A Comprehensive Framework for *Access to Information* Reform

A Discussion Paper

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Department of Justice Canada
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Table of Contents

Message from the Minister

First, I wish to congratulate the House of Commons for establishing this Standing Committee on Access to Information, Privacy and Ethics. I wish to encourage its early participation in modernizing the *Access to Information Act* to ensure that the *Act* continues to meet the needs of Canadians and to further strengthen government integrity and transparency.

Canadians have benefited from laws governing access since the *Act* was introduced in 1983. Canada was one of the first countries to enact access legislation and continues to be among the world's leaders in governing in a transparent manner. During the past 20 years, the federal government has taken steps to ensure the *Act* keeps pace with society. For example, the Government conducted a review of the Governance Framework for Canada's Crown Corporations during 2004. Also, the Government announced new policies on the mandatory publication of travel and hospitality expenses for selected government officials, of contracts over $10,000, and of information concerning the reclassification of occupied positions in the Public Service.

But many things have changed in the administration of government, throughout Canadian society and in the world since the *Act* was passed. Citizens have been calling for greater involvement in the decision-making process of their governments and rapid advances in information technology have changed the way governments create, store, manage and communicate information.

To address this changing environment, a government Task Force was created to study and report on the possibilities for access reform. The 2002 report of the Access to Information Review Task Force, entitled *"Access to Information: Making it Work for Canadians,"* included many recommendations that addressed these concerns. As well, some Members of Parliament have introduced Private Members Bills aimed at reforming the *Act*. The Government of Canada agrees that the *Act* must be modernized, and agrees with many of the suggestions put forth in both the Private Members' Bills and in the Task Force report. Many of these reform issues addressed in the Private Members' Bills and Task Force report are complex and would benefit from careful review by the Parliamentary Committee before the Government proceeds with legislative reforms.

We share a common goal - to have the most comprehensive and workable access to information legislation possible. This specially-constituted Committee should be given an opportunity to study the issues and provide its input and advice prior to legislation being introduced in the House of Commons.

Therefore, I have decided that the most appropriate action at this time is to present this Committee with this discussion paper outlining the Government's views on access reform issues for the Committee's full and deliberate consideration. Through this discussion paper and the active engagement of Parliamentarians on the issue of access reform, the Government affirms its commitment to transparency, accountability, integrity and democratic reform.

The Supreme Court of Canada has described the *Access to Information Act*, which allows citizen access to government information, as a pillar of our democracy. At the same time, we must appreciate that certain limitations to the right of access to government information are reasonable and necessary – for example, protecting the privacy of individual Canadians and sensitive matters of national defence. Striking the appropriate balance between openness and confidentiality in access reform is an important part of this exercise. It is important to listen carefully to stakeholders' concerns and to weigh competing interests, and particularly the views of the Information Commissioner. That is why it is so important to engage this Committee before any reforms are made.

By its very nature, the *Access to Information Act* is all about openness, transparency, accessibility to Canadians, and accountability. I believe this requires a thorough, open and inclusive process, with broad opportunity for Parliamentary and public engagement on what the reforms to the *Act* will look like. Canadians need to be fully engaged in reform of an *Act* that is about their rights of access to government information.

This discussion paper has been guided and inspired by the recommendations made by the Access to Information Review Task Force, recent Private Members' Bills, and the Information Commissioner and international sources. I wish to express my gratitude to the Committee for its earlier work that prepared the way for this discussion. I trust that the Committee will benefit further from the perspectives and concerns expressed by various stakeholders and, through debate, inform the future work of the Government in developing an access to information reform package.

Considering the importance of the *Access to Information Act*, we must come together as Parliamentarians to discuss it, we must hear from expert witnesses, we must consider all elements, all angles, all people. Once the Committee has completed its important work, the Government will be in a better position to move forward with a reform package.

Irwin Cotler
Minister of Justice and Attorney General of Canada

Introduction

Canada was one of the first countries to enact access to information legislation and when the *Act* came into force on July 1, 1983, it compared favourably with the freedom of information legislation already in place in a few Canadian provinces and a small number of foreign jurisdictions. The *Act* is of crucial importance in furthering democracy and the principles of openness that are the fundamental values of the society in which we want to live. The Supreme Court of Canada has described the *Act* as a pillar of our democracy which provides citizens with a right of access to government information. In *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403 Mr. Justice La Forest said on behalf of the entire Supreme Court: "The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry."

In this regard, there is nothing seriously wrong with the *Access to Information Act* as it is today. Indeed, the Government believes that the *Act* is basically sound in concept, structure and balance, and the Information Commissioner himself has stated that it is "a very good law." At the same time, more recent freedom of information initiatives underscore the fact that our law could be modernized, especially in regard to the scope of institutions covered by the *Act*. Since the *Act* came into force in 1983, the context of transparency has changed. In October 2004, the Government tabled Bill C-11, an Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings. As a result of recent court decisions, the practices of the Privy Council Office regarding Cabinet confidences have changed. Also, Ministers and their staff routinely put travel and hospitality expense information on the Internet as a matter of policy.

These are positive steps toward meeting the expectations of the Canadian public for a transparent government. However, they do not address the full range of changes in government. Since the Act came into force, government functions have been increasingly outsourced to consultants or contractors, or assigned to alternate service delivery organizations, such as NAVCAN. This suggests that improvements should be made to the federal access to information system to ensure that more entities that perform government-like functions are accountable under the *Act*. As well, technological advances have led to electronic means of storing and managing information, and the availability of websites encourages the government to provide information through proactive disclosure. These are also other changes that reform of the *Act* will have to address.

In considering options for access reform, the Government has studied the recommendations found primarily in certain key documents: the Task Force report, entitled *"Access to Information: Making it Work for Canadians"*, reports from Information Commissioners, Private Members' Bills, and international sources. In August, 2000, the Minister of Justice and the President of the Treasury Board announced the establishment of the interdepartmental Access to Information Review

Task Force. The Task Force was asked to review and make recommendations on all components of our Access to Information framework. Its Report, "*Access to Information: Making it Work for Canadians*," was released on June 12, 2002. The Task Force made a broad range of recommendations (139) for legislative and administrative changes that have the potential to impact the way every federal department, agency and Crown corporation does business. The recommendations are based on comprehensive research and analysis as well as on consultations with international partners, stakeholder groups and the public. The Report, together with the background research papers prepared for the Task Force, comprise a significant contribution to our knowledge of the federal access to information regime.

Successive Information Commissioners have highlighted possible legislative reforms, including the 1994 report entitled *The Access to Information Act: A Critical Review,* and the *Blueprint for Reform* outlined by the current Commissioner in his 2000-2001 Annual Report.

Over the years, the Government has studied carefully the Private Members' Bills that have been introduced in the House, among them the more recent Private Members' Bills of Mr. John Bryden, M.P. Liberal (Bill C-462) and Mr. Pat Martin, M.P. New Democrat Party (C-201). These Bills were introduced in 2003 and 2004, respectively, and reflect a number of recommendations made by the Task Force Report. The Government has studied the proposals in the Private Members' Bills and has found them a useful baseline for consideration, like the reports of the Task Force and the Information Commissioner.

Finally, there have been some interesting developments in access to information legislation internationally and within Canada. The Committee members may wish to compare our federal Act with a number of statutes in force in foreign jurisdictions as well as in Canada. Copies of various foreign (United Kingdom, New Zealand, Ireland and Australia) and provincial statutes (Québec, Ontario and British Columbia) can be made available to the Committee.

All of these sources have played an important role in understanding the complexities of access reform, and the Government seeks the views of the Committee on the issues put forward in this paper.

Government Views on Legislative Reform

To facilitate future discussions prompted by this paper, the Government's views on possible legislative reforms have been organized under a number of themes: expanding coverage under the *Act*, modernizing exclusions and exemptions, updating processes, and administrative reform. These themes represent the major areas of the *Act* in need of modernization.

1. Expanding Coverage under the *Act*

A number of advocates for reform maintain that the *Act* should automatically apply to all organizations delivering government programs and services, including all Crown corporations. The Task Force recommended instead that a comprehensive review of such organizations be undertaken first to determine whether they meet certain criteria for coverage. The Government could then, by order-in-council, add any organization meeting the criteria to Schedule I of the *Act*.

The Task Force also suggested that there may be a need for additional exclusions or exemptions to accommodate the mandates of organizations that otherwise meet the criteria (e.g., to prevent the disclosure of the Canadian Broadcasting Corporation's program materials to its competitors or of a journalist's confidential information).

In addressing the question of expanded coverage under the *Act*, the Government has focused on five primary areas: Crown corporations; federal interests outside the Government of Canada; Parliament and Officers of Parliament; Agents of Parliament; and Universal Access. Some of these areas lend themselves to straightforward solutions, while others require further study and nuance.

1.1 Crown Corporations

Currently, 28 parent Crown Corporations are subject to the *Act*, while 18 other parent Crown corporations are not. The Task Force reported that it could not identify an obvious rationale or any apparent criteria that were used in determining which of these organizations should be subject to the *Act*.

In keeping with the Task Force recommendation, the Government initiated in February 2004 a review of Crown Corporations Governance and considered whether the 18 parent Crown corporations under review should be made subject to the *Act*. On February 17, 2005, the President of Treasury Board released a report of this review, entitled "*Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations*" (which can be accessed at http://www.tbs-sct.gc.ca/report/rev-exa/gfcc-cgse_e.asp).

The Crown Corporations Governance Report concluded that 17 of the 18 parent Crown corporations reviewed should be made subject to the *Access to Information Act* in order to provide the public with a way of examining information on how these entities fulfil their mandates and, ultimately, to reinforce their accountability regimes.

In the Report, the Government identified 10 parent Crown corporations that could be covered by the *Access to Information Act* without requiring further reform. It committed to immediately extending the *Act* to the Canada Development Investment Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Cape Breton Growth Fund Corporation, Enterprise Cape Breton Corporation, Marine Atlantic Inc. Old Port of Montreal Corporation Inc., Parc Downsview Park Inc., Queens Quay

West Land Corporation, and Ridley Terminals Inc. As the current exemptions in the *Act* are considered sufficient to protect the sensitive commercial information of these 10 parent Crowns, the extension of the *Act* for these 10 Crown corporations can be achieved by Order in Council without reform to the *Act*. The process for extending the *Act* to these 10 parent Crowns is underway.

However, seven of the Crown corporations expressed strong concerns that the exemptions in the current Act were not sufficient to protect their commercial competitive information, third party confidential information and other unique interests. In particular, the Canadian Broadcasting Corporation (CBC) has expressed concerns that its journalistic integrity could be compromised by being made subject to the *Act*. So, although the Government also committed to extend the *Act* to cover these seven parent Crown corporations (Atomic Energy of Canada Limited, Canada Post Corporation, Canadian Broadcasting Corporation, Export Development Canada, National Arts Centre Corporation, Public Sector Pension Investment Board, and Via Rail Canada Inc.), further amendments may be required to ensure the *Act* properly addresses their concerns.

The Government would like to determine how the concerns expressed by the seven Crowns can be appropriately addressed taking into account the need for transparency and accountability. For example, a new provision could be added, similar to s. 18, to permit Atomic Energy of Canada Limited, Canada Post Corporation, Export Development Canada, and Via Rail Canada Inc. to refuse to disclose any record that contains trade secrets or financial, commercial, scientific or technical information and that is confidential and is treated consistently in a confidential manner. The new provision would be narrow in scope such that information related to the administration of the corporation or to programs that are funded solely by appropriations (for example, the mail service to Parliament provided by Canada Post or nuclear facilities operated by Atomic Energy Canada Limited that are subject to regulation by the Canadian Nuclear Safety Commission) would not fall within it. In other words, the provision would be targeted to protecting the core sensitive information that is vital to the competitive position of these corporations without subjecting them to the additional costs of having to prove harm.

Another proposal under consideration is to create new provisions to provide mandatory exemptions to protect third party confidential information obtained by the National Arts Centre Corporation, Public Sector Pension Investment Board, Atomic Energy of Canada Limited, and Export Development Corporation. Each provision would be tailored to meet the specific and unique sensitivities of each corporation. A public interest override provision would also be included, similar to subsection 20(6), relating to the records of Atomic Energy of Canada Limited.

The Government is sensitive to the concerns raised by the CBC. Information from journalistic sources and material related to program content are recognized as critical information that requires a high degree of protection. The degree to which the existing exemptions of the Act could protect such information is not clear. The Government is receptive to an exclusion from the Act of records that contain information relating to the

journalistic integrity and program or artistic material of CBC. This is consistent with the treatment of government broadcasting corporations in other countries, such as the United Kingdom and Australia. This proposed amendment would also be consistent with the exclusion contained in Subsection 4(2) of the *Personal Information Protection and Electronic Documents Act*, which currently applies to the CBC.

For those Crown corporations not already subject to the *Privacy Act*, the extension of the *Access to Information Act* to those Crown corporations will require extension of the *Privacy Act* to them as well. The Order in Council granted under the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) to make three of the parent Crown corporations subject to *PIPEDA* will have to be revoked. The *Library and Archives Act* will also apply to those Crowns not already subject to the *Privacy Act*.

Finally, it should be noted that the Government has not recommended inclusion at this time of the 18th parent Crown corporation under review, the Canada Pension Plan Investment Board. Given the federal/provincial nature of the Board, the provinces will be consulted on the Board's inclusion as part of the regular triennial review process.

The Government welcomes the views of the Committee on the proposals under consideration for specific exemptions for the six Crown corporations and the above-described exclusion for the CBC.

1.2 Federal Interests Outside of the Government of Canada

Following the Crown Corporations Governance Review, the Government is also prepared to review federal interests outside of the Government of Canada, such as wholly-owned subsidiaries of Crown corporations, collaborative and funding arrangements with organizations not controlled by the Government, and other corporate interests of the federal government (such as shared governance corporations and joint or mixed enterprises), to determine whether they should be covered by the Act. At this stage, the challenge for the Government is to decide on appropriate criteria for this review.

The Task Force recommended criteria to be added to the *Act* for determining what organizations should be covered. These criteria are based on government ownership and control of an organization, or the fact that public functions relating to health and safety, the environment, or economic security are carried out by the organization. The criteria include an exception where the mandate or structure of a particular organization is incompatible with coverage under the *Act*. For example, it may not be appropriate for a federal-provincial initiative, or a federal-private sector arrangement, to be subject to the federal access to information legislation.

With respect to the choice of criteria, the Government notes that Bill C-201, introduced by Mr. Pat Martin, M.P., NDP, proposed to expand definition of "government institution" to have the *Act* apply to other entities, such as subsidiaries of Crown corporations and to organizations that receive more than two-thirds of their funding from federal government appropriations. The amount of government financing provided to organizations could

fluctuate from year to year, and, therefore, status of coverage under the *Act* would also fluctuate.

The Government considers that the criteria to guide this review should be related to stable characteristics of the organization, such as function or controlling interest by the Government, and possibly not to criteria that relate to fluctuating characteristics, such as the level of federal funding.

Currently, the public is made aware of government institutions that are subject to the *Act* through Schedule I to the *Act*, where government institutions are listed. If criteria for coverage are chosen that result in fluctuations in status of coverage, a new mechanism may need to be developed to add or delete names in a timely fashion.

The Government seeks the input of the Committee on the appropriate criteria for determining which federal interests outside of the Government of Canada should be covered by the *Act*, and whether the Task Force criteria should be further refined to assist the Government in its review.

It is possible that the proposal in Bill C-201 was partly to improve the accountability of the government institutions that fund such organizations and that perhaps a more targeted solution than extending the *Act* to the recipient organizations may be found to address this concern.

The Government is also considering the addition of a provision to the *Act* requiring it to report to Parliament on the outcome of this initial review, as well as on determinations made each year about whether or not to include any newly-created organizations.

The Government invites the Committee to consider whether a more effective approach would be for the Government to improve the reporting and accountability activities of the funding government institutions, instead of extending the *Act* to recipient organizations.

1.3 Parliament and Officers of Parliament

The Task Force recommended that coverage under the *Act* be expanded to include the House of Commons, the Senate and the Library of Parliament. It added, however, that the *Act* should exclude information protected by parliamentary privilege, political parties' records, and the personal, political and constituency records of individual Senators and Members of Parliament. Since it would be inappropriate for the courts to review a parliamentary decision not to disclose information, the Task Force also recommended that Parliament consider alternative redress processes.

The Government notes that Bill C-462 and Bill C-201 proposed the amendment of the *Parliament of Canada Act* to provide a right of access to information in records under the control of the Senate, the House of Commons and the Library of Parliament respecting the financial administration of those institutions. The intent of the Private Members' Bills was to include Members of the Senate and the House of Commons.

The Government acknowledges the interest expressed by Parliamentarians in these proposals and invites the Committee's views on whether and how parliamentary institutions and Members, as well as Officers of Parliament, such as the Ethics Commissioner, Speaker and Clerk of the Houses, should be subject to the *Act* (and *Privacy Act*), and what special protections they would need if they were covered, as well as on possible redress mechanisms.

1.4 Agents of Parliament

The Government is considering extending the *Act* to the Offices of the following Agents of Parliament: the Information Commissioner, the Privacy Commissioner, the Commissioner of Official Languages, the Chief Electoral Officer (CEO), and the Auditor General. It should be noted that the *Privacy Act* already applies to the Office of the Auditor General, the Office of the Chief Electoral Officer and the Office of the Commissioner of Official Languages. As a result, those offices have operated under a statutory regime involving some of the same exemptions and exclusions as the *Access to Information Act*, as well as an identical complaint investigation process.

In 1986, the Standing Committee on Justice and Solicitor General reviewed the *Access to Information A*ct pursuant to Subsection 75(2) of the *Act* and in its report, "*Open and Shut: Enhancing the Right to Know and the Right of Privacy*", the Committee recommended that all Agents of Parliament be covered, including the CEO. The Task Force recommended that the Information and Privacy Commissioners, the Commissioner of Official Languages, and the Auditor General be covered by the *Act*, except for records relating to their audit or investigation processes. However, the Task Force suggested that a separate disclosure regime be established for the Office of the Chief Electoral Officer under the *Canada Elections* Act which already contains disclosure provisions. The Task Force also noted that, unlike other Agents of Parliament, the Chief Electoral Officer does not oversee government operations. Finally, the Government notes that Bills C-462 and C-201 proposed to cover the five Agents of Parliament.

Government officials have consulted with the offices of the five Agents of Parliament to discuss various approaches for coverage and specific needs for protection of records. The proposed application of the *Act* to these Agents raises a number of complex issues that would benefit from study by the Committee before any policy decisions are made. In particular, the specific nature of the information or records received or generated by these Agents should be considered in order to assess whether the *Act* would provide sufficient protection if applied, and more basically, whether, on balance, extension of the *Act* would be beneficial.

The Government has identified four possible approaches deserving of further study. First, the *Act* could apply to all activities of the Agents, but exemptions could be developed to protect from disclosure records pertaining to their investigative or audit activities and their policy advisory activities.

A second approach would be to cover all activities but exclude from the application of the *Act* records pertaining to the Agents' investigative or audit activities, to avoid potential conflicts of interpretation between the *Act* and the Agents' enabling statutes.

A third approach could be to extend the *Act* to apply only to records detailing the provision of goods and services or the travel and hospitality expenditures, allowances and benefits reimbursed to the Offices of the Privacy Commissioner, Information Commissioner, Auditor General, the Commissioner of Official Languages and the Chief Electoral Officer and their senior staff in the administration of their mandate.

A fourth approach would be to simply continue to have the Agents routinely disclose their administrative records in full. Currently, the five Agents voluntarily conform to the proactive disclosure policies issued by the Government in 2003 and 2004 with respect to travel and hospitality, contracts over $10,000 and reclassification. Although these institutions would continue to protect their investigatory and audit records, key records concerning the staffing and management of their support services would be open to public scrutiny.

The provisions of the *Access to Information Act* and *Privacy Act* could be further amended by adding an additional complaint mechanism and oversight provisions for the complaints and investigations involving the Offices of the Information Commissioner and Privacy Commissioner. As an example of one possible scheme, a retired Federal Court judge could review complaints under Section 12 of the *Privacy Act* with respect to requests for personal information made to the Office of the Privacy Commissioner (OPC) by the OPC's employees and officers to avoid conflicts of interest. Similarly, a retired Federal Court judge could review complaints made in connection to requests made under the *Access to Information Act* to access records under the control of the Office of the Information Commissioner (OIC) to avoid conflicts of interest. All other complaints arising under the *Access to Information Act* and *Privacy Act* would be handled by the Information Commissioner and Privacy Commissioner respectively, as usual.

An alternative oversight scheme under consideration would involve the delegation of the duties of investigation to a person independent of the parties. Such a scheme is currently in place for investigations of the Office of Official Languages under the *Official Languages Act*.

The Government invites the views of the Committee on whether some or all Agents of Parliament should be made subject to the *Act* and, if so, how this should be accomplished.

1.5 Universal Access

The *Access to Information Act* currently provides a right of access to records under the control of a government institution to: Canadian citizens, permanent residents within the meaning of the *Immigration Refugee Protection Act*, and individuals and corporations present in Canada.

The Task Force recommended that the *Act* be amended to provide that any person has a right of access, as is the case in many other jurisdictions. The Task Force added the caveat that this should only be done following discussions with those departments most likely to be affected about the impact on costs and how to manage any increase in requests that may result.

The departments that are most likely to receive requests from persons located in another country (e.g., Citizenship and Immigration Canada, Foreign Affairs Canada and Department of International Trade) have considered the possible impact of creating a universal right of access, and whether such a change could be implemented in a way that minimizes risks to existing programs. For example, extending the right of access to all persons may only be practical if the *Act* is amended to broaden the grounds for extending the time limit for processing requests. This would accommodate the situation where both the requester and the records subject to the request are located abroad, the expertise to review the records is situated in Canada, and it will take more than 30 days simply to deal with the logistics of transferring the records back and forth.

The Government is of the view that no amendment to the *Act* is required to create a universal right of access. The *Act* already contains a provision authorizing the Governor-in-Council to extend the right of access by order, subject to any conditions it deems appropriate. Before any decision is taken by the Government to extend the right of access, the Government needs to assess the cost and ensure that any proposed extension would not threaten the delivery of existing programs.

The Government seeks the opinion of the Committee on whether and under what circumstances it would be appropriate for the Government to consider broadening the right of access.

2. Modernizing Exclusions and Exemptions

Access rights are subject to specific and limited exclusions and exemptions, intended to balance freedom of information against other public interests, such as individual privacy, the relationship of the Government with third parties, commercial confidentiality, law enforcement, national security, international affairs and defence, government financial decision making and the frank communications needed within government for effective policy-making.

The Government considers that the overall structure of the *Access to Information Act* is sound, and that the current exclusions and exemptions strike the right balance between the citizen's right to know and the need to protect certain information in the public interest. If the *Act* is extended to apply to other entities, some of the exclusions and exemptions may need to be reviewed to ensure they are appropriate and effective for the new entities. The Government agrees with the Task Force that a certain degree of clarifying and modernizing of the *Act* is necessary to ensure the *Act* reflects current realities. This is, for example, true with respect to Cabinet confidences.

2.1 Cabinet Confidences

In order to make decisions on government policy, Ministers meet regularly in Cabinet to exchange views and opinions on policy matters in order to come to a consensus. For this decision-making process to be fully effective and in order to foster Cabinet solidarity, it is essential that ministers be able to have full and frank exchanges between and among themselves, and to have the assurance that these exchanges will be protected. The privacy of these deliberations is protected by the privilege associated with Cabinet confidences. The fact that Ministers take the Privy Councillor's oath, which requires them to maintain the secrecy of the matters they discuss in Council, is a clear indication of the high importance attached to this principle.

The importance of Cabinet confidentiality for the inner workings of government has been widely recognized by Parliament and the courts. In its 2002 decision in *Babcock*, the Supreme Court of Canada explained the importance attached to Cabinet confidentiality and stated as follows:

> "The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must 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[.] (…)"1

The Court referred to Cabinet confidentiality as "essential" to good government.

The privilege associated with Cabinet confidentiality finds its expression in three statutes: section 69 of the *Access to Information Act*, section 70 of the *Privacy Act*, and section 39 of the *Canada Evidence Act* (*CEA*).

The *Access to Information Act* and *Privacy Act* exclude Cabinet confidences from the class of information to which access can be obtained through their provisions. This means that when the government is preparing documents to disclose in response to an

1 *Babcock v. Canada (Attorney General),* [2002] 3 S.C.R. 3 [*Babcock*], at para. 18.

access request made under the *Acts*, it does not include documents, or portions of documents, that include Cabinet confidences.

For its part, section 39 of the *CEA* serves a different purpose. In the course of litigation, requests will usually be made, or orders issued, for the disclosure of all documents and information relevant to the issues at play. It often happens that there are, among the relevant documents collected by the government in answer to such requests or orders, Cabinet confidences. Section 39 of the *CEA* allows the Clerk of the Privy Council to protect Cabinet confidences from disclosure in such circumstances through the issuance of what is referred to as a section 39 certificate.

Recently, two key court decisions have significantly changed the existing regime for the protection of Cabinet confidences. These two decisions are: *Babcock* and *Ethyl* [2].

Prior to *Babcock,* when an opposing litigant requested or obtained an order for the disclosure of all relevant documents, the Clerk made an assessment as to whether or not any of the information subject to disclosure fell within the definition of a Cabinet confidence. When this was the case, the Clerk issued a certificate to protect that information from disclosure. In *Babcock*, the Supreme Court of Canada decided that, under s.39, the Clerk has a discretion, rather than a mandatory duty, to protect Cabinet confidences. The decision to object to the production of documents, the Court held, could be exercised by the Clerk only after weighing the potential harm of disclosing a Cabinet confidence against the benefit to the administration of justice that would flow from its disclosure. This is what has come to be known as "public interest balancing."

All three *Acts* describe a subset of Cabinet confidences called "discussion papers". These are documents whose purpose is to present to Cabinet background explanations, analyses of problems or policy options. If Cabinet has made a decision on the issue to which a discussion paper pertains, that discussion paper may no longer be protected once the decision has been made public, or after four years, if the decision has not been made public.

As a result of administrative reforms that were implemented around 1985, free-standing discussion papers ceased to be produced. Following this change in the Cabinet papers system, the government took the position that the discussion paper provisions no longer applied to information contained in Cabinet papers produced after that date.

In *Ethyl*, the Federal Court of Appeal held essentially that form could not prevail over substance. It ruled that, the legislation not having been amended, the discussion paper provisions must continue to be given effect. More specifically, the Court decided that those parts of Cabinet documents that are the equivalents of what used to be found in discussion papers (*e.g.*, background explanations, analyses of problems) must be identified and treated in the same manner as if they appeared in a discussion paper. As a

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2 *Canada (Minister of Environment) v. Canada (Information Commissioner)*, [2003] F.C.A. 68 [*Ethyl*].

result, such information is now disclosed much sooner after the relevant Cabinet decision has been made.

While the Government strongly believes that the Cabinet decision-making process must continue to be protected, it also recognizes that the current regime is twenty years old and needs to be modernized. In particular, it is important that any new legislative scheme should reflect, in as full and appropriate a manner as possible, the recent court decisions. In addition, there are other changes that can be made and should be considered to enhance transparency and to ensure that the overall scheme is fair and balanced, in light of all relevant considerations.

The Government is considering the following changes to the Cabinet confidence regime:

On the scope of protection, the Government would narrow the ambit of Cabinet confidentiality by focusing on its essence in a manner largely similar to what exists in the provinces and in most other Commonwealth countries. The new – and shortened – definition, which would be in keeping with the Task Force's recommendation, would be applicable to the three *Acts*.

The definition of a Cabinet confidence, more formally referred to as a "Confidence of the Queen's Privy Council for Canada", would essentially focus on information or communications that reveal the substance of Cabinet's deliberations, decisions, and submissions. In addition, the definition should give full effect to the decision of the Federal Court of Appeal in *Ethyl*. The impact of this new definition would reduce the amount of documents protected as Cabinet confidences and could result in greater accessibility under the *Act*, and therefore would provide greater transparency.

Cabinet confidences are currently excluded from the application of the *Access to Information Act* and the *Privacy Act*, and the Government believes this should continue with one important modification. The Government would enshrine in the legislation the right of the Information Commissioner (and the Privacy Commissioner) to go to court to challenge definitional issues. More specifically, in the access context, the proposal would allow the Information Commissioner to ask the Federal Court to review the government's determination that information sought under an access request, falls within the definition of a Cabinet confidence and, for that reason, is properly not accessible pursuant to the *Act*. If the Court did not agree with the determination made by the government, then the information would no longer be excluded from the application of the *Act*.

With respect to the application of Section 39 of the *CEA* and the manner in which public interest balancing is conducted, the Government proposes the following changes:

Firstly, the Clerk would determine whether or not information falls within the definition of a Cabinet confidence. When that is the case, the Clerk would have to determine whether or not the disclosure of the information would unduly prejudice effective decision-making by Cabinet or undermine the solidarity of Cabinet. If the Clerk was of

the view that decision-making would be so prejudiced or that solidarity would be so undermined, the Clerk would issue a certificate objecting to the disclosure of the information. The Government believes that the Clerk, being the custodian of Cabinet confidences, is best placed to make these two initial determinations.

When faced with such a certificate, a litigant could apply to the Federal Court, and seek to obtain the disclosure of the information. If the applicant could show that other public interests (such as, for example, the protection of individual rights under the *Charter of Rights and Freedoms*) clearly outweigh the public interest in confidentiality, then the judge could order disclosure. If the Court found it necessary, it could examine the Cabinet confidences in question. In addition, either party could appeal the decision of the trial judge made under this new recourse.

In order to ensure that the same interpretation of the law applies throughout the country, the Government is of the view that the Federal Court should be given this role. This, incidentally, is already the case in the context of Section 38 of the *CEA* and issues of national security issues and the protection of sensitive information.

Currently, under all three *Acts*, Cabinet confidences are protected from disclosure for a period of twenty years. In assessing the Task Force's recommendation that the maximum period of protection be reduced to fifteen years, the government reviewed the regimes in place in other jurisdictions which have a scheme similar to the federal one.[3] Our review of provincial and foreign statutes disclosed that the twenty-year terms currently provided in the three federal *Acts* is well within this range, and therefore the Government is not convinced that a change is warranted.

The Government would welcome the Committee's views on whether the proposed changes enhance transparency and the protection of the interests of litigants, while continuing to protect the essential confidentiality of Cabinet deliberation in our system of government.

2.2 Records in Ministers' Offices

The federal government has always taken the position that the *Access to Information Act* does not apply to records under the control of Ministers' offices, an interpretation that was endorsed by the first Information Commissioner, Ms. Inger Hansen, in her 1989 annual report, in which she indicated that the House of Commons and Ministers'offices are not subject to the *Access to Information Act*.

The federal government interprets the *Act* to mean that a Minister's office is separate and apart from the government institution or department over which the Minister presides. The Information Commissioner is currently challenging the Government's interpretation

3 In Canadian provinces, the period ranges considerably: for example, from 15 years in British Columbia, to 20 years in Ontario, to 25 in Quebec. At the international level, the period of protection in Australia is 20 years and in the U.K. 30 years.

before the Courts. The Task Force suggested that the Government await the court's ruling before considering any amendment to the *Act*.

The reasons that some twenty years ago motivated the exclusion from the application of the *Act* to records in Ministers' offices, are still valid today. This exclusion allows for the free and frank debates that are required to ensure the proper functioning of the political process. Our system of democracy depends on electoral, parliamentary and decision-making processes in which political parties and political considerations play vital roles. These processes require confidentiality in order to function effectively and fairly. Further, Ministers, like all Members of Parliament, devote significant time and effort responding to constituents' concerns. Such work requires confidentiality in order to protect the privacy of constituents.

The exclusion of records in Ministers' offices from the *Act* does not result in the public having absolutely no access to such records. On the contrary, under the current regime, records that a government institution receives from a Minister's office or sends to a Minister's office are covered by the *Act*. In practice, this means that, where a ministerial record is sent to the department, it comes under the control of the department and the *Act* applies. Similarly, where records under the control of a government institution are sent to a Minister's office, these records are subject to the *Act*.

In addition, in accordance with the Government's commitment to promote the values of transparency and accountability, all Ministers and exempt staff have been encouraged by the Prime Minister, since December 12, 2003, to proactively disclose information about their travel and hospitality expenses. There is no intention to move away from this approach.

A Minister's office provides partisan political support to the Minister to assist in the fundamentally political processes of Cabinet decision-making and parliamentary democracy. It is, therefore, distinct in its composition and functions from the relevant government institution, staffed by the non-political, non-partisan, professional, public service. The federal government's approach to the protection of records in Ministers' offices is consistent with the approach of other provincial and Westminster-type jurisdictions, which recognize the need to treat records under the control of a Minister's office differently from those under the control of a government institution.

Thus, while the Government does not favour legislative changes to the treatment of records under the control of a Minister's office, it nonetheless welcomes the views of the Committee on this complex issue.

2.3 Clarifying Existing Exemptions

In its Report, the Task Force recommended a number of changes to existing exemptions that echo proposals made by the Information Commissioner in the Blueprint for Reform set out in his 2000-2001 Annual Report.

The Government considers that the proposals to amend a number of the exemptions provisions and to establish new protections might be beneficial and invites the views of the Committee.

Section 13 – Records obtained from Other Governments

Section 13 of the *Act* provides mandatory class protection for records "obtained in confidence" from other governments, foreign, provincial and municipal as well as international organizations. The need for such an exemption is compelling since each government should be generally responsible for controlling and releasing its own information. As recommended in the 1986 Parliamentary Committee report, *Open and Shut*, and in the Task Force report, the Government considers that Section 13 could be amended to extend to the subdivisions of foreign states (e.g. an American state) and to include foreign authorities with which Canada has international and/or commercial relations.

Currently, Section 13 (3) defines "aboriginal government" as meaning (a) only the Nisga'a Government as defined in the Nisga'a Final Agreement, and (b) the Council, as defined in the West Bank First Nation Self-Government Agreement. The Government believes that Paragraph 13 (1) (e) should also be amended to accommodate the extension of the *Access to Information Act* to specified aboriginal governments. As more and more self-government agreements are being concluded and given effect by legislation and where a self-government agrees to be governed by the *Act*, Paragraph 13(3)(e) has to be re-opened to add a reference to each new aboriginal government. The Government considers that a more practical option could be implemented, such as creating and adding to a Schedule to the *Act* to list aboriginal governments benefiting from the protection of Section 13 of the *Act*. The name of the new aboriginal government would be added to Schedule III at the same time that legislation is passed to give effect to the related self-government agreement.

The Government seeks the Committee's views on whether it would be appropriate to amend Section 13 as proposed above.

Section 17 – Health and Safety

Section 17 provides a discretionary, injury-based exemption for information which, if disclosed, could reasonably be expected to threaten the safety of individuals. The current Information Commissioner and his predecessor have both recommended that Section 17 be amended to incorporate the words "mental or physical health" into the threat to an individual's safety, thereby extending protection to information that could reasonably be expected to threaten an individual's mental or physical health.

The Freedom of Information legislation in force in British Columbia has made a useful modification to the concept of "threats to the safety of individuals", by adding "mental or physical health". As suggested by the Task Force, and as proposed in Private Members' Bills C-462 and C-201, the Government considers that Section 17 could be extended to

records that, if disclosed, would threaten the physical or mental health of individuals or would offend the dignity of any individual even after that individual is deceased, such as photographs, videos or other depictions of violent crime, crime scenes and victims, which are now protected as "personal information" only for 20 years following the death of a victim.

The Government seeks the Committee's views whether Section 17 should be amended to protect records that, if disclosed, would threaten the physical or mental health of individuals or would offend the dignity of any individual.

Section 18

Section 18 deals with the protection of the economic interests of the Government of Canada. Both the Information Commissioner's 1994 report, entitled "*The* Access to *Information Act*: *A Critical Review*" and the Task Force's report, noted that the government's competitive, business-oriented activities are being carried out increasingly by special operating agencies (SOAs), which are part of or associated with a government department or agency, or by some other form of alternative service delivery. Section 18(b) protects information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution as a whole. The competitive business activities of these agencies may not be extensive enough to affect the competitive position of a government institution as a whole, and therefore Section 18 would not apply. As a result, many SOAs are expected to compete with the private sector without the protection afforded to competitors under Section 20, which protects third party information. To resolve this problem, Section 18 (b) could be amended so as to include apply to the Special Operating Agencies associated with various departments.

The Government is also considering recommendations made by the 1986 Parliamentary Committee, the Information Commissioner (Annual Report 93-94) and the Task Force, that Section 18 be amended so that it no longer would protect the results of product and environmental testing. The 1986 Parliamentary Committee argued that without such an amendment, government institutions may not have to disclose their own product or environmental testing results, even though the results of testing carried out by, or on behalf of, such institutions on private sector products or activities, are subject to disclosure. Such an amendment would bring Section 18 in line with Section 20, which expressly excludes from protection the results of product or environmental testing done by a company for a government institution.

The Government would welcome the Committee's views on these proposed amendments to Section 18.

Section 20 – Third Party

Whereas Section 18 protects the Government's own commercial information, Section 20 protects confidential commercial information which third parties provide to the Government. This is one of the few areas of the Act where there is a substantial body of

case law. The Government considers that the provision is basically sound and that the courts have consistently applied it as originally intended by Parliament.

Subsection 20(6) permits the head of a government institution to disclose information protected by Section 20(1) (except trade secrets) if that disclosure would be in the public interest as it relates to public health, public safety, or protection of the environment and if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

Both the Information Commissioner and the Task Force have recommended that the override in Section 20(6) be broadened to include consumer protection as an element of the public interest to be considered (along with public health, public safety and protection of the environment) in deciding whether to disclose the information in question. The Government agrees with this recommendation.

Currently, Section 20 does not protect the information provided to the Government about a third party's critical infrastructure vulnerabilities. Taking into account the recommendation of the Task Force and the proposals in Bills C-462 and C-201, the Government considers that an amendment to Section 20 would ensure its application to such information.

The Government would welcome the Committee's views on whether these proposed amendments to Section 20 would be useful.

Section 21 – Advice, Deliberations

Section 21(1)(a) is a discretionary exemption allowing the head of the institution of protect advice or recommendations developed by or for a government institution or a minister of the Crown. This is an important exemption for protecting the development of professional and impartial advice by the bureaucracy on sensitive policy and operational matters. Although the exemption was not intended to protect factual information, statistical surveys, and the results of public opinion polls, the provision appears to be broad enough to allow it. Therefore, it has been proposed on several occasions that the exemption be clarified to ensure that it does not protect such records. This proposal would, in part, codify recent case law that has specified that advice does not include factual information.

Section 21(1)(d) is also a discretionary exemption that protects plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation. If the plans are not implemented, or if no decision relating to them is taken, then the plans can stay protected for the full period specified for the exemption (20 years). According to the Task Force recommendation, the head of a government institution should have the discretion to protect such plans for a reasonable period of time, during which their status may change (e.g. work may cease and recommence a number of times), but that the protection should not exceed five years.

The Government is considering an amendment to Section 21 to implement this recommendation.

The Task Force recommended that Section 21 be amended to extend to consultants' advice the protection currently given to advice or recommendations developed by public servants.

The Government seeks the views of the Committee on whether it would be appropriate to apply this exemption to work done by consultants for or on behalf of government institutions.

Section 22 - Audits

Section 22 currently gives the head of a government institution discretion to refuse to disclose information relating to testing or audit procedures or techniques, or details of specific tests to be given or audits to be conducted, if disclosure would prejudice the use of results of particular tests or audits.

The Task Force recommended that Section 22 be amended to give the head of government institutions the discretion to refuse to disclose draft internal audit reports and related audit working papers until the earliest of: the date the report is completed; six months after work on the audit has ceased; or two years following commencement of the internal audit. The Auditor General has expressed concern about the negative impact the release of draft internal audit reports and working papers has on the internal audit process. The Auditor General has argued that the disclosure of internal audit working papers under the *Access to Information Act* risks compromising the internal auditor's ability to meet professional standards, and could reduce the extent to which the Auditor General could rely on internal audit work.

Given the role of the Auditor General in providing independent and objective examinations of government operations to Parliament, including detecting and exposing improper behaviour through the use of audits, the Government finds her arguments in this area compelling.

The Comptroller General, who has recently been given the task of ensuring that the Government has an effective internal audit function, strongly believes that internal auditing is not and cannot be effectively carried out under the existing provisions of the *Act*. The Comptroller General is of the view that internal audit working papers and draft reports contain information that has not been validated or verified and may contain errors of fact or erroneous conclusions. The release of such records, even after the audit has been completed and the final report has been issued, could therefore harm individuals or programs and will undermine the credibility of the internal audit function. In addition, the potential of the release of audit working papers has a chilling effect on the candour of individuals in their dealings with auditors.

The Comptroller General is recommending an amendment to Section 22 to add a mandatory 20-year protection for draft internal audit reports and working papers. Final audit reports would not be covered by this protection. If no final audit report is released within two years after the day that the audit was first commenced, then he proposes that the most recent draft of the report not be covered by this protection. In all cases, the Comptroller General recommends that the audit working papers and the earlier drafts of the report would remain protected for a period of 20 years.

The Government would welcome the Committee's views on whether it would be appropriate to amend Section 22, either to require or to permit the head of a government institution to refuse to disclose draft internal audit reports and related audit working papers, and, if so, how long should the period of protection continue.

Section 23 – Solicitor-Client, Other Privileges and Other Issues related to Legal Proceedings

Section 23 permits the head of a government institution to refuse to disclose records containing information subject to solicitor-client privilege. The doctrine of solicitor-client privilege has been recognized as a fundamental principle of our legal system for over 300 years. The exemption in Section 23 ensures that the government has the same protection for its legal documents as persons in the private sector. The exemption was made discretionary to parallel the common law rule that the privilege belongs to the client who is free to waive it. At the same time, Section 25 states that the head of a government institution shall disclose any part of a record that does not contain, and can reasonably be severed from any part of the record that can be protected using an exemption in the *Act*. The interplay of these two sections has been somewhat problematic, in that disclosure of parts of a document subject to solicitor-client privilege could constitute waiver of the privilege for the entire record.

The Task Force recommended an amendment to confirm that disclosure of information from a record subject to privilege would not terminate privilege in respect of the rest of the information in that record or in a related record. This proposal was intended to ensure the protection of information where information is severed and disclosed pursuant to Section 25. The Government questions whether such an amendment would be effective in the context of litigation.

The Government is considering what is the best way to clarify the interplay between Sections 23 and 25 and invites the committee's views on this.

Since the passage of the *Act* in 1983, other privileges have become more developed. For example, mediation is now widely accepted as a faster and less costly alternative to litigation. For mediation to be effective, the parties to the mediation must both be confident that they can freely exchange information with each other, and that this information will remain confidential. This is now described as mediation privilege. This privilege, for example, is not recognized in the *Access to Information Act*. The Government is considering clarifying the scope of Section 23 to protect information that

is subject to privilege between legal counsel and their clients or any privilege under the law of evidence.

The Government would invite the Committee to consider whether other privileges warrant protection in the Act.

During civil litigation proceedings, courts quite commonly order one party to provide the other party with confidential information relevant to the proceedings on the strict understanding and undertaking that the receiving party will not disclose the information. This is often referred to as an implied undertaking and is not recognised in the Act. Where the receiving party is a government institution subject to the Act, an access request would place the government institution in a conflict between its statutory duties and the implied undertaking.

The Task Force considered this problem and recommended that the *Act* be amended to exclude records obtained by the Government in a civil proceeding under an undertaking of confidentiality, as well as records seized from a third party in the course of a criminal investigation. As an alternative to this recommendation, the Government is also considering whether Section 23 exemption should be extended to protect records given under an undertaking of confidentiality.

The Government seeks the Committee's views whether it would be appropriate to add to Section 23 a discretionary exemption to protect information obtained by a government institution in the course of a civil proceeding and that is subject to an undertaking or a rule of confidentiality.

2.4 Adding New Exemptions

Heritage and Ecological sites

The *Act* currently does not contain an exemption protecting information where its disclosure could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites or other sites that have an anthropological or heritage value.

The Task Force noted that access regimes in several jurisdictions do protect this type of information. The Task Force also noted that Canada also accepted the United Nations Convention "concerning the protection of the world cultural and natural heritage". Based on these two points, the Task Force recommended that a new exemption be added to the *Act* to protect this type of information. This was also proposed in Bills C-462 and C-201.

The Government would consider adding a new discretionary, injury-based exemption to address emerging concerns about the protection of anthropological, cultural and heritage sites. This would include confidential information about a place of spiritual or other cultural value to aboriginal peoples.

Species at Risk

Bills C-462 and C-201 also proposed a new exemption to protect information the disclosure of which could increase the risk of extinction of endangered species. The Government is also willing to consider this amendment.

Records of Members of Administrative Board or Tribunal

The *Access to Information Act* applies to a record under the control of a government institution. The Task Force recommended that the *Act* be amended to exclude notes, analyses and draft decisions prepared by or for a person who is acting in a quasi-judicial capacity as a member of an administrative board or tribunal. This would reflect the Federal Court of Appeal decision in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* [2000] FCJ No. 617 (QL) (F.C.A.) that notes taken by members of the Canada Labour Relations Board during its quasi-judicial proceedings are not under the control of the Board itself for the purposes of the *Privacy Act*.

To remove any doubt about the treatment of such records, the Government is considering amending the *Access to Information Act* to expressly exclude notes taken by members of administrative boards and tribunals during quasi-judicial proceedings. This protection should also extend to the notes of judges and presiding officers acting in a judicial or quasi-judicial capacity in the military justice system.

The Government seeks the Committee's views on these issues.

2.5 Review of Section 24/Schedule II – Statutory Prohibitions against Disclosure

Section 24 provides that government institutions must not release records containing information governed by confidentiality provisions in other statutes that are listed in Schedule II to the *Act*. It is current practice for Parliament to review both the proposed statutory prohibition and its proposed inclusion in Schedule II when the relevant bill is being considered.

A number of calls for reform have maintained that this exemption is not necessary since the types of information protected by the provisions listed in the Schedule could also be protected by the exemptions for personal information and third party commercial information. More specifically, the Information Commissioner has recommended that the government eliminate Section 24 and the list in Schedule II of approximately 70 confidentiality provisions. Bills C-462 and C-201 also proposed that Section 24 and Schedule II be eliminated. On the other hand, the Task Force took the view that an exemption for statutory prohibitions was necessary, but that the standard to be met for such protection should be high. The Task Force recommended that the list of provisions on Schedule II be reduced and that criteria be established to define and control the confidentiality provisions that should be added to Schedule II. The Task Force also recommended that the Act be amended to authorize the Governor-in-Council to add provisions to Schedule II only if they meet the established criteria.

The Government supports the Task Force's recommendation because of the crucial importance to government operations of some of the confidentiality provisions listed in Schedule II. The most cogent examples of these statutory prohibitions are: tax payer information, census data information, information in the DNA databank, records subject to a court-ordered sealing order, and information about security measures developed under the *Aeronautics Act*.

The Government suggests that the review and reform of Section 24 and Schedule II could be approached from two angles: the first regarding confidentiality clauses already listed in Schedule II; the second regarding the future addition of clauses to Schedule II. Criteria could be established and applied to clauses currently listed to assess whether they should remain in Schedule II. These criteria could include how recently and frequently the Section 24 exemption has been used; the extent to which the information could be protected by other exemptions; whether the information continues to be highly sensitive; whether the confidentiality clause listed is mandatory or discretionary. It is important for the Government to understand whether the other exemptions of the Act are sufficient to protect the information covered under the statutory prohibition. To that end, departments are being asked about the possible impact on their operations if they were required to rely on other mandatory or discretionary exemptions instead of Section 24.

In relation to the second issue, that of future additions to Schedule II, the Government believes that criteria should also be adopted. These could include: whether the Government institution has a demonstrable and justifiable need to provide an iron clad guarantee that the information will not be disclosed. This criterion would cover records such as tax payer information and census data. The Government shares the opinion of the Task Force that the standard to be met for Section 24 protection should be very high. In addition to meeting the criteria, therefore, the government institution seeking to add a confidentiality provision to Schedule II should be required to justify why the information in question cannot be adequately protected by the other exemptions in the *Act*.

The Government wishes to bring these matters to the attention of the Committee for further consideration and discussion on the development of appropriate criteria for the Section 24 mandatory exemption.

3. Updating Processes

The *Access to Information Act* contains provisions relevant to a number of different processes. The authority to charge fees and the parameters for the fee structure are set out in the *Act* itself, while the specific fee provisions are included in the *Access to Information Regulation*. A number of provisions in both the *Act* and the *Regulation* relate to the administration of the access process, including limits such as legitimate extensions of the time taken to process a request. The *Act* also sets out the provisions defining the redress process, that is, the investigation of complaints by the Information Commissioner, and judicial review of decisions taken by government institutions not to disclose information.

3.1 Fees and the Fee Structure

Basic Application Fee

The Task Force recommended an increase in the basic application fee from $5.00 to $10.00. While the Government is mindful of the need to control the costs of administration of the access regime, the Government does not want to impose an additional burden on non-commercial requesters, which could discourage their seeking access. The Government does not support the increase and would propose to leave the fee at the current rate to encourage use of the *Act* by members of the general public.

The Government welcomes the Committee's views on whether the basic application fee should be changed.

Differentiating Between Commercial and Non-Commercial Requests

Section 11 of the Act is the authority for charging application and other fees related to access requests. The Regulations made under the Act set out specific amounts which are applicable to all requesters without distinction and these have remained virtually unchanged since the Act came into force. The Task Force recommended a new fee structure that would differentiate between commercial and general, or non-commercial, requests. The Task Force Report noted that approximately 40 per cent of requests under the *Act* are made for commercial purposes (e.g. corporations seeking information on a competitor's bid on a contract, or requests for information which the requester will repackage for sale), and that this proportion appears to be growing. The Task Force proposal was that the basic application fee for a general request would cover five free hours of search and preparation and 100 pages of reproduction. Commercial requests, on the other hand, would be subject to the basic application fee and an hourly rate for all reasonable hours of search, preparation and review.

The Information Commissioner has expressed the view that the current fee structure is adequate to ensure that requesters have serious motives for making requests. He was critical of the level of fees for commercial requests within the differential fee structure proposed by the Task Force, but did not comment on the concept or the desirability of a categorization of requesters except to say that it would be justifiable to charge actual costs to information brokers.

The Government is considering making a distinction between requests made to further commercial interests and those made primarily to further the public interest or inform individuals, in line with the objective of the *Act*. A fee structure making this distinction would create incentives for broad public access while ensuring the heavy commercial users bear a proportionate share of the cost. However, a clear definition of "commercial" should be added to the *Regulation*. In this regard, the Government agrees with the Task Force that the types of requests normally received from academics, the media,

Parliamentarians, non-profit public interest organizations, and members of the general public for their own use, should not be considered commercial requests.

To address any concern that requesters might be unfairly placed in the commercial requester category, the *Act* could be amended to include a provision requiring that the requester be notified of the decision and given the opportunity to give reasons why they should not be charged the commercial rates, or be given the right to complain to the Information Commissioner.

The Government would welcome the Committee's views on whether this distinction is appropriate.

Extremely Large Requests

Although rare, requests for exceedingly large numbers of records do occur. The Task Force Report referred to a request that involved over one million records, with processing costs estimated at $1.3 million involving a team of 12 to 15 people over more than two years. The Task Force concluded that the people making requests of this size should pay for the extra staff required to process them, and suggested that institutions be authorized to charge reasonable processing costs and not merely the rates set out in the *Regulation*.

The Information Commissioner has expressed the view that increasing fees for such large requests would act as a deterrent and could prevent the disclosure of information which is of interest and relevance to the general public. He also has expressed the view that, under the current fee structure, requesters seeking such large amounts of information do not get it for free. As stated previously, the Commissioner has offered the alternative suggestion that information brokers be charged the full cost of processing their requests. The Task Force recommended that the *Act* be amended to provide for full recovery of reasonable costs that can be directly attributed to the processing of requests (commercial or non-commercial) where the cost of processing exceeds $10,000. As with all other fees, the head of the institution would have the discretion to waive a portion or all fees, especially where it is in the public interest to do so. A requester could provide arguments as to why fees should be reduced or waived entirely, and may complain to the Information Commissioner and seek an order from the Federal Court.

The Government would welcome the Committee's views on how best to deal with these rare but exceedingly burdensome requests.

3.2 Administrative Issues

Defining a Request

The Government does not propose to implement the Task Force recommendation to require that access requests refer to a specific subject matter, or to specific records. Such a limit might have the effect of blocking legitimate access under the *Act*, while its effectiveness as a tool to clarify and focus access requests is questionable.

Frivolous, Vexatious and Abusive Requests

The Government supports the idea that institutions be allowed to refuse to process requests that are frivolous, vexatious or abusive. The Task Force recommended that institutions first have the agreement of the Information Commissioner. In his 2000-2001 Annual Report, the Information Commissioner instead recommended an appeal to his office following a refusal to process a request. Considering the current structure of the complaint process within the *Act* already provides for complaints from requesters to the Information Commissioner, the introduction of a procedure for institutions to seek prior agreement would not appear to be onerous.

The Government would welcome the input of the Committee as to the appropriate procedure for addressing this issue.

Timing for Processing Requests

The Government agrees with a number of other recommendations made by the Task Force to streamline elements of the access process and make it more effective. These administrative limits should result in more timely processing of requests overall, which would be beneficial to requesters. For example, the Government supports the Task Force proposal to change the time limit for processing an access request from 30 calendar days to 21 working days. On average, the two approaches are equivalent, but 21 working days overcomes the problem of a 30-calendar day period with a number of statutory holidays (e.g., December-January).

The Task Force also recommended simplifying the provision that allows an extension of the time limit for processing a request if the number of records is large and meeting the original time limit would unreasonably interfere with the operations of the government institution. The Government supports an amendment which would delete the reference to a large number of records in order to accommodate those rare situations where meeting the original time limit would unreasonably interfere with the operations of the government institution (e.g., the records are located in domestic or foreign field offices or on ships; the program officers or specialists required to review the records are not immediately available because of other priorities).

Similarly, the Government supports the Task Force recommendation to amend the *Act* so that institutions are able to aggregate requests that were made separately to avoid fees or the application of a time limit extension. The Information Commissioner has recognized that requesters may split requests in order to take advantage of the five free hours of processing time allotted to each request, and has, therefore, expressed support for this measure. In order to be grouped together in this manner, requests must be from the same requester or multiple requesters acting together, be on the same topic or on a reasonably similar topics, and be received within 21 working days of each other.

The Government seeks the Committee's views on these timing and process issues.

Duty to Assist Requesters

The Government agrees with the Task Force recommendation that the *Act* be amended to impose a duty on institutions to help requesters formulate their requests. The duty would include helping them to re-formulate a request that was refused as frivolous, vexatious or abusive or requests that a government institution has decided to aggregate.

The Government would appreciate the views of the Committee on these administrative proposals.

3.3 Redress Process

Mandates of Information Commissioner

The Task Force recommended that the non-investigative mandates of the Information Commissioner (education, advisory, mediation, practice assessment) be enshrined in the legislation. Although the Information Commissioner maintains that such an amendment would be superfluous, the Government believes that recognizing the multi-faceted role of the Commissioner in the *Act* could be beneficial to the full implementation of the *Act*.

The Government would appreciate the views of the Committee on this issue.

Time Period for Making Complaints

The Task Force recommended changing the time frame for making a complaint from the current one-year period from the time the request is made to 60 days after the institution responds. This would accommodate requesters by allowing them a greater opportunity to make a complaint. For those cases where government institutions do not respond to a request within the statutory time limit, the Task Force proposed that the Information Commissioner should have the discretion to allow a complaint to be made within a reasonable time.

The Government would be interested in the views of the Committee on these timing issues.

Time Limit for Investigating Complaints

There is currently no time limit on the completion of complaint investigations. The Government recognizes the importance of timely responses in the handling of requests, but stops short of the Task Force proposal to require the Information Commissioner to complete all complaint investigations within 90 days. Such a change would place too great a restriction on the complaint investigation process.

Procedural Fairness

The Information Commissioner provides independent review of decisions on disclosure of government information. In doing so, the Information Commissioner has at his disposal strong investigative powers under Section 36 of the *Act*, including the right to compel the production of documents, the right to enter any premises occupied by a government institution, and the right to summon and enforce the appearance of persons. Reform of the *Act* would provide an opportunity to modernize the complaint investigation process to ensure consistency with principles of administrative fairness.

The Task Force made a number of recommendations to amend the *Act* in order to ensure procedural fairness in the redress process:

- Clarifying that the requirement to conduct investigations in private, generally intended to prevent the Commissioner from disclosing information obtained during the course of an investigation, does not prevent government institutions or individuals from presenting a full response in the course of an investigation;

- Ensuring a right to counsel for witnesses testifying under oath;

- Extending the Information Commissioner's statutory duty to give notice to the head of the government institution and provide information about the complaint before commencing an investigation, to notify any person the Commissioner considers appropriate (e.g., any individual whose actions may be called into question because of a complaint);

- Protecting solicitor-client communications by providing that the Information Commissioner cannot compel the production of privileged communications relating to rights and obligations under the *Act* or in contemplation of proceedings under the *Act*;

- Providing that contempt charges be heard by a judge of the Federal Court; and

- Clarifying that evidence given to the Information Commissioner or the Commissioner's staff by a witness is inadmissible against the witness in a prosecution under Section 67.1 (the offence of intentionally denying a right of access by destroying, altering, concealing or falsifying a record, or by directing someone else to do so), and that the Information Commissioner and any person working on the Commissioner's behalf not be competent or compellable witnesses in a prosecution under Section 67.1.

The Government would appreciate the Committee's views on these procedural fairness issues.

3.4 Reviewing the Ombudsman Model

The Office of the Information Commissioner is currently given "ombudsman" powers, which include the powers of investigation and recommendation but not directive powers. Under the current two-tiered review process, requesters have the right to complain to the Information Commissioner about an institution's handling of their request. Following an investigation and report by the Commissioner to the head of the institution, there is a further right to seek review of a denial of access to the Federal Court of Canada, which may order the government to disclose the records in question.

A number of provinces with newer access legislation have adopted an adjudicative model. As well, a single Commissioner administers both access and privacy legislation in the provinces and territories while federally there are two Commissioners to administer the *Access to Information Act* and *Privacy Act*[4].

Generally speaking, the Task Force highlighted the success of this model, noting that over 99% of requesters' complaints were resolved informally under the ombudsman model. The Task Force did not recommend that the Commissioner be given directive powers, but instead encouraged "the government to consider moving to an order-making model...in the medium term".

Switching from an ombudsman to a quasi-judicial model at the federal level could have significant impacts on the administration of the access to information law and would only be warranted if it would bring about demonstrable improvements to the access regime. In contemplating such a change, it would be important to consider the implications for other Agents of Parliament who exercise ombudsman functions.

The Government is not persuaded of the need to shift to an order-making or quasi-judicial model for the Information Commissioner, but nonetheless would welcome the views of the Committee on this issue.

4. Administrative Reform

The Task Force stressed that the administrative practices and attitudes within government must be changed – from the way records are created and managed, to how public servants are trained, to the way government information is made available.

In his response to the Task Force report, the Information Commissioner supported many of the non-legislative proposals. The Commissioner agreed that public servants should be better educated about their access obligations and about information management in general, that information management be improved, and that the access function be better resourced and better supported within the public service.

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4 The *Privacy Act* envisages the possibility of one Commissioner performing both functions, as was the case with the very first Commissioner.

Consistent with its commitment to the principles of transparency, openness and accountability, the Government is considering administrative reforms to improve the access regime. Administrative reforms do not require changes to the *Act*, but may be affected by any statutory changes that are made. Administrative measures could include initiatives related to fostering the culture of openness within the public service, encouraging compliance with the spirit of transparency, and the updating of the set of Treasury Board policies related to access to information.

Some of the key elements for each of these could be:

- Enhancing a public service culture of transparency by:
  - providing specific training in information management and disclosure of information to executives and to the public service at large;
  - incorporating an assessment of compliance with access to information requirements into managers' accountability contracts; and
  - developing new proactive disclosure initiatives.

- Improve government compliance with the *Act* by:
  - investing in tools for the access to information, privacy and information management/information technology communities; improving the capacity of the access to information community through a variety of training;
  - taking steps to improve the stature of the access to information community, through new competency profiles and a review of classification levels;
  - investing in improvements to information management to accelerate response to access requests by departments; and
  - upgrading tools to assist institutions in processing access requests or to track timeliness and other performance aspects of policy compliance through government wide tracking of access requests.

Since each of these measures carries significant costs, the Government would welcome the views of the Committee concerning the priority which should be assigned to the various initiatives. If funding is not available for the complete administrative reform package, it would be helpful to know where the Committee believes the money would best be spent.

Conclusion

It has been said that information is the currency of democratic life. This is true, in part, because the public's ability to hold government to account depends on having a full understanding of the circumstances in which government operates. Also, a well-informed citizenry can participate more effectively in public life.

However, the public's right of access to government-controlled information must be balanced with the public interest in protecting certain types of information. Maintaining this balance is the most significant challenge facing the development of a comprehensive reform package. Also, any amendments to the *Access to Information Act* should be forward-looking, able to withstand changing circumstances, and effective for many years

to come. The Parliamentary and public debate engendered by this paper and the work of the Committee will make an important contribution to the creation of a modern, finely balanced, and enduring federal access regime.