.

Such an amendment, when paired with the Commissioner's recommendation that all exemptions be subject to a general public interest override, would:

- focus the exemption so that it protects certain third party information when disclosure could reasonably be expected to cause significant harm;
- streamline this exemption, thus reducing the concurrent application of multiple overlapping exemptions;
- make the protections for third party information consistent with provincial laws;[50] and
- in conjunction with the Commissioner's recommendation in Chapter 3 that a third party is deemed to consent to disclosing its information when it fails to respond to a consultation request within appropriate timelines, give an incentive to third parties to provide adequate representations to institutions to establish proof that harm would result if the information were to be disclosed.

50 The laws of B.C., Alberta, Ontario and P.E.I., as well as the Organization of American States model law, follow such an approach.

Recommendation 4.17

The Information Commissioner recommends a mandatory exemption to protect third-party trade secrets or scientific, technical, commercial or financial information, supplied in confidence, when the disclosure could reasonably be expected to:

- **significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;**
- **result in similar information no longer being supplied voluntarily to the institution when it is in the public interest that this type of information continue to be supplied; or**
- **result in undue loss or gain to any person, group, committee or financial institution or agency.**

The Act provides that in circumstances where consent to disclose is given by a third party, institutions *may* disclose the information. This exception should be directive rather than discretionary: An institution *shall not* refuse to disclose information on the basis of section 20 when the third party has consented to disclosure.

Recommendation 4.18

The Information Commissioner recommends requiring institutions to disclose information when the third party consents to disclosure.

The application of section 20 is narrowed when such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment, and provided the public interest in disclosure clearly outweighs any loss or gain to the third party. In these instances, institutions have the discretion to disclose a third party's information.

Given the Commissioner's recommendation that all exemptions be subject to a general public interest override, this limited public interest override can be repealed.

Recommendation 4.19

The Information Commissioner recommends that the limited public interest override in the third party exemption be repealed in light of the general public interest override recommended at Recommendation 4.1.

The application of the exemption for third parties should be limited in one other instance. Under the Act, institutions can apply third party exemptions to protect information about grants, loans or contributions that have been given to a third party by the government (as long as the information meets the criteria of the exemption as currently constructed).

Given that grants, loans and contributions are publicly funded, the public has an interest in knowing how this money is spent. The Commissioner therefore recommends increasing the level of transparency surrounding grants, loans and contributions by providing that section 20 cannot be applied to information about them, including information related to the status of repayment and compliance with the terms (See Chapter 7 for a broader discussion on proactive disclosure related to grants, loans and contributions).

This will aid the public in tracking the types, amounts, recipients and repayment of grants, loans and contributions, and keep institutions accountable for their decisions surrounding these types of financial support.

Recommendation 4.20

The Information Commissioner recommends that the third party exemptions may not be applied to information about grants, loans and contributions given by government institutions to third parties.

Advice and recommendations (section 21)

Policy- and decision-making is at the heart of government. As this encompasses much of the daily business of government, institutions hold a vast amount of information related to policy- and decision-making.

There is a public interest in protecting the policy- and decision-making processes of government. If all policy- and decision-making information were disclosed, there is a risk that public officials may not provide full, free and frank advice. This, in turn, could impair the effective development of policies, priorities and decisions.

There is an equally important public interest in providing citizens with the information needed to be engaged in public policy and decision-making processes, to have a meaningful dialogue with government, and to hold government accountable for its decisions.

Section 21 is a class-based, discretionary exemption that protects a wide range of information relating to policy- and decision-making. However, the exemption in its current form extends far beyond what must be withheld to protect the provision of free and open advice. The breadth of this exemption must be narrowed to strike the right balance between the protection of the effective development of policies, priorities and decisions on the one hand, and transparency in decision-making on the other.

First, the section should only protect information which, if disclosed, could reasonably be expected to be injurious to the provision of free and open advice and recommendations.[51]

Section 21 is a **discretionary**, **class-based**, **time-limited** exemption for advice or recommendations developed by or for an institution or a minister of the Crown.

This exemption also applies to accounts of consultations or deliberations, positions or plans for negotiations carried on or to be carried on by or on behalf of the government or plans relating to managing personnel or the administration of institutions that have not been implemented.

The exemption applies to records that came into existence fewer than 20 years prior to the request.

Section 21 does not apply to:

- accounts or statements 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; and
- a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

Section 21 was invoked 6,517 times in 2013–2014.

Recommendation 4.21

The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations.

51 Adding an injury test to section 21 was recommended in *Main Brief 1986*, the Commissioner's 1993–1994 annual report, the *Open Government Act* and *Open and Shut*. See Office of the Information Commissioner, *Main Brief to House of Commons Standing Committee on Justice and Legal Affairs from the Office of the Information Commissioner* (Ottawa: Government of Canada, May 7, 1986); Office of the Information Commissioner. *Open Government Act*. October 25, 2005. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf>; and Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2nd Sess, 33rd Parl, No 9 (March 1987) (Chair: Blaine A. Thacker).

Second, the Act should extend the list of explicit examples of information that will not fall within the scope of the exemption.[52]

At present the list is limited to:

- an account 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; and
- a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.[53]

The list should also include factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts and instructions or guidelines for employees of a public institution.[54]

Successive information commissioners have indicated that the exemption for advice and recommendations is problematic.

Inger Hansen (1983–1990)

Section 21, permitting the exemption of advice and accounts of consultations and deliberations, is probably the Act's most easily abused provision.
Annual Report 1987–1988

John Grace (1990–1998)

The advice and recommendations exemption, together with the exclusion of Cabinet confidences, ranks as the most controversial clause in the Access to Information Act.
Annual Report 1992–1993

John Reid (1998–2006)

The exemption for advice and recommendations is one of the most controversial provisions of the Act as its broad language can be made to cover—and remove from access—wide swaths of government information.
Open Government Act: Notes

Recommendation 4.22

The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

Third, in light of the public interest in citizen engagement and the government's Open Government commitments, the 20-year time frame included in section 21 is unnecessarily long.[55] This time limit should be reduced to provide certainty as to when the exemption can no longer be applied.

Recommendation 4.23

The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

52 See *Making it Work for Canadians*, the Commissioner's 2000–2001 Annual Report and the *Open Government Act*. Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services Canada, 2002).
53 At section 21(2).
54 The laws of B.C., Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, P.E.I., and Newfoundland and Labrador include such a list.
55 *Making it Work for Canadians*, p. 49. This report, *Open and Shut* and Commissioner Grace's 1993–1994 Annual Report recommended reducing this time limit to 10 years. The *Open Government Act* reduced it to five.

Solicitor-client privilege (section 23)

Institutions frequently engage the services of legal professionals. As a result, institutions hold information that stems from these relationships, such as legal opinions, factums of law, routine communications and fee invoices.

The Act contains an exemption to protect information that is subject to solicitor-client privilege. Solicitor-client privilege is not defined in the Act; however, the courts have clarified that the exemption covers both legal advice privilege and litigation privilege.[56]

Section 23 is a **discretionary**, **class-based** exemption for information subject to solicitor-client privilege.

Section 23 was invoked 2,132 times in 2013–2014.

Legal advice privilege recognizes that the justice system depends on the vitality of full, free and frank communication between those who need legal advice and those who are best able to provide it. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice and the public's confidence in the legal system.[57] Legal advice privilege is of unlimited duration.

Litigation privilege, in contrast, is aimed at ensuring the efficacy of the adversarial process by creating a zone of privacy that allows litigants to "prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."[58] It applies to documents that were created for the dominant purpose of existing, contemplated, or anticipated litigation. Litigation privilege is of temporary duration, automatically coming to an end upon the termination of the litigation that gave rise to its existence.

Given the importance of the protection of solicitor-client privilege to the proper functioning of the legal system, a class-based, discretionary exemption for solicitor-client privilege should be maintained.

Unlike litigation privilege, the indefinite application of section 23 as it relates to legal advice privilege in the public sector is problematic.

Contrary to organizations in pursuit of private goals, the government's mandate is to pursue the public interest. This public interest aspect of government administration justifies differences in the operation of solicitor-client privilege. The government's public interest mandate provides heightened incentive to waive privilege to ensure greater transparency and accountability.[59] Therefore, factors such as whether the protection is still relevant, whether the advice is old and outdated, or the historical value of the advice carry more weight in favour of disclosure.

Section 23 was recently considered in *Canada (Information Commissioner of Canada) v Canada (Minister of Public Safety and Emergency Preparedness) et al.*, 2012 FC 877.

A requester sought access to a copy of a protocol between the Royal Canadian Mounted Police (RCMP) and the Department of Justice regarding the principles governing the listing and inspection of RCMP documents within the context of civil litigation.

Requests for this protocol were sent to both the RCMP and the Department of Justice. In response, both institutions refused to disclose the protocol based on section 23, as well as another exemption.

The Court was asked to determine whether the protocol contained information subject to solicitor-client privilege and, if so, whether discretion to refuse access was reasonably exercised.

The Court held that most of the protocol was not protected by solicitor-client privilege, because it was "a negotiated and agreed-upon operational policy formulated after any legal advice has been given and after any continuum that is necessary to be protected in light of the purposes behind the privilege." It was impossible to tell whether the protocol was based on earlier legal advice. Thus, disclosing the document does not disclose the content of any earlier legal advice.

56 *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para. 4.
57 *Blank* at paras. 26–27.
58 *Blank* at para. 27.
59 As per *Stevens v Canada (Prime Minister)*, [1998] 4 FC 89 at para. 52 (FCA).

The Commissioner therefore recommends that this exemption, as it applies to the legal advice privilege, be subject to a time limit of 12 years after the last administrative action on the file.[60] This is consistent with the practice at the Department of Justice to transfer to LAC legal opinions 12 years after the last administration action on the file because the information no longer has any business value.[61]

Recommendation 4.24

The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege.

The Commissioner has observed that section 23 is frequently applied to withhold legal counsel's billing information.

In common law, this information is presumed privileged. However, in the case of aggregate total amounts billed, this presumption of privilege can frequently be rebutted on the grounds that the information is neutral and, as such, the disclosure of total billing amounts would not prejudice the interest that solicitor-client privilege is intended to protect.[62]

Given that legal fees associated with the work done by counsel retained by institutions are funded by taxpayers, the Commissioner recommends that section 23 cannot be applied to aggregate total amounts of fees paid. This will help the public track how much money institutions spend on legal issues and keep institutions accountable for their decisions to engage legal services.

Library and Archives Canada (LAC) received a request for all records in a file concerning an individual involved in the Halifax Explosion disaster of 1917. LAC refused to disclose certain information in this file, stating it was still subject to solicitor-client privilege, as per section 23 of the Act.

The requester, who is a professional historian and author who needed the requested information for an upcoming publication, complained to the Commissioner about the denial of access.

The Commissioner asked LAC if it would exercise its prerogative as client to waive solicitor-client privilege and release the information to the requester, as it would be in the public interest.

During the investigation it was revealed that LAC consulted with the Department of Justice, who confirmed that the requested information was still covered by solicitor-client privilege and recommended that it be withheld.

Based on that recommendation, LAC withheld the records. However, it did not consider disclosing the information in the public interest, as the Commissioner had requested. The Commissioner asked LAC again to carry out this assessment.

During a second consultation with the Department of Justice, LAC was advised that the documents in question were actually under the control of either Transport Canada or Fisheries and Oceans Canada, even years after the event to which they refer occurred. This effectively made one of these two institutions the actual "client" and, as such, responsible for exercising the required discretion.

Fisheries and Oceans Canada replied that the records were not under its control. Transport Canada reviewed the information and, after careful consideration, determined that it held no litigation value and waived the solicitor-client privilege. LAC subsequently released all records to the requester.

Recommendation 4.25

The Information Commissioner recommends that the solicitor-client exemption may not be applied to aggregate total amounts of legal fees.

60 A time limit is not needed for this exemption as it applies to litigation privilege, as litigation privilege comes to an end upon the termination of the litigation that gave rise to its existence.
61 Department of Justice. *Records Retention and Disposition Schedule*, June 20, 2012. Note that the retention period for files related to Aboriginal law are retained for 25 years.
62 *Maranda v Richer*, 2003 SCC 67.

Cabinet confidences (section 69)

Cabinet is responsible for setting the policies and priorities of the Government of Canada. In doing so, ministers must be able to discuss issues within Cabinet privately, so as to arrive at decisions that are supported by all ministers publicly, regardless of their personal views. The need to protect the Cabinet decision-making or the deliberative process is well established under the Westminster system of Parliament, and is known as Cabinet confidences. This need for protection has been recognized by the Supreme Court of Canada.[63]

At present, Cabinet confidences are excluded from the right of access under the Act, subject to certain limited exceptions. What is described as a Cabinet confidence in section 69(1) of the Act is overly broad and goes beyond what is necessary to protect the interest that the exclusion is intended to address – namely, Cabinet's deliberative process.

Section 69 **excludes** confidences of the Queen's Privy Council for Canada. This includes Cabinet confidences and confidences of the Privy Council and Cabinet committees, such as Treasury Board (hereinafter "Cabinet confidences").

The exclusion sets out a non-exhaustive list of types of records that constitute a Cabinet confidence, that includes:

- memoranda to cabinet (69(1)(a));
- discussion papers (69(1)(b));
- agenda of Cabinet or records recording deliberations or decisions of Cabinet (69(1)(c));
- records used for or reflecting certain communications or discussions between ministers (69(1)(d));
- records intended to brief Ministers in relation to matters (69(1)(e));
- draft legislation (69(1)(f));
- any record that contains information about the contents of any record referred to in sections 69(1)(a) to (f) (69(1)(g)).

The exclusion does not apply to:

- Cabinet confidences that are more than 20 years old; or
- discussion papers, when the decision to which the paper relates has been made public or four years have passed since the decision was made.

Section 69 was invoked 3,136 times in 2013–2014.[1]

1. Because Cabinet confidences are protected by an exclusion from the Act, requesters often specify, either in their initial request or at the prompting of the institution, that the institution should not include information that could be considered a Cabinet confidence in its response. In addition, sometimes requesters do not complain about the application of section 69 because of the Commissioner's inability to review the records at issue. Of those complaints the Commissioner has received and investigated on the application of section 69 from April 2009 to November 2014, the Commissioner has found on average that 14% are well founded.

63 In *Babcock v Canada (Attorney General)*, [2002] 3 SCR 3 at para. 18 the Supreme Court of Canada stated that there are two reasons to protect Cabinet confidences: First, it allows "those charged with the heavy responsibility of making government decisions [to be] free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny." Second, Cabinet confidentiality "avoids creating or fanning ill-informed or captious public or political criticism."

Successive information commissioners have indicated that the Act's exclusion for Cabinet confidences is problematic.

Inger Hansen (1983–1990)

[M]y concern was that the withholding of records under the exclusionary section should be minimal. [...] My personal opinion [...] was that a democracy would benefit by having access to that kind of material.
1989–1990 Annual Report

John Grace (1990–1998)

Perhaps no single provision brings the Access to Information Act *into greater disrepute than section 69 which excludes Confidences of the Queen's Privy Council for Canada from the legislation's reach.*
1993–1994 Annual Report

John Reid (1998–2006)

The last vestiges of unreviewable government secrecy – i.e. Cabinet confidences – should be brought within the coverage of the law and the review jurisdiction of the Commissioner. Cabinet confidentiality risks being broadly, and too self-servingly, applied by governments when it is free from independent oversight.
Remarks to the University of Alberta's 2006 Access and Privacy Conference

Robert Marleau (2007–2009)

The role of Cabinet in a Westminster system of Parliament and the need to protect the Cabinet decision-making process are well understood. However, experience in other provincial, territorial and international jurisdictions with Westminster-style governments has demonstrated that the deliberations and decisions of Cabinet can be properly protected without excluding them from the purview of the legislation.
Strengthening the *Access to Information Act* to Meet Today's Imperatives, presentation to the Standing Committee on Access to Information, Privacy and Ethics, March 2009

Suzanne Legault (2009-present)

As I stated publicly, it is my deep conviction that, under the Access to Information Act*, Cabinet confidences should be subject to an exemption, and not an exclusion [...] Similarly, the Office of the Commissioner should have the right to review them independently to determine whether they are in fact Cabinet confidences.*
Evidence given to the Standing Committee on Procedure and House Affairs, March 16, 2011

Section 69(1) of the Act sets out a non-exhaustive list of types of records that are to be considered Cabinet confidences. This list includes records not traditionally considered to be part of the Cabinet paper system. For instance, pursuant to section 69(1)(g) even records containing information about the content of any Cabinet record are to be excluded.

Section 69(3) sets out some exceptions to the Cabinet confidences exclusion. According to this provision, discussion papers are not excluded if the decision to which the discussion paper relates has been made public or, if the decision has not been made public, when four years have passed since the decision was made.[64] However, as a practical matter, these exceptions may be unlikely to result in the disclosure of additional information. This is because what was known as a discussion paper in 1983 no longer exists as a result of changes to the Cabinet paper system.[65]

Also problematic is the fact that Cabinet confidences are currently excluded from the Act, and not just exempted from the right of access. This is unlike the protection afforded to Cabinet confidences in all but one Canadian province, as well as in Australia, the U.K. and New Zealand.[66]

The fact that the Act excludes Cabinet confidences has significant repercussions on the Commissioner's ability to provide effective oversight when investigating a complaint that concerns a government institution's refusal to disclose records based on section 69(1). Based on current case law, the Commissioner cannot require that records claimed to be excluded under section 69(1) be provided to her office so that she can independently assess whether the records are in fact Cabinet confidences.[67] This means that the Commissioner cannot actually see or consider the substance of what is claimed to be excluded. Instead, the Commissioner must assess whether the exclusion applies based on tombstone descriptions of the records or circumstantial evidence concerning the record's content.

An exemption for Cabinet confidences has been recommended in the following government or parliamentary documents:

- The Green Paper that was a precursor to the *Access to Information Act*
- Bill C-43, which was the bill that introduced the Act
- *Open and Shut*
- *A Call for Openness,* the 2001 report of the ad hoc Parliamentary Committee on Access to Information
- *Making it Work for Canadians*
- Private members bills C-554 and C-556

The Commissioner recommends that Cabinet confidences be protected by a mandatory exemption when disclosure would reveal the substance of deliberations of Cabinet and, as is the case for all exemptions, that this exemption be subject to a general public interest override.[68] Such an exemption will sufficiently protect the interest that is intended to be protected, while ensuring that:

- claims of Cabinet confidences are subject to effective independent oversight;
- disclosure is based on the substance of the information at issue instead of the record's format or title;
- the protection afforded to Cabinet confidences is consistent with the majority of national and international access laws.

64 The exclusion for Cabinet confidences does not apply to records that are more than 20 years old.

65 In *Canada (Minister of Environment) v Canada (Information Commissioner)*, 2003 FCA 68, the Court noted that the type of discussion previously reflected in a separate document identified as a "discussion paper" had, since the Act's coming into force, been moved to the "analysis" section of the document referred to as a "memorandum to Cabinet" (or MC). The Federal Court of Appeal concluded that when a corpus of words, consisting of information that would have previously been found in a discussion paper, is within or appended to another document in the Cabinet Paper system (i.e. an MC), it must be severed and disclosed where conditions described in 69(3)(b) are met. Since this time the Cabinet Paper system has again been changed. According to new MC templates introduced in Fall 2012, MC are no longer to include a background / analysis section; meanwhile, the Privy Council Office's 2013 Drafter's Guide to Cabinet Documents does not refer to Discussion Papers as being part of the Cabinet Paper system. See Privy Council Office. *A Drafter's Guide to Cabinet Documents,* 2013. <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=mc/guide-eng.htm>.

66 The exemptions for Cabinet confidences in B.C., Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia and P.E.I. focus on the substance of deliberations and then list the type of information this would cover, such as advice, recommendations, policy considerations or draft legislation. Only Newfoundland and Labrador's access law contains an exclusion for ministerial briefing papers. Other Cabinet records in Newfoundland and Labrador are subject to an exemption; however, the Commissioner's oversight is limited when a record is certified as an "official Cabinet record." In the U.K., protections focus on whether disclosure would likely prejudice the maintenance of the convention of the collective responsibility of ministers of the Crown, or would likely inhibit the free and frank provision of advice, exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.

67 *Gogolek v Canada (Attorney General)*, [1996] FCJ No. 154, paras. 9 -14; *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2011 FCA 326 at para. 45.

68 A public interest override for Cabinet confidences is consistent with *Carey v Ontario*, [1986] 2 SCR 637 and *Babcock v Canada (Attorney General)*, which both provided that the government must weigh the need to protect confidentiality in Cabinet deliberations against the public interest in disclosure.

Recommendation 4.26

The Information Commissioner recommends a mandatory exemption for Cabinet confidences when disclosure would reveal the substance of deliberations of Cabinet.

Most of the provincial access laws list types of information that cannot be withheld as a Cabinet confidence. A parliamentary committee and the task force mandated with reviewing the Act in 2002 also recommended that the Act mirror this approach.[69] Examples of the types of information that cannot be withheld include:

- information, the purpose of which is to provide background explanations or analysis to Cabinet for its consideration in making a decision, if the decision has been made public, has been implemented or more than a certain amount of time has passed since the decision was made or considered;
- purely factual or statistical information provided to Cabinet;
- analyses of problems or policy options that do not contain subjective information; and
- information in a record of a decision made by Cabinet when acting in its capacity as an appeal body.[70]

Several jurisdictions in Canada that contain an exemption for Cabinet records provide that the exemption cannot be applied to records that are older than 15 years, rather than 20, as currently found in the Act.[71]

Finally, the access laws in Saskatchewan, Manitoba and Ontario provide that the exemption for Cabinet confidences cannot be applied when the Cabinet for which the record has been prepared consents to access being given.[72]

To facilitate citizens' participation in the government's decision-making process, the government needs to be more forthcoming with the information it relies upon to make decisions. The exemption for Cabinet confidences should allow for maximum disclosure. To accomplish this, the exemption should not apply to information other than what is necessary to protect Cabinet's deliberative process and should be of limited duration.[73]

Recommendation 4.27

The Information Commissioner recommends that the exemption for Cabinet confidences should not apply:

- **to purely factual or background information;**
- **to analyses of problems and policy options to Cabinet's consideration;**
- **to information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act;**
- **to information in a record that has been in existence for 15 or more years; and**
- **where consent is obtained to disclose the information.**

69 The exemptions for Cabinet confidences in the access laws of B.C., Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia and P.E.I. list records to which the exemption cannot apply. Open and Shut (at p. 31), Making it Work for Canadians (at p. 47) and *The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches* also recommended limiting the exemption for Cabinet confidences. Office of the Information Commissioner of Canada. *The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches*. Ottawa: Minister of Public Works and Government Services Canada, 1996.

70 At the federal level, the Cabinet functions as an appeal body with authority to vary or rescind decisions made by administrative tribunals for certain statutes related to economic regulation, such as the *Canada Transportation Act*, SC 1996, c 10.

71 The time limit in the laws of B.C., Alberta and New Brunswick is 15 years. Nova Scotia's is limited to 10 years.

72 In Ontario, two orders have been issued with respect to obtaining consent to disclose deliberations of the Executive Council. In Order 24 (Re Ministry of the Attorney General; October 21, 1988), it was held that there was no requirement on the head of an institution to seek consent of the Executive Council to disclose. Rather, the exemption provides discretion on the head to seek consent depending on the circumstances. In Order P-1390 (Re Ministry of Finance; May 8, 1997), it was determined that the head must reasonably exercise his or her discretion to seek consent, which is reviewable by the Ontario Information and Privacy Commissioner.

73 Any changes made to the Act with respect to Cabinet confidences would require similar amendments to the *Canada Evidence Act*.

Given the sensitivity attached to Cabinet confidences, the Commissioner recommends that investigations of refusals to disclose pursuant to this exemption be delegated to a limited number of designated officers or employees within her office. Such a requirement would be consistent with section 59(2) of the Act, which limits the number of officers or employees who may investigate complaints related to international affairs or defence.

Recommendation 4.28

The Information Commissioner recommends that investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within her office.

Creating a law of general application

Restrictions to the right of access found in other laws

Section 4 of the Act provides that, notwithstanding any other act of Parliament, every person has a right to access and shall, on request, be given access to any record under the control of an institution. This section gives the Act precedence over any other act of Parliament. However, section 24 requires government institutions to withhold information protected by a series of statutory provisions listed in Schedule II of the Act (for example, sections of the *Statistics Act* and *Criminal Code*).[74]

Section 24 is a **mandatory** exemption for any information the disclosure of which is restricted by a provision listed in Schedule II of the Act.

Section 24 was invoked 135 times in 2013–2014.

In addition, the precedence of the Act over any other act of Parliament may be impaired when recent legislation includes language intended to prevent disclosure of information, by using language such as "despite the *Access to Information Act*."[75]

Schedule II and the laws that contain language that is intended to supersede the Act affect the general right of access to government information. These provisions make it more difficult to understand what information can be obtained because determining whether or not the information falls within the mandatory exemption set out in section 24 frequently involves an analysis of complex provisions incorporated from other statutory regimes into the Act.

74 According to *Making it Work for Canadians* (at p. 64) the rationale for section 24 and Schedule II is to protect confidentiality regimes found in other laws, even though general exemptions may be available to protect the information. Listing the provision in Schedule II gives a very firm assurance that the specific information will not be disclosed.

75 For example, section 46 of the *Hazardous Materials Information Review Act*, RSC 1985, c 24 (3rd Supp), Part III claims to privilege information, and thus prevent disclosure, "despite the *Access to Information Act*."

Successive information commissioners have indicated that section 24 and Schedule II are problematic.

Inger Hansen (1983–1990)

In our view, section 24 and the Schedule II statutes are not necessary at all to the working of the Access to Information Act*, and in some instances give rise to unfairness and inconsistent treatment. We recommend their repeal.*

Main brief to House of Commons Standing Committee on Justice and Legal Affairs, May 7, 1986

John Grace (1990–1998)

These "by the back door" derogations from access rights are ... troubling to the Commissioner....The spirit and intent of the Access to Information Act *can be whittled away by oft-ignored consequential amendment provisions buried at the back of other laws. For that reason, too, Parliamentarians have reason for concern. When Parliament adopted the right of access to government records it included a very important phrase: "notwithstanding any other Act of Parliament" (section 4). The continuing growth of Schedule II now threatens to erase the vital constraint on creeping secrecy which those six words originally gave.*

Annual Report 1991–1992

The Commissioner [is] also concerned that the process used to effect these changes [are] not by direct amendments to the access Act. They [are] treated much like minor housekeeping amendments, tagged on to other bills. There [is] no debate; no discussion of the effects or the need for this type of an amendment. There [is] no consultation with the Commissioner's office.

Annual Report 1992–1993

John Reid (1998–2006)

The Access to Information Act *contains a sweeping, catch-all provision. Section 24 requires that secrecy be maintained with respect to information made secret by another statute, if that other stature is referenced in Schedule II of the* Access to Information Act.

Annual Report 1999–2000

Connected with this notion, that the coverage of the Act should be comprehensive, is the notion that the Act should be a complete code setting out the openness/secrecy balance. No longer should we permit secrecy provisions in other statutes to be mandatory, in perpetuity, without meeting any of the tests for secrecy in the Act's substantive exemptions. Section 24 of the Access to Information Act*, which sets out this open-ended, mandatory, class exemption, should be abolished.*

The Access Act – Moving Forward – A Commissioner's Perspective, September 8, 2005

Suzanne Legault (2009-present)

The inclusion of statutory provisions in Schedule II, and the resulting expansion of the mandatory class-based exemption found in section 24, has, in my opinion, resulted in the erosion of the right of access. It has done so by requiring government institutions to consider more than one statute in their decision-making process and making it more difficult for requesters to understand and exercise their access rights.

A letter from the Information Commissioner of Canada to the Chair of the Senate Committee on Legal and Constitutional Affairs concerning C-51, *An Act to amend the Witness Protection Program Act and another Act*, June 12 2013

Schedule II has not been comprehensively reviewed since the Act came into force. Moreover, the number of provisions listed in Schedule II is growing. There were 40 provisions in 33 statutes in 1983. This number has now doubled – as of 2015, Schedule II contains 81 provisions listed in 58 statutes.[76]

In addition, many of the provisions listed in Schedule II or found in other laws may not be necessary.[77] In many instances, general exemptions already available in the Act adequately protect the information at issue.[78]

It is also unclear to what extent the Commissioner can exercise her independent oversight over the application of the provisions listed in Schedule II. For example, when a provision from another Act listed in Schedule II also includes an alternative method for accessing information, case law suggests that a requester may need to pursue disclosure under that statute, rather than under the Act.[79]

The result of these issues is that the right of access is diluted by a regime that is complex and not comprehensive. For this reason, repealing section 24 and Schedule II has repeatedly been recommended by information commissioners and Parliamentarians.[80]

Top Aces Consulting Inc v Minister of National Defence, 2012 FCA 75 raises some question as to whether the Commissioner would have jurisdiction, in some instances, to consider whether disclosure is restricted by a statutory regime incorporated by reference into section 24.

At issue before the Court in this decision was:

- Whether a provision in the *Defence Production Act* (DPA), incorporated by reference into section 24, restricted access to certain information, thereby warranting exemption under that section; or
- Whether the information was not restricted under section 24 because an exception to the prohibition against disclosure set out in the DPA provision applied.

The Court ultimately concluded that the information was not restricted within the meaning of section 24, as an exception to the restriction set out in the DPA provision applied.

However, when doing so, the Court suggested that if a statute that contains a provision incorporated by reference into Schedule II provides an adequate mechanism by which an individual can seek disclosure, the individual seeking access cannot pursue that information's disclosure within the framework of the *Access to Information Act*.

In this instance, the DPA did not have an adequate mechanism for obtaining access. Therefore, disclosure was able to be considered under the Act.

76 The Commissioner recommends in Chapter 5 that the government be required to consult the Commissioner on all proposed legislation that potentially impacts access to information. In 2013, the Commissioner wrote to the Minister of Justice and Attorney General of Canada to request that she be consulted during the drafting phase of legislation that impacts access rights. In his response, the Minister stated that the current approach to collaboration with the Commissioner was sound and did not need to be modified. See Information Commissioner of Canada. Letter to Peter MacKay, Minister of Justice and Attorney General of Canada, December 23, 2013 and Minister of Justice and Attorney General of Canada. Letter to Suzanne Legault, Information Commissioner of Canada, February 24, 2014.

77 For example, Schedule II refers to section 14 of the *Anti-Inflation Act*, a law which had been repealed four years before the Act came into force.

78 The Commissioner made this point in a letter to the Senate Committee on Legal and Constitutional Affairs concerning Bill C-51, *An Act to amend the Witness Protection Program Act and another Act*. This bill added a new statute and provision to Schedule II. See Office of the Information Commissioner of Canada. "A letter from the Information Commissioner of Canada to the Chair of the Senate Committee on Legal and Constitutional Affairs concerning C-51, *An Act to amend the Witness Protection Program Act and another Act*," June 12, 2013. <http://www.oic-ci.gc.ca/eng/lettre-au-lcjc-projet-de-loi-c-51_bill-c-51-letter-to-lcjc.aspx>.

79 *Top Aces Consulting Inc v Minister of National Defence*, 2012 FCA 75.

80 Such a recommendation has been made by information commissioners in the 1986 *Main Brief*, the Commissioner's 1993–1994 and 2000–2001 annual reports, and 2002 special report, and the *Open Government Act*. Parliamentarians have recommended repealing section 24 and Schedule II in *Open and Shut*, Bill C-201 and Bill C-554. Office of the Information Commissioner of Canada. *Response to the Report of the Access to Information Review Task Force*. Ottawa: Minister of Public Works and Government Services Canada, 2002; Bill C-201, *Open Government Act*, 1st Sess, 38th Parl; and Bill C-554, An Act to amend the Access to Information Act (*Open Government Act*), 2nd Sess, 39th Parl.

To address these issues, a comprehensive review of all of the provisions listed in Schedule II or of provisions in other laws that limit the right of access must be undertaken. Any information that can be adequately protected by a general exemption that already exists in the Act should be repealed. For any information that would not be protected by a general exemption, a new exemption that is specific and limited should be added to the Act. These should be constructed in line with the considerations discussed at the beginning of this chapter.[81]

The Commissioner expects that the necessity for new exemptions will arise only in very limited circumstances. Any review and decision to add a new exemption should be made in consultation with the Commissioner in an advisory capacity (See her recommendation in Chapter 5).

Recommendation 4.29

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of all of the provisions listed in Schedule II and any legislation that otherwise limits the right of access. Any provision covered by the general exemptions in the Act should be repealed.

Recommendation 4.30

The Information Commissioner recommends that new exemptions be added to the Act, in consultation with the Information Commissioner, where the information would not be protected by a general exemption that already exists in the Act.

The complexity of incorporating by reference statutory regimes from other laws into the Act was illustrated in *Hibernia Management and Development Company Ltd. v Canada-Newfoundland and Labrador Offshore Petroleum Board and Information Commissioner of Canada*, 2012 FC 417.

In this decision, a third party challenged an institution's decision under the Act to disclose records relating to the institution's safety and environmental protection audits and inspections based, in part, on section 24. The relevant provision listed in Schedule II of the Act was section 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act* ("the Accord Act"). Section 119(2) sets out a privilege over certain information "provided" for the purposes of Parts II and III of the Accord Act, or regulations made under those Parts. However, Section 119(2) goes on to provide that the privilege is subject to a particular provision in the Accord Act (section 18) as well as a number of exceptions, such as:

- if there is written consent from the person who provided the information;
- if disclosure would be for the purposes of the administration or enforcement of entire Parts of the Accord Act; or
- if disclosure would be for the purposes of legal proceedings relating to the administration or enforcement of entire Parts of the Accord Act.

The Commissioner intervened in this case and had to hire an expert to understand the statutory regime in the Accord Act.

Ultimately, the Federal Court concluded that the information at issue was not privileged under section 119(2) of the Accord Act and therefore could not be exempted under section 24. The Court further concluded that section 20(1)(b) and section 19 were not applicable. Interestingly, a number of arguments made by the parties concerning the requirements of section 20(1)(b) duplicated those made concerning the application of section 119(2).

Recommendation 4.31

The Information Commissioner recommends that section 24 and Schedule II be repealed.

81 For example, new exemptions should only be mandatory and class-based if the information warrants such a high degree of protection. Otherwise, any new exemption must be limited and specific to protect only what merits protection and, to the greatest extent possible be discretionary and injury-based. Any new exemption should be subject to a public interest override and its application should be subject to independent oversight.

Exemptions and exclusions for institutions brought under the coverage of the Act as a result of the *Federal Accountability Act*

In 2006, the coverage of the Act was extended to a number of Crown corporations, agents of Parliament, foundations and a series of other organizations as a part of the *Federal Accountability Act* (FedAA).[82]

Crown corporations are corporations owned or controlled by the government. They may operate in a competitive market and benefit from direct or indirect public funding. Examples are the Canadian Broadcasting Corporation, Canada Post Corporation and VIA Rail.

Agents of Parliament carry out specific statutory mandates that require them to conduct investigations, audits and other compliance activities in relation to government institutions and individuals. Examples are the Information Commissioner, the Auditor General and the Privacy Commissioner.

The FedAA added a number of exemptions and exclusions to the Act. In most instances these new limitations protect information that may already fall within existing exemptions. These changes introduced a patchwork regime of protection to the Act.

The following table sets out the new exemptions: seven are mandatory exemptions without the need to demonstrate injury from disclosure, are not time limited and contain no public interest or consent overrides. Four exemptions are discretionary but contain no injury test and one protects records for 15 years. It also included two new institution-specific exclusions.

82 SC 2006, c 9.

New exemptions adopted under the FedAA		
Mandatory, class-based exemptions		
Section	**Exemption**	**Institutions**
s. 16.1	Records relating to investigations, examinations and audits	Auditor General Commissioner of Official Languages Information Commissioner Privacy Commissioner
s. 16.2	Records relating to investigations	Commissioner of Lobbying
s. 16.4	Records relating to investigations or conciliation	Public Sector Integrity Officer
s. 16.5	Records relating to the *Public Servant Disclosure Protection Act*	All government institutions
s. 20.1	Advice or information relating to investments	Public Sector Investment Board
s. 20.2	Advice or information relating to investments	Canada Pension Plan Investment Board
s. 20.4	Contracts for the service of performing artist or the identity of a donor	National Arts Centre Corporation
Discretionary, class-based exemptions		
s. 16.3	Investigations, examinations and reviews under the *Canada Elections Act*	Chief Electoral Officer
s. 16.31	Investigations, examinations or reviews in the performance of the functions of the Commissioner of Canada Elections under the *Canada Elections Act*[82]	Director of Public Prosecutions
s. 18.1	Economic interest of certain government institutions	Canada Post Corporation Export Development Canada Public Sector Pension Investment Board VIA Rail Canada
s. 22.1	Draft internal audits (less than 15 years)	All government institutions

New exclusions		
Section	**Exclusion**	**Institutions**
s. 68.1	Information that relates to journalistic, creative or programming activities, other than information that relates to its general administration	Canadian Broadcasting Corporation
s. 68.2	Information that is under the control of the institution, other than information that relates to its general administration or operation of any nuclear facility	Atomic Energy of Canada

83 Added in 2014 by the *Fair Elections Act*, SC 2014, c 12.

Most of the information that falls within these new limitations would be subject to exemptions in the Act that apply to all government institutions. These additions have introduced an increased level of complexity to the Act and led to institutions concurrently applying multiple and overlapping exemptions for the same information.

When the *Federal Accountability Act* was introduced, the Commissioner at that time argued that most of the new limitations were not necessary and should be repealed.[84]

These institution-specific exemptions and exclusions should be reviewed to determine whether they are necessary to protect the interests in question.

Recommendation 4.32

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of the exemptions and exclusions for institutions brought under the coverage of the Act as a result of the *Federal Accountability Act*.

84 See Commissioner Reid's appearances before the Legislative Committee on Bill C-2, May 18, 2006 (Parliament, House of Commons, Legislative Committee on Bill C-2, *Minutes of Proceedings and Evidence*, 1st Sess, 39th Parl), the Standing Committee on Access to Information, Privacy and Ethics, June 19, 2006 (Parliament, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Minutes of Proceedings and Evidence*, 1st Sess, 39th Parl), and the Senate Standing Committee on Legal and Constitutional Affairs, September 20, 2006 (Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Minutes of Proceedings and Evidence*, 1st Sess, 39th Parl), as well as Deputy Commissioner Leadbeater's appearance before the Standing Committee on Access to Information, Privacy and Ethics on November 6, 2006 (Parliament, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Minutes of Proceedings and Evidence*, 1st Sess, 39th Parl). Added in 2014 by the *Fair Elections Act*, SC 2014, c12.

Chapter 5

Strengthening oversight

A key element of an access to information regime is independent and effective oversight of government decisions. An effective oversight model assists requesters in obtaining the information to which they are entitled in a timely manner.

The two main oversight models featured in Canada are the ombudsperson model and the order-making model.[1]

Oversight models

Ombudsperson model

The Act follows an ombudsperson model, with strong investigative powers provided to the Commissioner. Under section 36 of the Act, the Commissioner's investigative powers include obtaining and reviewing all records required for an investigation (with some exceptions), issuing subpoenas, administering oaths, and entering the premises of any government institution.

Under this model, the Commissioner may also investigate a broad range of issues.[2]

After concluding an investigation, the Commissioner may issue recommendations to institutions. These recommendations are not binding. When an institution does not follow her recommendations, the Commissioner's (and the complainant's) recourse is limited.

Under section 42 of the Act, the Commissioner may, with the complaint's consent, apply to the Federal Court for a review of the institution's decision to refuse disclosure. The hearing before the Federal Court is *de novo*, which means the review of the application of exemptions begins anew, with evidence being introduced afresh before the Court.

There are significant drawbacks to this model:

- The Act provides that the Federal Court may only review an institution's refusal to disclose information.[3] There are situations that are not subject to judicial review, despite the fact that the Commissioner has the authority to investigate and make recommendations on a broad range of issues.[4] Without an ability to have the Court review these recommendations, requesters have no avenue to enforce their rights when an institution does not follow the Commissioner's recommendations.[5]

1 A third oversight model, which allows for appeals directly to the court, can also be found internationally.
2 Section 30(1)(f) provides that the Commissioner may investigate any matter relating to requesting or obtaining access to government-held records. In addition, sections 30(1)(a)-(e) provide that she may receive and investigate complaints from (a) 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 a fee 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 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 or have not been given such access within a period of time that they consider appropriate; (e) and in respect of any publication or bulletin institutions are required to publish as per section 5.
3 As per section 41.
4 See n. 2 for a list of the issues the Commissioner may investigate in addition to an institution's refusal to disclose information.
5 Where an institution does not wish to follow the Commissioner's recommendation with respect to issues that are not reviewable by the Court, the Commissioner's ability to assist the requester is limited to negotiating with the institution the most suitable outcome possible.

- Strict confidentiality requirements imposed on the Commissioner prevent her from routinely publishing her findings and recommendations.[6] Consequently, there is not a wide body of precedents guiding institutions and requesters. This often results in the same issues being investigated needlessly.
- Different interpretations of the Act between the Treasury Board of Canada Secretariat and the Commissioner result in conflicting guidance to institutions. This leads to unnecessary complaints, as well as litigation.[7]
- The *de novo* hearing before the Federal Court allows institutions to present new or fulsome representations to the Court and has, at times, resulted in the application of new exemptions.

As a whole, the ombudsperson model provides no incentive on institutions to maximize disclosure in a timely manner, particularly in instances where the institution may wish to delay disclosure.

Order-making model

Under an order-making model, the Commissioner is an adjudicator. The adjudicator receives appeals from requesters regarding an institution's treatment of their access request, including the institution's decision on disclosure.[8] The Commissioner may mediate the appeal and, if necessary, adjudicate the appeal based on the representations that have been provided. At the conclusion of the adjudication, an order disposing of the issues raised in the appeal must be rendered. This order is binding.

This model features a number of benefits:

- It gives a clear incentive to institutions to apply exemptions only where there is sufficient evidence to support non-disclosure and then put this evidence before the adjudicator, as judicial review before the Court is based on the record that was before the adjudicator.
- The grounds on which the order can be set aside are limited and the institution cannot introduce new evidence or rely on new exemptions, as it is the adjudicator's, and not the institution's, decision that is under review before the Court.
- It avoids the redundancy of having two levels of review of the same decision, which can result in more timely access to information.
- The burden to seek a judicial review before the Court is on institutions, and not requesters, if the institution wishes to oppose the disclosure ordered by an adjudicator.
- It provides finality for requesters because orders of the adjudicator are binding unless reviewed by the Court.

6 During an investigation, the Commissioner may only disclose information when it is necessary to carry out an investigation or establish the grounds for her findings and recommendations (section 63(1)(a)(i) and (ii)); in the course of a prosecution for an offence under the Act, a prosecution for an offence under section 131 of the *Criminal Code*, RSC, 1985, c C-46 (perjury) in respect of a statement made under the Act, a review before the Federal Court under the Act or an appeal (section 63(1)(b)); or to the Attorney General of Canada when, in the Commissioner's opinion, she has evidence relating to the commission of an offence against a law of Canada or a province by a director, officer or employee of a government institution (section 63(2)). Once an investigation is complete, the Commissioner must report her findings to the complainant and any third parties entitled to make representations concerning the disclosure of the requested information. In addition, when a complaint is well founded, the Commissioner must, prior to reporting her findings to the complainant, provide the institution with her findings and any recommendations for resolving the complaint. The Commissioner may inform the public about her investigations through her annual report to Parliament. She may also issue special reports that can be tabled in Parliament at any time; however, they must be related to an important or urgent matter within the scope of the Commissioner's assigned powers, duties and functions.

7 For example, as a result of conflicting guidance, the Commissioner made a reference to the Federal Court in 2013 seeking a determination on whether institutions may charge search and preparation fees for electronic records when the Regulations under the Act specify that institutions are allowed to charge such fees when records are non-computerized. *Information Commissioner of Canada v Attorney General of Canada et al.* (T-367-13).

8 The following discussion in this chapter is based on an appeal of an institution's refusal to disclose information.

As a whole, the order-making model puts the incentive on institutions to maximize disclosure in a timely manner and reduces the burden on requesters.

Ombudsperson vs. Order-making model	
Requesters **complain** to the Commissioner about an institution's handling of a request.	Requesters **appeal** to the Commissioner about an institution's decision about a request.
The Commissioner mediates and **investigates** the complaint.	The Commissioner begins with mediation and, if mediation fails to resolve the entirety of the appeal, she **adjudicates**.
The Commissioner **recommends** a resolution to the complaint.	The Commissioner issues an **order** disposing of the issues raised in the appeal.
If there is no resolution, the Commissioner, with the complainant's consent, or the complainant, must seek a ***de novo* review** of the **institution's decision** to refuse disclosure.	If the institution continues to oppose disclosure, it must seek **judicial review** of the **Commissioner's order.** This review would be based on the record that was before the Commissioner.

Adopting a more effective model

An order-making model has become the progressive standard. Sixty-eight percent of all the countries that have implemented an access law in the past ten years feature an order-making model.[9] It can also be found in the access laws of B.C., Alberta, Ontario, Quebec, P.E.I., the U.K., India and Mexico. Model access laws and recent private members' bills also endorse this approach.[10]

Adopting an order-making model in the Act would provide the following benefits to requesters:

- The processing of requests would be more timely because institutions would be aware that the Commissioner could order that a request be processed by a certain time.
- The Commissioner's ability to issue binding orders would instill in the appeals process more discipline and more predictability. It would also provide an incentive for institutions to make comprehensive and complete representations to the Commissioner at the outset.
- Orders would create a body of precedents that increases over time. Requesters and institutions would then have clear direction as to the Commissioner's position on institutions' obligations under the Act. The body of precedents would also reduce the likelihood that the Commissioner would have to review issues that have already been adjudicated.
- The Commissioner's orders would provide finality to the requester (unless the decision of the Commissioner is judicially reviewed).

9 Where the access law established an independent oversight body dedicated to access to information. Some countries provide that complaints go directly to the court or to a human rights commissioner. The countries that adopted an order-making model for the independent body overseeing the right of access are Maldives, Ivory Coast, Sierra Leone, Guyana, Yemen, Malta, Hungary, El Salvador, Brazil, Liberia, Indonesia, Ethiopia, Chile, Bangladesh, Nepal, Macedonia, Honduras, India and Azerbaijan.

10 The Article 19 and Organization of American States model laws, and the *Open Government Guide* all include order-making powers for their respective oversight authorities. Bill C-567 at cl. 5 and Bill C-613 at cl. 8 both amended the Act to include an order-making model. Article 19. "A Model Freedom of Information Law." 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Organization of American States. "Model Inter-American Law on Access to Public Information and its Implementation Guidelines." 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>; Open Government Guide. "Welcome to the Open Gov Guide." 2013. <http://www.opengovguide.com>. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>; and Bill C-567, An Act to Amend the Access to Information Act (Transparency and Duty to Document), 2nd Sess, 41st Parl, 2014; Bill C-613, An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency), 2nd Sess, 41st Parl, 2014.

- The burden to seek judicial review of a decision of the Commissioner would be on the institution.
- Judicial reviews to the Federal Court would be more limited and would consist of a review of the Commissioner's adjudication, rather than being a *de novo* hearing.

After overseeing more than 10,000 investigations, the Commissioner is of the view that, of the two models, the order-making model best protects information rights under the Act.

Recommendation 5.1

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

Discretion to adjudicate

All of the jurisdictions that adopt an order-making model in Canada give their respective commissioners the discretion to adjudicate an appeal.[11] Such discretion can also be found in the access law of the U.K.[12]

Giving the Commissioner the discretion to adjudicate an appeal would ensure effective control of the adjudicative process. To protect appellants' right to an independent review of an institution's decision under the Act, any decision not to adjudicate an appeal should be subject to judicial review.

Recommendation 5.2

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

Mediation

Mediation provides a way to amicably resolve appeals or narrow issues for adjudication. Mediation can be a powerful tool for resolving appeals, especially when order-making is available to focus the negotiations and provide an incentive to resolve issues. Many laws that adopt an order-making model also allow for mediation of an appeal.[13]

Given the positive experience of other jurisdictions that have paired mediation with order-making powers, the Commissioner recommends that the Act should include the explicit authority to resolve complaints by mediation.

Recommendation 5.3

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

11 The laws of B.C., Alberta, Ontario, Quebec and P.E.I. all give the respective commissioners the discretion to refuse to adjudicate. In Alberta and P.E.I, this discretion is limited to where the subject-matter of the appeal has been dealt with in an order or investigation report of the Commissioner or the circumstances warrant refusal. In Ontario, in addition to having the discretion to adjudicate, the Commissioner may also immediately dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record to which the notice relates exists. In Quebec, the Commission d'accès à l'information may refuse or cease to examine a matter if it has reasonable cause to believe that the application is frivolous or made in bad faith or that its intervention would clearly serve no purpose.

12 The law in the U.K. provides that the Commissioner does not have to provide a decision where it appears that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice; there has been undue delay in making the application; the application is frivolous or vexatious; or the application has been withdrawn or abandoned.

13 The laws of B.C., Alberta, Ontario and P.E.I. all give their commissioners the authority to mediate disputes, as well as order-making power.

Enforcement of orders

The Act should provide a mechanism to certify the Commissioner's orders as orders of the Federal Court. This is important to ensure enforcement of her orders issued pursuant to her investigative powers under section 36 and under an order-making model.[14]

The *Canadian Human Rights Act* provides for the certification of orders made by the Canadian Human Rights Tribunal through the Federal Court.[15] Once this occurs, orders are deemed to be orders of the Federal Court for the purposes of enforcement. Any subsequent failures to observe the terms of a certified order would be subject to the contempt process of the Federal Court and dealt with accordingly.

Recommendation 5.4

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

Other powers

Since an order-making model is adjudicative, it is important to specify in the legislative regime the scope of powers, in addition to issuing orders, necessary to maximize the effectiveness of the oversight model and the access to information regime.

Commissioner-initiated investigations

The laws of B.C., Alberta, Québec and P.E.I., which have adopted an order-making model, all include the power to conduct investigations at the Commissioner's own initiative.

Under this model, the Commissioner would be able to investigate issues affecting information rights.

Issues that have been the focus of Commissioner-initiated investigations

- The use of instant messaging across government institutions
- The processing of requests in relation to timeliness at specific institutions

Recommendation 5.5

The Information Commissioner recommends that the Act maintain the existing power to initiate investigations related to information rights.

14 This issue was most recently addressed in *Rowat v Canada (Information Commissioner)* (2000), 193 FTR 1 (FCTD).
15 RSC, 1985, c H-6 at section 57.

Compliance audits

The ability to conduct audits into institutions' general compliance with the Act would enable the Commissioner to proactively identify issues that are developing and address them in a timely and comprehensive manner. The Commissioner could issue recommendations to improve information rights practices.

Many jurisdictions that feature an order-making model also provide their respective commissioners with the general power to audit institutions' compliance with the access law. Such a mandate has also been recommended in Canada previously.[16]

Recommendation 5.6

The Information Commissioner recommends that the Act provide for the power to audit institutions' compliance with the Act.

Investigative powers

To support her investigative function, the Commissioner should continue to have strong investigative powers. These powers facilitate the effectiveness of investigations and ensure the co-operation of institutions during investigations.

The access laws of B.C., Alberta and P.E.I. feature an order-making model and also provide their respective commissioners with investigative powers.

Recommendation 5.7

The Information Commissioner recommends that the Act maintain the existing investigative powers of the Information Commissioner.

Education

As part of *Canada's Action Plan on Open Government 2014–2016*, the government recognized that digital literacy skills are needed to take full advantage of the benefits of open data, information, and dialogue. The government therefore committed to develop tools, training resources, and other initiatives to help Canadians acquire the essential skills needed to access, understand, and use digital information and new technologies. The same level of commitment and effort needs to be put towards educating Canadians on their right of access.

Without knowledge of the right of access and how to exercise it, Canadians are missing an opportunity to exercise their democratic rights and hold their government to account. However, absent an express mandate for education, the Commissioner is limited in how she can increase awareness.

In Scotland, the Information Commissioner is responsible for promoting Scotland's freedom of information law and has published several surveys on public awareness of freedom of information.

The first survey, conducted in 2004, just prior to the coming into force of the *Freedom of Information (Scotland) Act 2002* found that only 44% of respondents were aware of the act. By 2014, this number had increased to 84%.

These surveys are available online: Scottish Information Commissioner, *Research*. <http://www.itspublicknowledge.info/home/SICReports/OtherReports/Research.aspx>.

16 The laws of B.C., Alberta, Quebec and P.E.I. all include the power to conduct investigations and audits to ensure compliance with the law in conjunction with order-making, as do the Article 19 and Organization of American States model laws. *Making it Work for Canadians* and the *Open Government Act* both recommended giving such power to the Commissioner. Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services Canada, 2002); Office of the Information Commissioner. *Open Government Act*. October 25, 2005. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf>.

An education mandate or a similar power for commissioners to promote the right of access can be found in all but one provincial access law, as well as in the laws of Canada's international counterparts and in various model laws.[17] Such a mandate has also been recommended in Canada previously.[18]

The experiences in other jurisdictions have demonstrated that an education mandate poses no risk to the impartiality of the Commissioner. In addition, giving the Commissioner such a mandate would bring the Act in line with comparable jurisdictions and increase the profile of the Act and the right of access generally.

Recommendation 5.8

The Information Commissioner recommends that the Act provide for the power to carry out education activities.

Research

The authority to conduct, commission or publish research is becoming more common among the provinces and comparable jurisdictions.[19] The federal Privacy Commissioner has a mandate to conduct and publish research related to the protection of personal information under section 24(b) of the *Personal Information Protection and Electronic Documents Act*. Former commissioners have recommended a similar mandate for the Information Commissioner.[20]

By carrying out research that draws from and includes Canadian perspectives, the Commissioner could help generate information, insights, analysis and, in some instances, debate on access to information. In turn, these would contribute to the protection and promotion of the right of access.

Recommendation 5.9

The Information Commissioner recommends that the Act provide for the power to conduct or fund research.

17 Nova Scotia's law does not include an education mandate. The U.K. and Mexican laws (in the latter case, through the publication of a guide on the procedure to access government information), the Article 19 and Organization for American States model laws and the *Open Government Guide* all provide for this type of mandate.

18 See the Information Commissioner's *1992–1993 Annual Report*. See also the *Open Government Act* and Office of the Information Commissioner. "Strengthening the *Access to Information Act* to Meet Today's Imperatives." March 9, 2009. <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>. *Open and Shut* recommended that the Commissioner be given the mandate to foster public understanding of the Act and that the Treasury Board of Canada Secretariat conduct a public education campaign (Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2nd Sess, 33rd Parl, No 9 (March 1987) (Chair: Blaine A. Thacker)). *Making it Work for Canadians* recommended amending the Act to recognize the role of the Commissioner in educating the public about the Act and access to government information in general.

19 The laws of B.C., Alberta, Saskatchewan, Manitoba, Ontario, the U.K. and Mexico (all of which were passed after the *Access to Information Act*) give the Commissioner such power.

20 See the *Open Government Act* and "Strengthening the *Access to Information Act* to Meet Today's Imperatives."

Advisory function

The Commissioner proactively comments on legislation that impacts access rights once it has been tabled in Parliament. Unfortunately, the lack of a mandatory consultation provision in the Act has contributed to the growth of Schedule II and in the number of laws that contain language that is intended to supersede the Act (as described in Chapter 4), thereby eroding the right of access.[21]

Current and former commissioners, as well as reports on reforming the Act, have considered providing independent input or advice on the potential impacts to access to information to be an important part of the Commissioner's role and responsibilities, and have recommended providing this mandate to the Commissioner.[22]

The authority to comment on the implications for access to information of proposed legislation can be found in the access laws of the majority of provinces, and is also recommended in the Organization of American States model law.[23]

Recommendation 5.10

The Information Commissioner recommends that the government be required to consult with the Information Commissioner on all proposed legislation that potentially impacts access to information.

Access to information should be included by design in programs and activities.[24] To achieve this, the Commissioner recommends that institutions be required to complete access to information impact assessments in a manner that is commensurate with the level of risk identified to access to information rights, before establishing any new or substantially modifying any program or activity.

This would allow institutions and the Commissioner to proactively address issues that may impact access to information rights.[25]

Treasury Board of Canada Secretariat's "Information Management Protocol — Instant Messaging Using a Mobile Device" recommends that departments should not use automatic logging of instant messages.

The Commissioner was not consulted on this protocol before its implementation.

This protocol is contrary to the Commissioner's recommendations in her special report *Instant messaging putting access to information at risk*. In this report, the Commissioner found that there was a real risk that information communicated via instant message that should be accessible by requesters was being irremediably deleted or lost. She specifically recommended that an adequate technical safeguard mechanism be made available and implemented to ensure that instant messages (whether or not of business value) were archived on a government server for a reasonable period of time.

21 In 2013, the Commissioner wrote to the Minister of Justice and Attorney General of Canada to request that she be consulted during the drafting phase of legislation that impacts access rights. In his response, the Minister stated that the current approach to collaboration with the Commissioner was sound and did not need to be modified. See Information Commissioner of Canada. Letter to Peter MacKay, Minister of Justice and Attorney General of Canada (December 23, 2013) and Minister of Justice and Attorney General of Canada. Letter to Suzanne Legault, Information Commissioner of Canada (February 24, 2014).

22 See the *Open Government Act*, "Strengthening the Access to Information Act to Meet Today's Imperatives," Making it Work for Canadians and Department of Justice Canada. *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues (Report of the Special Advisor to the Minister of Justice)* (Ottawa: Minister of Public Works and Government Services Canada, November 15, 2005).

23 The laws of B.C., Alberta, Manitoba, New Brunswick, P.E.I., and Newfoundland and Labrador give the Commissioner advisory authority. Quebec's law provides that the Commission must give its opinion on draft regulations submitted to it under that law. In the U.S., the Office of Government Information Services can review policies and procedures of administrative agencies as they relate to the *Freedom of Information Act*.

24 More information about the concept of access by design can be found at: Information and Privacy Commissioner of Ontario. "Introduction to access by design." <https://www.ipc.on.ca/english/access-to-information/Introduction-to-AbD/>.

25 This requirement would be similar to privacy impact assessments, which help ensure that privacy protection is a core consideration when a project is planned and implemented. Under the Treasury Board of Canada Secretariat's *Directive on Privacy Impact Assessment*, government departments must conduct a PIA in a manner that is commensurate with the level of privacy risk identified, before establishing any new or substantially modified program or activity involving personal information. Treasury Board of Canada Secretariat. *Directive on Privacy Impact Assessment*, April 1, 2010. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18308>.

Recommendation 5.11

The Information Commissioner recommends that institutions be required to submit access to information impact assessments to the Information Commissioner, in a manner that is commensurate with the level of risk identified to access to information rights, before establishing any new or substantially modifying any program or activity involving access to information rights.

Appointment and term of the Commissioner

Under section 54, an Information Commissioner holds office during good behaviour for a term of seven years and may only be removed with cause. He or she is appointed by the Governor in Council, after consultation with the leader of every recognized party in the House of Commons and Senate, and after approval by resolution of both houses.

This appointment process in the Act could be amended to reflect model laws and be consistent with the appointment of the other agents of Parliament.

Model laws provide that the appointment of an Information Commissioner should be approved by a supermajority of the legislature (i.e. more than two-thirds).[26] There should also be eligibility criteria for the position.[27]

The Auditor General and the Chief Electoral Officer are both appointed for a ten-year term, which is not subject to renewal.[28]

Recommendation 5.12

The Information Commissioner recommends:

- **that the appointment of the Information Commissioner be approved by more than two-thirds of the House of Commons and the Senate;**
- **10 years relevant experience in order to be eligible for the position of Information Commissioner; and**
- **a non-renewable, 10-year term for the position of Information Commissioner.**

26 The Organization of American States and Article 19 model laws require a super majority to appoint a Commissioner. P.E.I. has adopted this approach.

27 Jurisdictions that use eligibility criteria include Quebec, Australia, Mexico and Serbia, as well as the model laws of the Organization of American States and Article 19. Examples of such criteria include that the person have legal or other significant relevant experience, have not recently held a government or political position, or have no criminal convictions. In Canada, as per section 81 of the *Parliament of Canada Act*, RSC, 1985, c P-1, the Conflict of Interest and Ethics Commissioner must be either a former judge, a former member of a federal or provincial board, commission or tribunal, or a former Senate Ethics Officer or former Ethics Commissioner. Judges of the Federal Court, as per the *Federal Courts Act*, RSC, 1985, c F-7 at section 5.3 must also meet eligibility criteria, including 10 years standing at the bar of any province. (Under section 55(2) of the Act, the Commissioner is to be paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice of that Court.)

28 *Auditor General Act*, RSC, 1985, c A-17 at section 3; *Canada Elections Act*, SC 2000, c 9, s 13.

Chapter 6

Open information

In 2011, the Government of Canada made open government a priority in its Speech from the Throne, committing to provide Canadians with open data, open information and open dialogue.[1] Shortly thereafter, it joined the Open Government Partnership and committed, in two separate action plans, to increase transparency, accountability, civic engagement, and trust in government.[2]

As noted in Canada's second action plan, "the proactive release of data and information is the starting point for all other open government activity. It is the foundation upon which all other aspects of Canada's Action Plan are based."[3]

In 2014, the Treasury Board of Canada Secretariat issued the *Directive on Open Government*, which establishes an open by default position and requires institutions to maximize the release of data and information, with a goal to effect a fundamental change in government culture.[4] Following the issuance of this directive, the Commissioner recommended to the President of the Treasury Board that the government should adopt an integrated approach to open government and that an essential foundational commitment to achieve a meaningful open by default culture is to modernize the Act.[5]

The Act should be amended to reflect the government's open government initiatives, including additional requirements for proactive disclosure. Such an approach will codify these initiatives and make compliance with these proactive disclosure requirements subject to independent oversight.

Obligation to publish information of public interest

Several provincial access laws impose an obligation on institutions to proactively publish information of public interest, regardless of whether an access request for that information has been made.[6] The Act does not contain such an obligation.

Instances where proactive disclosure would clearly be in the public interest include where the government holds information that may be used to prevent a risk of significant harm or, as in the Lac Mégantic catastrophe, to proactively disclose information about the government's actions in response to such an event, as well as any other existing information that is clearly of public interest.

1 Parliament, House of Commons, *Speech from the Throne,* 41st Parl, 1st Sess, June 3, 2011.
2 See Open Government (Canada) *Canada's Action Plan on Open Government* <http://open.canada.ca/en/canadas-action-plan-open-government> and Open Government (Canada), *Canada's Action Plan on Open Government 2014–2016*. <http://open.canada.ca/en/content/canadas-action-plan-open-government-2014-16>.
3 *Canada's Action Plan on Open Government 2014–2016* at part A "Open Government Foundation - Open By Default."
4 Treasury Board of Canada Secretariat. *Directive on Open Government*. October 9, 2014. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=28108>. Section 5.1.
5 Office of the Information Commissioner. "Letter to the President of the Treasury Board on Action Plan 2.0." November 5, 2014. <http://www.oic-ci.gc.ca/eng/lettre-plan-d-action-2.0_letter-action-plan-2.0.aspx>.
6 The laws of B.C., Alberta, Nova Scotia and P.E.I. all contain a broad positive obligation to disclose information when it is clearly in the public interest. The laws of Ontario, New Brunswick and Newfoundland and Labrador impose a positive obligation to disclose information that is about a risk of significant harm to the environment or to the health or safety of the public.

Proactive disclosure of information that is clearly of public interest will:

- serve to provide more information to the public so that they may effectively evaluate the government's response to issues of public interest;
- allow the public to pressure the government to take remedial action to prevent harm; and
- reduce the impact of events of public interest on the access system by decreasing the number of access requests that the public makes to an institution.

Recommendation 6.1

The Information Commissioner recommends that institutions be required to proactively publish information that is clearly of public interest.

British Columbia's access law requires institutions to proactively disclose information when it is clearly in the public interest.

The provincial Information and Privacy Commissioner recently reported on this requirement and found that the Ministry of Forests, Lands and Natural Resource Operations had failed to meet its obligation when it did not proactively disclose the results of inspection reports related to a failing dam.

The dam eventually collapsed and seriously damaged houses and farmland downstream. It was the provincial commissioner's view that "the information about the risk of failure of the dam was information that the public did not know and that [if they had known] would have likely resulted in the local citizenry, at the very least, pressuring [the] government to take remedial action."

See Investigation Report F13-05 *Public Body Disclosure of Information under Section 25 of the Freedom of Information and Protection of Privacy Act* (December 2, 2013).

Publication schemes

Section 5 of the Act requires institutions to publish certain information about their organization each year, including descriptions of:

- the institution and its responsibilities;
- all classes of records under their control; and
- all manuals used by their employees.

These descriptions—known as information registers—were intended to be used by the public to help determine what information holdings government institutions had and what types of general information could be requested. This approach is common in older access to information laws.

It is becoming more common in comparable jurisdictions, as well as in model laws, to use publication schemes.[7] Publication schemes are mandatory requirements within access laws to disclose, on a routine basis, certain broad classes of information, such as policies and procedures, minutes of meetings, annual reports and financial information. Usually, this information must be made available to the public via an institution's website and must be kept up to date.[8]

7 The laws of Ontario, Quebec, Mexico, Australia, the U.K., and the U.S., the Article 19 and Organization of American States model laws, and the *Open Government Guide* all require the publication of certain documents and other types of information. Article 19. *A Model Freedom of Information Law*. 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>; Organization of American States. *Model Inter-American Law on Access to Public Information and its Implementation Guidelines*. 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>; Open Government Guide. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>.

8 Although the information identified in the scheme must also be available in printed format, when possible, for those without Internet access.

Institutions are required by policy or directive to proactively disclose some information. As described above, the *Directive on Open Government* establishes an open by default position across the Government of Canada and is intended to maximize the release of open data and information. Additional policies require institutions to proactively disclose certain kinds of information related to travel and hospitality expenses, as well as some information related to contracts, grants, loans and contributions.[9] However, these requirements are not codified in law.

A requirement that institutions adopt a publication scheme would support the government's open government objective to establish an open by default culture and would be a tool to implement the *Directive on Open Government*. It would also:

- ensure the proactive publication of key information;
- transform the access framework from a responsive to a proactive system;
- decrease the need to make access to information requests; and
- reduce delays to obtain information.

Recommendation 6.2

The Information Commissioner recommends requiring institutions to adopt publication schemes in line with the *Directive on Open Government*.

Institutions are required to proactively disclose limited information about grants, loans and contributions of more than $25,000 awarded to third parties.[10] They are not required to proactively release information about grants, loans or contributions of less than $25,000. In addition, they are not required to proactively release the terms associated with these grants, loans or contributions, or information on the status of repayment and compliance with the terms.

As explained in Chapter 4, currently some recipients of these loans, grants and contributions have relied on section 20 of the Act (dealing with third party information) to oppose disclosure. Yet, a significant amount of public money is spent by the Government as part of the grants, loans and contributions programs. Increased transparency related to the spending of these public funds would enhance accountability by ensuring Canadians are able to assess whether this money is being spent responsibly and whether the recipients abide by the terms and conditions of repayment.

The Commissioner recommends that the proactive disclosure requirements of Treasury Board of Canada Secretariat policy be expanded to all grants, loans and contributions. In addition, the Commissioner recommends that the repayment and compliance with the terms of grants, loans or contributions given by the government should be proactively disclosed.[11]

The *2014–2015 Estimates* list the following total grants and contributions transferred in 2014–2015:

Health Canada: $1,683,745,108

Employment and Social Development Canada: $1,227,675,995

Canadian Heritage: $1,187,709,835

Natural Sciences and Engineering Research Council of Canada (grants only): $1,015,471,014

Social Sciences and Humanities Research Council (grants only): $666,664,097

Industry Canada: $557,723,370

9 See Treasury Board of Canada Secretariat "Disclosure of Travel and Hospitality Expenses," March 26, 2013. <http://www.tbs-sct.gc.ca/pd-dp/dthe-dfva/index-eng.asp>, "Disclosure of Contracts Over $10,000," October 31, 2012. <http://www.tbs-sct.gc.ca/pd-dp/dc/index-eng.asp> and the "Policy on Transfer Payments," April 1, 2012. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13525&section=text#cha6>.

10 For grants, loans and contributions over $25,000 institutions proactively disclose the name of the recipient, location of the recipient, date, value of the funding, whether the funding is a grant, loan or contribution, the purpose of the grant, loan or contribution and additional technical comments, such as whether the funding is a multi-year commitment or the reporting was belated.

11 In the meantime, the government may wish to consider adding this kind of information to its *Directive on Open Government*.

Recommendation 6.3

The Information Commissioner recommends including within publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.

Some access laws require institutions to publish information given in response to an access request so that future information seekers do not need to make a formal request to receive it.

For example, Mexico's law requires that each response to a request be made public. Other jurisdictions require publication of information that has become or is likely to become the subject of subsequent requests (U.S.) or is routinely requested (Australia).[12]

The Act does not require the publication of all records given in response to access requests.[13] The Commissioner acknowledges that it may not be reasonable to require institutions to post the responsive records of all requests given, for example, current accessibility requirements and obligations under the *Official Languages Act*.[14]

The Commissioner recommends that institutions should have to post online the responsive records of completed access requests within 30 days after the end of each month, if that information is or is likely to be frequently requested.[15]

Recommendation 6.4

The Information Commissioner recommends including within publication schemes a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested.

Exclusion for published material, material available for purchase or library or museum material (section 68)

Government institutions hold information that has been published or is publicly available such as books, government studies, reports, statistical information, court decisions, statutes and regulations, and media articles. Library and Archives Canada (LAC) and museums also hold material for exhibition and material that has been given to them by third parties.

Currently, the scope of the Act does not cover:

- published material or material available for purchase by the public;
- library or museum material preserved solely for public reference or exhibition purposes; or
- material placed in the Library Archives of Canada, or listed museums, by or on behalf of persons or organizations other than government institutions.

12 In the U.S., information that is the subject matter of a request must be proactively disclosed if it is either requested or is anticipated to be requested for a third time. See U.S. Department of Justice, *Guide to the Freedom of Information Act*. "Proactive Disclosure" (Washington, D.C.: U.S. Government Printing Office, 2009 Edition) at p. 17.

13 The Treasury Board of Canada Secretariat does have a policy requiring institutions to post summaries of completed access to information requests within 30 calendar days after the end of each month, including the disposition of the request and the number of pages released. Treasury Board of Canada Secretariat. *Directive on the Administration of the Access to Information Act*. Section 7.13. May 5, 2014. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=18310>.

14 RSC, 1985, c 31 (4th Supp).

15 Publication of these responsive records to access requests will need to meet the requirements of the *Official Languages Act* and accessibility requirements. See Treasury Board of Canada Secretariat. *Standard on Web Accessibility*, August 1, 2011. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=23601>.

Generally, it is not reasonable or efficient to require institutions to process and provide published, library, or museum materials that are readily available to the public. However, reproduction costs have diminished significantly in the past 30 years, and much of what the government publishes or exhibits today is available online. Therefore, the kinds of information listed above that are currently excluded should be brought under the Act, in order to allow disclosure when doing so would fulfill the purpose of the Act.[16]

For example, information that is "published" or "exhibited" is not always reasonably accessible. Although information may be available on the Internet, a requester may not have access to the information if he or she does not have access to a computer. This has occurred in the context of requesters who are inmates in penal institutions.

The issue of affordability has also been raised in the Commissioner's investigations. A requester was denied a copy of the Canada Corporations database because the information was available for purchase at the cost of $1 per page. While this seemed reasonable at first, the investigation revealed that the entire database, which was the subject of the request, consisted of 300,000 pages.

In such instances, the institutions applied the exclusion found in section 68 despite the fact that it was unreasonable to believe the requester could access the information. Therefore, the exclusion should be repealed, and an exemption created to allow institutions to refuse disclosure only where information is reasonably available to a requester.

Finally, the exemption should allow an institution to withhold information placed in LAC, or in museums currently listed in the Act, by non-government persons or organizations. Without this protection, third parties would be less likely to provide important historical information of archival value.

Recommendation 6.5

The Information Commissioner recommends a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester. The exemption should continue to allow an institution to withhold information placed in Library and Archives Canada or listed museums by third parties.

16 Note that the *Copyright Act*, RSC, 1983, c C-42 at section 32.1 states that it is not an infringement of copyright for a person to disclose a record pursuant to the *Access to Information Act*.

Chapter 7

Criminal liability and civil responsibility

An important aspect of an access to information law is a comprehensive regime of sanctions to address actions contrary to the right of access. Sanctions create an incentive to comply with the law. To be most effective, they must be proportionate to address a range of behaviours, from more serious actions made in bad faith to less serious actions that result in failing to meet the obligations under the law.

The Act contains two offences. The first (section 67) prohibits the obstruction of the Information Commissioner and anyone acting on her behalf or under her direction in the performance of their duties and functions under the Act.

In 1999, a second offence was added to the Act (section 67.1). This offence prohibits all persons from destroying, mutilating, altering, falsifying or concealing records with the intent of denying a right of access under the Act. It also forbids directing, proposing or causing anyone else to do any of the prohibited acts.

The Commissioner has found information related to the possible commission of an offence under section 67.1 on three occasions.[1]

The Commissioner has come to the conclusion that the Act needs a broader range of prohibited actions to cover all types of behaviours that may hinder the right of access. The Act also needs a spectrum of sanctions to allow for a proportionate response to behaviours that are contrary to the right of access.

Section 67.1 was added to the Act as a result of a private member's bill that was drafted in response to concerns that had been raised by Commissioner John Grace. In the wake of various findings that the right of access to government records had been thwarted through record destruction, tampering and cover-up, including incidents linked to the Somalia Inquiry and the Canadian Blood Inquiry, Commissioner Grace arrived at the conclusion that "the time ha[d] come to consider amending the Access Act to provide penalties for flagrant violations of this statute."[1] He echoed this sentiment by again recommending the next year that there be "a specific offence in the access act for acts or omissions intended to thwart the rights set out in the law."[2]

1 1995–1996 Annual Report, p. 11.

2 1996–1997 Annual Report, p. 14.

1 The three occasions where the Commissioner found information related to the possible commission of an offence under section 67.1 are described in detail in 1) the *2009–2010 Annual Report*; 2) *Interference with Access to Information: Part 1*; and 3) *Interference with Access to Information: Part 2*. See Office of the Information Commissioner, "Without a trace", *2009–2010 Annual Report*. <http://www.oic-ci.gc.ca/eng/inv-inv_not-inv-sum-som-inv-not_sum_2009-2010_14.aspx>; Office of the Information Commissioner, *Interference with Access to Information: Part 1*, March 2011. <http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2010-2011_interference-with-ati-interference-avec-ati.aspx>; and Office of the Information Commissioner, *Interference with Access to Information: Part 2*, April 2014. <http://www.oic-ci.gc.ca/eng/ingerence-dans-acces-a-l%E2%80%99information-partie-2-interference-with-access-to-information-part-2.aspx>.

Obstruction

Section 67 of the Act prohibits obstructing the Commissioner in the performance of her duties.[2] It does not address obstructing the processing of an access request.

During the investigations that formed the basis of the *Interference with Access to Information: Part 2* special report, the Commissioner uncovered evidence that the processing of several access requests had been interfered with.

In order to address instances where the processing of an access request is obstructed, the Commissioner recommends that a new offence be added to the Act. Directing, proposing or causing anyone to do so should also be an offence under the Act.

Recommendation 7.1

The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.

Section 67.1 applies to the destruction, mutilation, alteration, falsification or concealment of a *record*. To be consistent throughout the Act, this section should be amended so that it is an offence to destroy, mutilate, alter, falsify or conceal any record or *part thereof* to deny the right of access.

Recommendation 7.2

The Information Commissioner recommends that section 67.1 prohibit destroying, mutilating, altering, falsifying or concealing a record or part thereof or directing, proposing or causing anyone to do those actions.

In 2008 the National Gallery of Canada (NGC) was involved in litigation as a result of a wrongful dismissal action. During the litigation it was revealed that documents may have been destroyed and/or individuals were counselled to destroy records that may have been responsive to an access request. Upon learning this information, the Commissioner initiated an investigation.

During the investigation, the Commissioner found as a fact that records responsive to an access to information request were destroyed and individuals were counseled to destroy records during the course of the processing of the request. As a result, she referred the matter to the Attorney General. No charges were laid.

In *Interference with Access to Information: Part 2*, the Commissioner concluded that there was improper interference in the processing of five access requests at Public Works and Government Services Canada by ministerial staff. This interference took the form of directions to the ATIP Directorate from the ministerial staff members, who had no authority under the Act, to sever or remove information that the delegated authority had decided to disclose.

2 An example of obstructing the Commissioner in the performance of her duties would include making a false statement to mislead or attempt to mislead the Commissioner.

Failure to document

In light of the Commissioner's recommendation in Chapter 2 to add to the Act a duty to document, the Act also needs to prohibit non-compliance with this obligation.

The Commissioner therefore recommends that failing to document or preserve a decision-making process with intent to deny the right of access be prohibited under the Act. Directing, proposing or causing anyone to do so should also be prohibited under the Act.

Recommendation 7.3

The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Failure to report

In Chapter 2 the Commissioner also recommended establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Commissioner.

In order to ensure compliance, failing to report to Library and Archives Canada and/or notify the Commissioner of the unauthorised destruction or loss of information should also be prohibited.

Recommendation 7.4

The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Spectrum of sanctions

In order to address the broad range of prohibited behaviours discussed above, the Act needs to include a spectrum of sanctions. At one end of the spectrum are the criminal offences related to obstruction, then administrative monetary penalties, then, at the other end, disciplinary proceedings.

The Organization of American States model law envisages this approach and makes available criminal sanctions for certain wilful actions, but also fines and disciplinary proceedings for administrative offences.[3]

Adding a spectrum of sanctions to the Act has also been mentioned by the Government. In contemplating whether a duty to document should be added to the Act, the Government noted that "penalties for public servants who fail to create a record could range from disciplinary measures through an administrative monetary penalty to a criminal offence."[4]

3 Organization of American States. "Model Inter-American Law on Access to Public Information and its Implementation Guidelines." 2012 at articles 64–65. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>.

4 Government of Canada, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act* (Ottawa: Government of Canada, 2006) at p. 35 <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/index.html>.

Spectrum of sanctions			
	Criminal	Administrative monetary penalties	Disciplinary proceedings
Obstructing the Commissioner in the performance of her duties (section 67)	Yes	Yes	Yes
Obstructing the processing of an access request (new offence)	Yes	Yes	Yes
Destroying, mutilating, altering, falsifying or concealing information (section 67.1 as amended)	Yes	Yes	Yes
Failure to document	Yes	Yes	Yes
Failure to report and/or notify	No	Yes	Yes

No liability where acting in good faith

The Organization of American States model law also provides that no one will be subject to civil or criminal action or any employment detriment where they are acting in good faith in the exercise, performance or purported performance of any power or duty within the model law, as long as they acted reasonably and in good faith.[5]

This is an important aspect of the model law as it ensures that sanctions are only applied against those who act in bad faith or are negligent in the performance of their duties. The Commissioner recommends that the Act should make clear that no one acting reasonably and in good faith in the performance of their duties under the Act will be subject to sanction.

Recommendation 7.5

The Information Commissioner recommends that no one acting reasonably and in good faith in the performance of their duties under the Act will be subject to sanction.

5 At article 63.

Criminal offences – increasing fines

The Commissioner is of the view that the fines under the Act need to be updated to accurately reflect the seriousness of these violations. The fines that can currently be levied are lower than what can be found in the offences section in other provincial access laws and in other federal regulatory schemes.[6]

Sanctions under the Act		
	Section 67	**Section 67.1**
Summary Conviction	Up to a $1,000 fine	Up to a $5,000 fine and/or imprisonment for a term not exceeding six months
Indictable offence[1]	N/A	Up to a $10,000 fine and/or imprisonment for a term not exceeding two years

1. An indictable conviction offence is considered a more serious category of criminal offence. In contrast, a summary conviction offence is generally a less serious category of offences that carries less severe penalties (in most cases a maximum of six months imprisonment) and cannot be prosecuted more than six months after the date of the offence.

The Commissioner recommends that the maximum fine for a summary conviction offence under the Act should be $5,000. This would be consistent with provincial laws and ensure consistency within the Act. For the indictable offence under section 67.1, the maximum fine should be increased to $25,000 to provide a stronger deterrent than currently exists against serious violations of the right of access.

Recommendation 7.6

The Information Commissioner recommends increasing the maximum fine for summary convictions under the Act to $5,000 and to $25,000 for indictable offences.

Administrative monetary penalties

An administrative monetary penalty (AMP) is a compliance mechanism that is used for less serious contraventions of a law in order to encourage compliance. It also falls outside of the scope of criminal law. AMPs can be graduated based on the seriousness of the contravention and take various factors into consideration when determining the amount to be imposed.

As part of the spectrum of sanctions available under the Act, the Commissioner should have the authority to levy AMPs against any individual for breaches of any of the prohibited actions set out in this chapter (as set out in the table "Spectrum of sanctions").

As noted above, the Government has mentioned an AMP regime.[7] As well, the Organization of American States model law also provides for an administrative regime of fines.

6 For example, Manitoba's access law allows for a fine up to $50,000 on summary conviction, New Brunswick up to $10,200, Alberta and P.E.I. (on summary conviction) up to $10,000 and B.C., Ontario, and Newfoundland and Labrador (on summary conviction) up to $5,000. Under the *Canada Elections Act*, SC 2000, c 9 every person who is guilty of an offence under section 495(4) (offences requiring intent, including willfully transmitting election survey results during blackout period) is liable on summary conviction of a fine not more than $50,000. Under the *Lobbying Act*, RSC, 1985, c 44 (4th Supp) every individual who fails to file a return or knowingly makes any false or misleading statement in any return or other document submitted to the Commissioner of Lobbying is liable on summary conviction to a fine not exceeding $50,000.

7 See n. 4.

Including an AMP regime in the Act would allow the Commissioner to proportionately respond to the broad spectrum of actions she encounters that are not in compliance with the Act and, in so doing, protect the right of access.[8]

An example of an AMP regime can be found in the *Conflict of Interest Act*.[9] Included in this regime is that all AMPs that have been levied under this act are required to be published.[10] Adding such a regime has also been recommended by a Parliamentary Committee for the *Lobbying Act*.[11]

The Commissioner recommends that an AMP regime be added to the Act. The regime should also require the publication of AMPs that have been imposed in order to heighten awareness of the obligations under the Act.

Recommendation 7.7

The Information Commissioner recommends an administrative monetary regime be added to the Act, which should include a requirement to publish any administrative monetary penalty imposed.

Term and condition of employment for employees, directors and officers of institutions

As part of the spectrum of possible sanctions, disciplinary proceedings should be an option. In order to put in place this option, compliance with the Act must be a term and condition of employment.

Currently, employees must abide by the *Values and Ethics Code for the Public Sector* (the Code). There is a general obligation on all employees to carry out their duties in accordance with legislation, policies and directives; however, the Code does not highlight or specifically address employees' obligations under the *Access to Information Act*.[12]

The Commissioner recommends that meeting obligations under the Act should be a term and condition of employment for employees, directors and officers of institutions.[13, 14] Such a condition would make it clear to those that work in institutions that they have responsibilities under the Act, are accountable for meeting them, and are subject to disciplinary procedures when these obligations are not met.

8 For example, an AMP may be appropriate where prosecution is not pursued, but the behaviour still merits some form of sanction. According to the *Public Prosecution Service of Canada Deskbook*, when deciding whether to initiate and conduct a prosecution on behalf of the federal Crown, Crown counsel must consider two issues: 1) Is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial? If there is 2) would a prosecution best serve the public interest? A number of factors are considered in the public interest, including the nature of the alleged offence, the nature of the harm caused by or the consequences of the alleged offence, the circumstances, consequences to and attitude of victims, the level of culpability and circumstances of the accused, the need to protect sources of information and confidence in the administration of justice. Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook*, March 1, 2014. <http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg/index.html>.

9 SC 2006, c 9, s 2 at section 52.

10 The Organization of American States model law requires that any sanction ordered under the law be posted on the websites of the oversight body and respective institution within five days of the sanction being ordered (see article 65(4)).

11 During a five-year review of the *Lobbying Act*, the Commissioner of Lobbying recommended to the Standing Committee on Access to Information, Privacy and Ethics that an administrative monetary penalty regime be added to the *Lobbying Act*. This recommendation was supported by the committee, who submitted it to Parliament. See Office of the Commissioner of Lobbying, "Administering the Lobbying Act Observations and Recommendations Based on the Experience of the Last Five Years," December 13, 2011. <https://www.ic.gc.ca/eic/site/012.nsf/vwapj/Administering_LA_2011-12-13-en.pdf/$FILE/Administering_LA_2011-12-13-en.pdf> and Parliament, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Statutory Review of the Lobbying Act: Its First Five Years*, 1st Sess, 41st Parl).

12 By contrast, Expected Behaviour 5.1 of the *Values and Ethics Code for the Public Sector* specifically highlights the obligations of public servants to provide fair, timely, efficient and effective services that respect Canada's official languages. Expected Behaviour 1.1 generally requires public servants to respect the rule of law and carry out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner. Treasury Board of Canada Secretariat, *Values and Ethics Code for the Public Sector*, December 15, 2011. <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049>.

13 This would include ministerial staff if the Act is amended to include ministers' offices under the coverage of the Act.

14 Similarly, during consultations with the Treasury Board of Canada Secretariat on the Policy on Access to Information, the Commissioner recommended that compliance with the administration of the Act, including the resolution of complaints, be included in the performance agreement of the member of the executive responsible for the access functions. She also recommended that compliance with the administration of the Act, including meeting specific performance indicators, be a part of each institution's *Report on Plans and Priorities*.

The Commissioner recommends that such a provision resemble section 19 of the *Conflict of Interest Act*, which provides that compliance with that law is a condition of a person's appointment or employment as a public office holder. In this instance, the recommended provision should be applicable to all employees, directors and officers of all institutions subject to the Act.

Recommendation 7.8

The Information Commissioner recommends that adherence to the requirements of the *Access to Information Act* be made a term and condition of employment for employees, directors and officers of institutions.

Referral of criminal offences

Suspending investigations

Recent enabling legislation of bodies that perform administrative investigations provide that administrative investigations must be immediately suspended where the investigative authority believes on reasonable grounds that a criminal offence on the same subject-matter of the administrative investigation has occurred. The investigative authority is then required to notify the relevant authorities.[15]

The Act contains no such provision to suspend investigations when the Commissioner has reasonable grounds to believe that a criminal offence has been committed.[16] The Commissioner therefore recommends that the Act be amended to require the suspension of investigations in such situations.

Recommendation 7.9

The Information Commissioner recommends that an investigation under the Act must be suspended when the Information Commissioner believes on reasonable grounds that a criminal offence on the same subject-matter of the investigation has occurred.

Notifying authorities

The Act imposes strict confidentiality obligations on the Commissioner (see Chapter 5), with few exceptions. Section 63(2) of the Act allows the Commissioner to disclose information to the Attorney General of Canada when she is of the view that she has evidence of an offence against a law of Canada or a province by a director, officer or employee of an institution.

The interaction between the Commissioner's strict confidentiality obligations, the exemption in the Act for investigations of the Commissioner (section 16.1), and section 63(2) raises issues.

First, although section 63(2) of the Act sets out that the Commissioner is able to provide information when she is of the view that she has evidence of an offence, it doesn't set out what information she can provide.

15 For example, see section 10.4 of the *Lobbying Act* or section 49 of the *Conflict of Interest Act*. The provisions in these laws require the suspension of an investigation where there are reasonable grounds to believe that a criminal offence on the same subject-matter of the administrative investigation has occurred. As well, in *R v Jarvis*, 2002 SCC 73 and *R v Ling*, 2002 SCC 74, the Supreme Court of Canada held that *Charter* protections for life, liberty and security of person (section 7) and against unreasonable search and seizure (section 8) are violated when testimony on documents provided in an administrative investigation are used in a criminal investigation. At the heart of the issue was the principle against self-incrimination. The Court held that once the predominant purpose of an investigation becomes one of criminal liability, *Charter* rights are engaged. Although these decisions were made in the context of income tax law and involved the dual function of the Canada Revenue Agency, who performs both administrative investigations and investigations of criminal offences under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp), the principles established remain important in the context of an administrative investigation that may uncover criminal actions.

16 Instead, section 63(2) of the Act simply gives the Commissioner permission to disclose information relating to the commission of an offence to the Attorney General of Canada.

Second, section 63(2) is limited to directors, officers or employees. This means the Commissioner may report on the conduct of those individuals only, and she may not report on the conduct of, for example, current and former consultants, contractors, or ministers and their exempt staff.[17]

Finally, section 63(2) permits the Commissioner to report to the Attorney General of Canada, who is not charged with conducting criminal investigations.[18] This places the Attorney General in the unusual position of acting as a courier between the Commissioner and the appropriate criminal investigative authority. By contrast, the Federal Court has the discretion under the Act to provide information to an "appropriate authority" to conduct the relevant criminal investigation.[19] The enabling legislation of some of the agents of Parliament include similar provisions, but authorize the Agent of Parliament to provide the information to either the "relevant authority" or a peace officer having jurisdiction to investigate the alleged contravention.[20]

As reported in both the *Interference with Access to Information: Part 1* and *Part 2* special reports, the responses available to the Commissioner to sanction the actions that were the subject of the complaint were limited because many of the actions were undertaken by ministerial staff.

The Information Commissioner was not able to disclose information in relation to the actions of the ministerial staff because they were not officers, directors or employees of a government institution. This is so despite the wording of the offences to the Act, which prohibit every person from engaging in the offensive conduct.

In order to address these issues, the Act must be amended to make clear that, despite her confidentiality obligations, the Commissioner is permitted to share information where she is of the view that a referral is warranted. The Act must also be amended to allow the Commissioner to share this information about anyone's conduct to the appropriate authority.

Recommendation 7.10

The Information Commissioner recommends that the Information Commissioner be permitted to share any information to the appropriate authority where the Information Commissioner believes a referral is warranted about anyone's conduct related to a criminal offence.

17 This issue would be resolved by expanding coverage of the Act to include ministers' offices.
18 Nor is the Director of Public Prosecutions, who is the delegated authority to prosecute non-*Criminal Code* federal offences on behalf of the Attorney General (as per section 3(3) of the *Director of Public Prosecutions Act*, SC 2006, c 9, s 121).
19 See section 47(2).
20 The *Conflict of Interest Act* allows the Conflict of Interest and Ethics Commissioner to make such disclosures to the "relevant authority." The *Public Servants Disclosure Protection Act*, SC 2005, c 46 and the *Lobbying Act* generally allow the respective commissioners to make such disclosures to a peace officer having jurisdiction to investigate the alleged contravention.

Chapter 8

Mandatory periodic review of the Act

The *Access to Information Act* has not been comprehensively updated since its enactment over 30 years ago. The Act has fallen behind modern standards. The result is that Canadians' information rights are not adequately protected.

Periodic, comprehensive reviews by either a legislative committee or commission are built into the access laws of several provinces, with five years being the most common time frame.[1]

The Act needs to be strengthened to meet the information realities of the 21st century and ensure that Canadians benefit from the modern, effective law they expect and deserve. Mandatory, periodic parliamentary review of the Act, particularly when coupled with the requirement to table a report in Parliament within a year of undertaking the review, would ensure the Act remains up to date and provide a scheduled opportunity to:

- quickly fill gaps in legislative coverage identified in the Commissioner's orders;
- harmonize the Act with progressive national and international standards; and
- ensure Canada is a global leader in protecting the right of access and in being accountable to its citizens.

Recommendation 8.1

The Information Commissioner recommends a mandatory parliamentary review of the Act every five years, with a report tabled in Parliament.

1 The laws of B.C., Quebec, and Newfoundland and Labrador all contain such a provision. Federal commissioners have recommended including such a provision in the Act on a number of occasions. See Office of the Information Commissioner. *Open Government Act*. October 25, 2005. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf> and Office of the Information Commissioner. "Strengthening the *Access to Information Act* to Meet Today's Imperatives." March 9, 2009. <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.

List of recommendations

Chapter 1: Extending coverage

Recommendation 1.1

The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:

- institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);
- institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
- institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);
- institutions established by statute (such as airport authorities); and
- all institutions covered by the *Financial Administration Act*.

Recommendation 1.2

The Information Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries.

Recommendation 1.3

The Information Commissioner recommends creating an exemption in the Act for information related to the parliamentary functions of ministers and ministers of State, and parliamentary secretaries as members of Parliament.

Recommendation 1.4

The Information Commissioner recommends extending coverage of the Act to the bodies that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.

Recommendation 1.5

The Information Commissioner recommends creating a provision in the Act to protect against an infringement of parliamentary privilege.

Recommendation 1.6

The Information Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.

Recommendation 1.7

The Information Commissioner recommends that the Act exclude records in court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.

Chapter 2: The right of access

Recommendation 2.1

The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

Recommendation 2.2

The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report.

Recommendation 2.3

The Information Commissioner recommends extending the right of access to all persons.

Recommendation 2.4

The Information Commissioner recommends that institutions be allowed to refuse to process requests that are frivolous, vexatious or an abuse of the right of access.

Recommendation 2.5

The Information Commissioner recommends that institutions' decision to refuse to process an access request be subject to appeal to the Information Commissioner.

Recommendation 2.6

The Information Commissioner recommends limiting the application of section 10(2) to situations in which confirming or denying the existence of a record could reasonably be expected to do the following:

- injure a foreign state or organization's willingness to provide the Government of Canada with information in confidence;
- injure the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities;
- injure law enforcement activities or the conduct of lawful investigations;
- threaten the safety of individuals; or
- disclose personal information, as defined in section 3 of the *Privacy Act*.

Recommendation 2.7

The Information Commissioner recommends that institutions be required to provide information to requesters in an open, reusable, and accessible format by default, unless the following circumstances apply:

- the requester asks otherwise;
- it would cause undue hardship to the institution; or
- it is technologically impossible.

Recommendation 2.8
The Information Commissioner recommends eliminating all fees related to access requests.

Chapter 3: Timeliness

Recommendation 3.1
The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.

Recommendation 3.2
The Information Commissioner recommends that extensions longer than 60 days be available with the permission of the Information Commissioner where reasonable or justified in the circumstances and where the requested extension is calculated with sufficient rigour, logic and support to meet a reasonableness review.

Recommendation 3.3
The Information Commissioner recommends allowing institutions, with the Commissioner's permission, to take an extension when they receive multiple requests from one requester within a period of 30 days, and when processing these requests would unreasonably interfere with the operations of the institution.

Recommendation 3.4
The Information Commissioner recommends the Act make explicit that extensions for consultations (as per section 9(1)(b) may only be taken to consult other government institutions or affected parties, other than third parties who already have consultation rights under section 9(1)(c), and only where it is necessary to process the request.

Recommendation 3.5
The Information Commissioner recommends that, in cases where a consulted party fails to respond to a consultation request, the consulting institution must respond to the request within the time limits in the Act.

Recommendation 3.6
The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

Recommendation 3.7
The Information Commissioner recommends allowing an extension when the requested information is to be made available to the public, rather than claiming an exemption.

Recommendation 3.8
The Information Commissioner recommends that if an extension is taken because the information is to be made available to the public, the institution should be required to disclose the information if it is not published by the time the extension expires.

Recommendation 3.9
The Information Commissioner recommends repealing the exemption for information to be published (section 26).

Recommendation 3.10

The Information Commissioner recommends that extension notices should contain the following information:

- the section being relied on for the extension and the reasons why that section is applicable;
- the length of the extension (regardless of what section the extension was taken under);
- the date upon which the institution will be in deemed refusal if it fails to respond;
- a statement that the requester has the right to file a complaint to the Information Commissioner about the extension within 60 days following receipt of the extension notice; and
- a statement that the requester has the right to file a complaint to the Information Commissioner within 60 days of the date of deemed refusal if the institution does not respond to the request by the date of the expiry of the extension.

Chapter 4: Maximizing disclosure

Recommendation 4.1

The Information Commissioner recommends that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider the following, non-exhaustive list of factors:

- open government objectives;
- environmental, health or public safety implications; and
- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.

Recommendation 4.2

The Information Commissioner recommends that all exclusions from the Act should be repealed and replaced with exemptions where necessary.

Recommendation 4.3

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information from the provincial, municipal, regional or Aboriginal government to whom the confidential information at issue belongs.

Recommendation 4.4

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information of the foreign government or international organization of states to which the confidential information at issue belongs, when it is reasonable to do so.

Recommendation 4.5

The Information Commissioner recommends that, where consultation has been undertaken, consent be deemed to have been given if the consulted government does not respond to a request for consent within 60 days.

Recommendation 4.6

The Information Commissioner recommends requiring institutions to disclose information when the originating government consents to disclosure, or where the originating government makes the information publicly available.

Recommendation 4.7

The Information Commissioner recommends replacing international and federal-provincial "affairs" with international and federal-provincial "negotiations" and "relations."

Recommendation 4.8
The Information Commissioner recommends combining the intergovernmental relations exemptions currently found in sections 14 and 15 into a single exemption.

Recommendation 4.9
The Information Commissioner recommends a statutory obligation to declassify information on a routine basis.

Recommendation 4.10
The Information Commissioner recommends repealing the exemption for information certified by the Attorney General (section 69.1).

Recommendation 4.11
The Information Commissioner recommends repealing the exemptions for information obtained or prepared for specified investigative bodies (section 16(1)(a)), information relating to various components of investigations, investigative techniques or plans for specific lawful investigations (section 16(1)(b)) and confidentiality agreements applicable to the RCMP while performing policing services for a province or municipality (section 16(3)).

Recommendation 4.12
The Information Commissioner recommends amending the exemption for personal information to allow disclosure of personal information in circumstances in which there would be no unjustified invasion of privacy.

Recommendation 4.13
The Information Commissioner recommends that the definition of personal information should exclude workplace contact information of non-government employees.

Recommendation 4.14
The Information Commissioner recommends including a provision in the Act that allows institutions to disclose personal information to the spouses or relatives of deceased individuals on compassionate grounds, as long as the disclosure is not an unreasonable invasion of the deceased's privacy.

Recommendation 4.15
The Information Commissioner recommends requiring institutions to seek the consent of the individual to whom the personal information relates, wherever it is reasonable to do so.

Recommendation 4.16
The Information Commissioner recommends requiring institutions to disclose personal information where the individual to whom the information relates has consented to its disclosure.

Recommendation 4.17
The Information Commissioner recommends a mandatory exemption to protect third-party trade secrets or scientific, technical, commercial or financial information, supplied in confidence, when the disclosure could reasonably be expected to:

- significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- result in similar information no longer being supplied voluntarily to the institution when it is in the public interest that this type of information continue to be supplied; or
- result in undue loss or gain to any person, group, committee or financial institution or agency.

Recommendation 4.18
The Information Commissioner recommends requiring institutions to disclose information when the third party consents to disclosure.

Recommendation 4.19
The Information Commissioner recommends that the limited public interest override in the third party exemption be repealed in light of the general public interest override recommended at Recommendation 4.1.

Recommendation 4.20
The Information Commissioner recommends that the third party exemptions may not be applied to information about grants, loans and contributions given by government institutions to third parties.

Recommendation 4.21
The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations.

Recommendation 4.22
The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

Recommendation 4.23
The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

Recommendation 4.24
The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege.

Recommendation 4.25
The Information Commissioner recommends that the solicitor-client exemption may not be applied to aggregate total amounts of legal fees.

Recommendation 4.26
The Information Commissioner recommends a mandatory exemption for Cabinet confidences when disclosure would reveal the substance of deliberations of Cabinet.

Recommendation 4.27
The Information Commissioner recommends that the exemption for Cabinet confidences should not apply:

- to purely factual or background information;
- to analyses of problems and policy options to Cabinet's consideration;
- to information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act;
- to information in a record that has been in existence for 15 or more years; and
- where consent is obtained to disclose the information.

Recommendation 4.28
The Information Commissioner recommends that investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within her office.

Recommendation 4.29

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of all of the provisions listed in Schedule II and any legislation that otherwise limits the right of access. Any provision covered by the general exemptions in the Act should be repealed.

Recommendation 4.30

The Information Commissioner recommends that new exemptions be added to the Act, in consultation with the Information Commissioner, where the information would not be protected by a general exemption that already exists in the Act.

Recommendation 4.31

The Information Commissioner recommends that section 24 and Schedule II be repealed.

Recommendation 4.32

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of the exemptions and exclusions for institutions brought under the coverage of the Act as a result of the *Federal Accountability Act*.

Chapter 5: Strengthening oversight

Recommendation 5.1

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

Recommendation 5.2

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

Recommendation 5.3

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

Recommendation 5.4

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 5.5

The Information Commissioner recommends that the Act maintain the existing power to initiate investigations related to information rights.

Recommendation 5.6

The Information Commissioner recommends that the Act provide for the power to audit institutions' compliance with the Act.

Recommendation 5.7

The Information Commissioner recommends that the Act maintain the existing investigative powers of the Information Commissioner.

Recommendation 5.8
The Information Commissioner recommends that the Act provide for the power to carry out education activities.

Recommendation 5.9
The Information Commissioner recommends that the Act provide for the power to conduct or fund research.

Recommendation 5.10
The Information Commissioner recommends that the government be required to consult with the Information Commissioner on all proposed legislation that potentially impacts access to information.

Recommendation 5.11
The Information Commissioner recommends that institutions be required to submit access to information impact assessments to the Information Commissioner, in a manner that is commensurate with the level of risk identified to access to information rights, before establishing any new or substantially modifying any program or activity involving access to information rights.

Recommendation 5.12
The Information Commissioner recommends:

- that the appointment of the Information Commissioner be approved by more than two-thirds of the House of Commons and the Senate;
- 10 years relevant experience in order to be eligible for the position of Information Commissioner; and
- a non-renewable, 10-year term for the position of Information Commissioner.

Chapter 6: Open information

Recommendation 6.1
The Information Commissioner recommends that institutions be required to proactively publish information that is clearly of public interest.

Recommendation 6.2
The Information Commissioner recommends requiring institutions to adopt publication schemes in line with the *Directive on Open Government*.

Recommendation 6.3
The Information Commissioner recommends including within publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.

Recommendation 6.4
The Information Commissioner recommends including within publication schemes a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested.

Recommendation 6.5
The Information Commissioner recommends a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester. The exemption should continue to allow an institution to withhold information placed in Library and Archives Canada or listed museums by third parties.

Chapter 7: Consequences for non-compliance

Recommendation 7.1

The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.

Recommendation 7.2

The Information Commissioner recommends that section 67.1 prohibit destroying, mutilating, altering, falsifying or concealing a record or part thereof or directing, proposing or causing anyone to do those actions.

Recommendation 7.3

The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Recommendation 7.4

The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Recommendation 7.5

The Information Commissioner recommends that no one acting reasonably and in good faith in the performance of their duties under the Act will be subject to sanction.

Recommendation 7.6

The Information Commissioner recommends increasing the maximum fine for summary convictions under the Act to $5,000 and to $25,000 for indictable offences.

Recommendation 7.7

The Information Commissioner recommends an administrative monetary regime be added to the Act, which should include a requirement to publish any administrative monetary penalty imposed.

Recommendation 7.8

The Information Commissioner recommends that adherence to the requirements of the *Access to Information Act* be made a term and condition of employment for employees, directors and officers of institutions.

Recommendation 7.9

The Information Commissioner recommends that an investigation under the Act must be suspended when the Information Commissioner believes on reasonable grounds that a criminal offence on the same subject-matter of the investigation has occurred.

Recommendation 7.10

The Information Commissioner recommends that the Information Commissioner be permitted to share any information to the appropriate authority where the Information Commissioner believes a referral is warranted about anyone's conduct related to a criminal offence.

Chapter 8: Mandatory period review of the Act

Recommendation 8.1

The Information Commissioner recommends a mandatory parliamentary review of the Act every five years, with a report tabled in Parliament.

Annex: Sources

Access to information laws of other jurisdictions

Comparing elements of the Act to aspects of the laws found elsewhere highlighted what has become standard in the legislation in Commonwealth jurisdictions (such as the Canadian provinces, as well as the United Kingdom, Australia and New Zealand), in other democracies (such as the United States, Mexico and India) and also in those countries whose access laws have been singled out as being particularly strong. These include the 10 laws that received the highest scores on the Global Right to Information Rating (discussed on page 104).[1]

Model laws and guides

Model laws and guides on access to information reflect the highest standards and best practices for access to information legislation. They also provide a framework for enacting or amending legislation. The following were particularly considered:

- **Model Inter-American Law on Access to Public Information**: Drafted by the Organization of American States (of which Canada is a member), in consultation with high-level public officials, experts, academics, and private sector and civil society representatives, this model law provides for the broadest possible right of access to public information among member countries. The law received 142 out of a possible 150 points on the Global Right to Information Rating—the highest score to date.[2]
- **Open Government Guide**: The Transparency and Accountability Initiative, with the support of the Open Government Partnership (OGP), developed this guide to help governments develop the action plans required as part of their membership in the OGP. The guide includes a chapter on the right to information.[3]
- **The Global Principles on National Security and the Right to Information (Tshwane Principles)**: Published in 2013, these principles are the most current guidelines on how to balance access to information with other interests. They are intended for those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds. However, the general principles are relevant for all aspects of an access law. The principles are based on international and national law, standards, good practices and expert opinions. They were drafted by representatives from 22 organizations and academic centres, in consultation with more than 500 experts from more than 70 countries.[4]
- **A Model Freedom of Information Law**: This model law, developed by the civil society group named Article 19 sets out standards for national and international freedom of information legislation, based on international and regional laws and norms, evolving state practice (as reflected in national laws and the judgments of national courts) and the general principles of law recognized by the community of nations. The United Nations and the Organization of American States have both endorsed this model law.[5]

1 These are the laws of Serbia, India, Slovenia, Liberia, El Salvador, Sierra Leone, Mexico, Antigua, Azerbaijan and Ukraine.
2 Organization of American States. "Model Inter-American Law on Access to Public Information and its Implementation Guidelines." 2012. <http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf>.
3 Open Government Guide. "Welcome to the Open Gov Guide." 2013. <http://www.opengovguide.com>. The chapter on right to information can be found at <http://www.opengovguide.com/topics/right-to-info/>.
4 Open Society Foundations, "The Global Principles on National Security and the Right to Information (Tshwane Principles)." 2013. <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>.
5 Article 19. "A Model Freedom of Information Law." 2006. <http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>. United Nations, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain." 2000. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>. Organization of American States, "Report of the Inter-American Commission on Human Rights to the OAS." 1999 (Vol. III).

High-level Canadian reports on access reform

Canadian parliamentary committees, a special task force and the Department of Justice Canada have all studied the Act with a view to reform. The following were among the reports whose analysis and recommendations the Commissioner considered in the drafting of her report:

- ***Open and Shut: Enhancing the Right to Know and the Right to Privacy***: Section 75(2) of the Act required a parliamentary committee to conduct a comprehensive review of the provisions and operations of the Act no later than July 1, 1986 (three years after the Act came into force). Published in 1987, the report of the House of Commons Standing Committee on Justice and Solicitor General concluded that the Act had "major shortcomings and weaknesses."[6]
- ***Access to Information: Making it Work for Canadians***: In 2002, the Access to Information Review Task Force, composed of public servants and advised by two advisory committees,[7] was mandated with reviewing the Act. The task force also assessed the appropriateness and adequacy of the legislation, regulations and policies that related to the Act, and examined how they were being interpreted and applied within the federal government. The resulting report contained nearly 140 recommendations to improve access to information at the federal level.[8]

Government and private members' bills

The Act has not been comprehensively amended since it was enacted, although Parliament has passed a number of piecemeal amendments.[9] In addition, some private members' bills have unsuccessfully tried to reform or otherwise change the Act.[10] The Commissioner considered this legislative activity when formulating her recommendations.

Policy instruments from the Treasury Board of Canada Secretariat

The President of the Treasury Board is the designated minister responsible for administering the *Access to Information Act*. In this capacity, the Treasury Board of Canada Secretariat has published a number of policy instruments, best practices, manuals, guidelines and tools to support the administration of the Act. It also collects and publishes statistics each year on individual institutions' access to information operations. The Commissioner took these and the various policies and related guidance into consideration when formulating her recommendations.

6 Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2nd Sess, 33rd Parl, No 9 (March 1987) (Chair: Blaine A. Thacker), p. xiii.
7 One made up of individuals outside of government and the other of senior government officials.
8 Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services Canada, 2002).
9 Notable among these amendments are *An Act to Amend the Access to Information Act*, SC 1999, c 16, which made it an offence to obstruct the right of access; the *Anti-Terrorism Act*, SC 2001, c 41, which added section 69.1 to the *Access to Information Act*, whereby records could be excluded from the Act upon the issuance of a certificate by the Attorney General; and the *Federal Accountability Act*, SC 2006, c 9, which codified the duty to assist requesters and increased the number of institutions covered by the Act, while at the same time adding institution-specific exemptions and exclusions.
10 For example, Bill C-201, *Open Government Act*, 1st Sess, 38th Parl; Bill C-556, An Act to Amend the Access to Information Act (Improved Access), 2nd Sess, 39th Parl, 2008; Bill C-554, An Act to amend the Access to Information Act (*Open Government Act*), 2nd Sess, 39th Parl, 2008; Bill C-461, an Act to amend the Access to Information Act and the Privacy Act (Disclosure of Information), 2nd Sess, 41st Parl, 2013; Bill C-567, An Act to Amend the Access to Information Act (Transparency and Duty to Document), 2nd Sess, 41st Parl, 2014; Bill C-613, An Act to amend the Parliament of Canada Act and the Access to Information Act (transparency), 2nd Sess, 41st Parl, 2014.

Rating tool

The Global Right to Information Rating was particularly useful in drafting this report. This is a tool for assessing the overall strength of a country's access to information law. The rating indicates the strengths and weaknesses of laws in seven categories: right of access, scope, requesting procedures, exceptions and refusals, appeals, sanctions and protections, and promotional measures. The tool was launched in 2011 and updated in 2013 by Access Info Europe (Spain) and the Centre for Law and Democracy (Canada), two civil society organizations with expertise on access to information.[11]

Consultations

During a four-month consultation starting in Fall 2012, the Commissioner asked the public for advice and input on a broad range of issues related to the Act. Her questions encompassed all aspects of the current access to information regime, such as the coverage of the Act, exemptions and exclusions, and the powers of the Information Commissioner.[12]

In response, the Commissioner received submissions from 44 groups and individuals—including two petitions totalling more than 2,300 signatures—representing a broad spectrum of opinions, both from Canada and internationally. This report draws on those submissions, a summary of which may be found on the Commissioner's website.[13]

Commissioner's reform proposals

This report took into account a number of reform proposals and supporting materials prepared by previous information commissioners. These include Commissioner John Reid's 2006 draft bill, entitled the *Open Government Act*, and 2009 reform proposals by Commissioner Robert Marleau.[14]

In addition, the commissioners' annual and special reports to Parliament, as well as investigation findings, advisory notices and joint resolutions with provincial and territorial commissioners have all informed the recommendations in this report.[15]

11 Access Info Europe and Centre for Law and Democracy. "Global Right to Information Rating." 2013. <http://www.rti-rating.org/>. The rating scheme only measures quality of the legal framework and not the implementation of that framework.
12 Office of the Information Commissioner. "How to get involved." 2012. <http://www.oic-ci.gc.ca/eng/modernization-atia_2012.aspx>.
13 Office of the Information Commissioner. "Summary of submissions." September 2013. <http://www.oic-ci.gc.ca/eng/summary-submissions-sommaire-soumission.aspx>.
14 Office of the Information Commissioner. *Open Government Act*. October 25, 2005. <http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=89501bda-16c0-49a8-b0a1-35fb3c9b65d5&section=a28b5dbf-f427-4d4b-89ba-536d67d40974&file=Access_to_Information_Act_-_changes_Sept_28_2005E.pdf>; Office of the Information Commissioner. "Strengthening the *Access to Information Act* to Meet Today's Imperatives." March 9, 2009. <http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx>.
15 See, for example, the 2013 joint resolution of all of Canada's information and privacy commissioners and ombudspersons: Office of the Information Commissioner. "Modernizing access and privacy laws for the 21st century." 2013. <http://www.oic-ci.gc.ca/eng/2013-reading-room-other-documents-of-interests-2013-salle-de-lecture-autres-documents-interests_4.aspx>.